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**CONSTITUTIONAL LAW-FREEDOM OF EXPRESSION -Although a Municipal Ordinance Governing Airports May Regulate to Protect Citizens from Undue Annoyance from Religious Sects Canvassing for Converts, such Ordinances must be Narrow, Objective, and Definite. *International Society for Krishna Consciousness, Inc. v. Rochford*, 425 F. Supp. 734 (N.D. Ill. 1977)**

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# Case Note

**CONSTITUTIONAL LAW—FREEDOM OF EXPRESSION—**Although a Municipal Ordinance Governing Airports May Regulate to Protect Citizens from Undue Annoyance from Religious Sects Canvassing for Converts, such Ordinances must be Narrow, Objective, and Definite. *International Society for Krishna Consciousness, Inc. v. Rochford*, 425 F. Supp. 734 (N.D. Ill. 1977).

The International Society for Krishna Consciousness (ISKCON) is a non-profit religious corporation which promotes the views of Krishna Consciousness. Its members are required to perform a religious ritual called Sankirtan which consists of evangelistic activities including solicitation of contributions and sale of religious materials. For some time, members of ISKCON have performed this ritual in the public areas of Chicago's O'Hare International Airport, and they wish to continue to do so.

O'Hare Airport<sup>1</sup> is owned by the city of Chicago, subject to its ordinances, and operated by the Chicago Department of Aviation.<sup>2</sup> Effective March 29, 1976, the Commissioner of Aviation adopted regulations<sup>3</sup> for all airports within his jurisdiction. The regulations

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<sup>1</sup> O'Hare Airport, the busiest airport in the world, has 72 departure gates that handle approximately 1,800 flights daily. The airport employs 33,000 persons; some 100,000,000 passengers, visitors, and employees use the airport each year. Portions of the airport are leased to airlines and concessionaires. These include lobbies and areas open to the general public without restriction.

<sup>2</sup> The Department of Aviation, an executive arm of the city government, was established in 1958 by the Chicago Municipal Code. CHICAGO, ILL., CODE ch. 8.2 (1958).

<sup>3</sup> Pursuant to the authority vested in the Commissioner of the Department of Aviation of the City of Chicago by Chapter 8.2 of the Municipal Code of the City of Chicago, and in order to balance the rights of the traveling public and those who have a right to be in public places to publicize their views, the following regulations are adopted, to be effective immediately. These regulations are intended to accomplish goals of:

- assuring fair use of facilities in Chicago's airports by passengers and persons accompanying them, employees, lessees, and persons and groups wishing to publicize their views;
- preventing interference with the right of passengers to free access to the airport travel facilities and the free passage among those facilities;

were intended to balance the rights of the traveling public with those who have a right to be in public places to express their views.<sup>4</sup>

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- discouraging interference with persons who are required to wait in lines;
  - preventing interference with hijack and other security measures;
  - permitting equitable access among persons and groups desiring to publicize their views.

I.

Persons authorized by law to distribute literature, or solicit contributions may do so only in public areas of Chicago airports, provided that they may not do so in the following areas:

- A. All aircraft departure lounges and concourses leading to them including concourses A through K;
- B. All concourses leading to the terminal buildings including the rotunda;
- C. At, in, at the entrance to, or exit from:
  - (1) hijack, search, and security areas;
  - (2) ticket counters;
  - (3) baggage pickup or collection areas;
  - (4) washroom areas;
  - (5) areas leased to concessionaires and other lessees except by permission of such lessee;
  - (6) elevators, escalators, moving walkways; and
  - (7) main terminal doors and vestibules.
- D. At locations where persons are in line at or before areas described in subparagraph C.

II.

- A. No person shall distribute literature or solicit contributions unless he shall have registered beforehand with the airport manager or his authorized representative for each day such activities are engaged in.
- B. Between 9 a.m. and 9:30 a.m. each day each person who desires to distribute literature or solicit contributions shall register in person with the airport manager or his authorized representative, who shall allot reservations for each day in the sequence each person registers. Each person shall give his name and address as well as the organization or purpose he represents and the terminal in which he will be on that day.

III.

- A. No person except concessionaires and other lessees as permitted by contract with the City of Chicago shall sell anything for commercial purposes.
- B. No person shall make a noise or create other disturbances which interferes with the ability of others to hear public announcements or interferes with the transaction of business with airlines, concessionaires, or lessees.

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IV.

The airport manager or his authorized representative may declare an emergency on account of unusually congested conditions in the airport terminals caused by weather, schedule interruptions, extremely heavy traffic movements or other causes, or on account of emergency security measures. In such case an announcement shall be made. All persons distributing literature or soliciting contributions as permitted under paragraphs I and II shall immediately cease such activities for the duration of such emergency.

International Soc'y for Krishna Cons., Inc. v. Rochford, 425 F. Supp. 734, 737-38 (N.D. Ill. 1977) (hereinafter cited as Airport Regulations).

<sup>4</sup>*Id.*

Under the regulations, persons authorized by law may distribute literature and solicit contributions only in the public areas of Chicago airports, and many such areas are specifically excepted.<sup>5</sup> Such persons must register with the airport manager each day before beginning their activities.<sup>6</sup> They may not sell anything for "commercial purposes," nor may they "make a noise or create other disturbances."<sup>7</sup> In addition, the airport manager may declare an emergency should the terminals become "unusually congested" and order all distribution of literature and solicitation of funds to immediately cease for the duration of the emergency.<sup>8</sup>

ISKCON sought declaratory and injunctive relief from the enforcement of the regulations. The Society alleged that the ordinance was unconstitutional under the first and fourteenth amendments as it lacked procedures guaranteeing due process and gave airport officials unqualified power to grant or deny permits. Contending that there was no material issue of fact, ISKCON moved for summary judgment. *Held, motion granted*: Although a municipal ordinance governing airports may regulate to protect citizens from undue annoyance from religious sects canvassing for converts, such ordinances must be narrow, objective and definite.<sup>9</sup>

This case becomes more enlightening when viewed as part of a series of cases in which cities or airports sought to restrict various forms of proselytizing. The simplest form of restriction used by the cities was the application of general ordinances against peddling, soliciting, public exhibitions, disorderly conduct, or breach of the peace.<sup>10</sup> Such regulations, however, were held to be inapplicable to religious groups where they abridged freedom of religion, and when a license or permit to distribute literature was required the

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The court further held that the regulations are facially unconstitutional in that their provisions are susceptible to a number of meanings; they lack definite standards to guide airport officials in making decisions which may abridge freedom of religion, speech and press. They also lack a procedure, administrative or judicial, by which airport decisions can be reviewed.

<sup>10</sup> See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *International Soc'y for Krishna Cons., Inc. v. New York Port Authority*, 425 F. Supp. 691 (S.D.N.Y. 1977); *International Soc'y for Krishna Cons., Inc. v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973).

laws were deemed an unconstitutional prior restraint on freedom of expression.<sup>11</sup> Another approach adopted by some cities was the use of written<sup>12</sup> and unwritten<sup>13</sup> regulations directly prohibiting the distribution of literature. This practice was held to abridge freedom of speech, press, and assembly.

Having realized that absolute prohibitions of first amendment activities would be held unconstitutional, some cities sought to condition the right to distribute handbills<sup>14</sup> or solicit funds<sup>15</sup> on the prior permission of some municipal authority. Courts have held, however, that preregistration may only stand when the statute is narrow, objective, and definite.<sup>16</sup> Where these regulations gave uncontrolled discretion to a municipal official to grant or deny the permits they have been found to be invalid.<sup>17</sup> Thus, even an ordinance which allowed the distribution of literature and other demonstrations as long as "the transportation function of the airport" was not impaired was struck down, since it required any materials used to be submitted to the airport managers before distribution.<sup>18</sup>

In order to make the constitutional basis for these decisions clearer, this note will examine the extent of first amendment guarantees and the government interest necessary to curb freedom of expression. It will then explore possible avenues for putting limits on solicitation in airports.

### *A. First Amendment Guarantees*

The first amendment to the United States Constitution establishes fundamental personal rights allowing each individual to

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<sup>11</sup> See text accompanying notes 41-44 *infra*.

<sup>12</sup> See *Jamison v. Texas*, 318 U.S. 423 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *International Soc'y for Krishna Cons., Inc. v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977); *International Soc'y for Krishna Cons., Inc. v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

<sup>13</sup> See *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975).

<sup>14</sup> See *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>15</sup> See *International Soc'y for Krishna Cons. v. Dallas-Fort Worth Regional Airport Bd.*, 391 F. Supp. 606 (N.D. Tex. 1975).

<sup>16</sup> *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *International Soc'y for Krishna Cons., Inc. v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977).

<sup>17</sup> *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>18</sup> *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973).

express himself with immunity from legal censure.<sup>19</sup> These rights, however, are not absolute and exist only when the expression is not harmful when tested by such standards as the law affords.<sup>20</sup> These rights are most often endangered when the ideas promoted are supported by a minority of citizens.<sup>21</sup> Nevertheless, first amendment rights of freedom of speech and religion are entitled to protection no matter how aberrant or abhorrent the expression may seem to others.<sup>22</sup>

In the area of freedom of religion, the Court originally drew a distinction between belief and conduct, granting greater constitutional protection to the former.<sup>23</sup> However, not all conduct resting on religious belief is beyond the pale of first amendment protection.<sup>24</sup> For example, the distribution of religious pamphlets is protected along with the right to hold the beliefs expressed in the pamphlet itself.<sup>25</sup> Nor does the fact that pamphlets are sold com-

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<sup>19</sup> The first amendment provides that no law shall be made "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." This provision is made applicable to the states through the fourteenth amendment. U.S. CONST. amends. I, XIV.

<sup>20</sup> See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554 (1965): "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." See also *Jones v. City of Opelika*, 316 U.S. 584 (1942) (restrictions justified by needs of preservation of peace and good order); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (restrictions justified to promote general welfare, public health, safety, and morals); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (restrictions justified to safeguard use of public highways); *Schenck v. United States*, 249 U.S. 47 (1919) (restrictions justified to prevent 'clear and present danger').

<sup>21</sup> "[I]f the majority member who would have the itinerant preacher swept off the streets with the 6 P.M. trash were himself arrested on the streets for cheering the Longhorn Band, or caroling with Dr. Criswell, then suddenly there would materialize a renaissance of majority belief in First Amendment rights, illustrative perhaps of an old Texas axiom: It depends on whose ox is in the ditch." *International Soc'y for Krishna Cons. v. Dallas-Fort Worth Regional Airport Bd.*, 391 F. Supp. 610, 616 (N.D. Tex. 1975) (footnotes omitted).

<sup>22</sup> *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

<sup>23</sup> *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>24</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>25</sup> See *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

promise the right to distribute them.<sup>26</sup>

First amendment rights, however, are not absolutes, and states continually pass laws placing restrictions on the exercise of these freedoms. Some survive constitutional attack, but many are struck down by the courts. Laws seeking to limit first amendment guarantees have been invalidated on two principal grounds: the form of the law, and the governmental interest it protects. Criticism of laws based on form arises directly from the "preferred position" of freedom of expression.<sup>27</sup> Since this liberty is to be guarded with particular scrutiny, any law which is overbroad, unduly vague, or which constitutes a prior restraint on first amendment rights will be held to be unconstitutional on its face.<sup>28</sup>

Overbreadth scrutiny was a primary tool of the Warren Court.<sup>29</sup> Overbreadth analysis does not reach the question of whether the challenger's speech is constitutionally protected, but rather strikes statutes down because they might be applied to others not before the court whose activities are protected.<sup>30</sup> Using overbreadth scrutiny, the Court struck down a wide range of federal and state statutes without considering the actual conduct of the litigants.<sup>31</sup>

The Burger Court has been increasingly hostile to this method of analysis.<sup>32</sup> In *Broadrick v. Oklahoma*<sup>33</sup> the Court held that a law is fatally overbroad only if the harmfulness of the chilling effect it produces is greater than, or at least substantial in relation to, the legitimate interest which is the law's central thrust.<sup>34</sup> This case

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<sup>26</sup> *Id.*

<sup>27</sup> *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). This "preferred position" was criticized by Justice Frankfurter in *Kovacs v. Cooper*, 336 U.S. 77 (1949) and has at times been given more lip service than enforcement.

<sup>28</sup> *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>29</sup> The doctrine is based on the premise that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

<sup>30</sup> An overbreadth challenge therefore involves a relaxing of prudential standing rules as well.

<sup>31</sup> See Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U.L. REV. 532, 533 (1974).

<sup>32</sup> *Id.*

<sup>33</sup> 413 U.S. 601 (1973).

<sup>34</sup> *Id.* Thus the court will balance the interest of the government with the danger produced by overbreadth.

marked the demise of overbreadth review in all but a limited class of cases. Where pure speech is involved, overbreadth challenges will remain viable, but as conduct becomes increasingly non-oral, the Court has greater difficulty finding that the conduct requires first amendment protection. Therefore, more substantial overbreadth will be required where the petitioner's activity involves "speech-plus-conduct."<sup>35</sup> The Court characterized the deterrent effect of overbroad laws as "at best a prediction,"<sup>38</sup> implying that the most minimal state interest is likely to justify the regulation.

Another problem in form arises where laws limiting freedom of expression are unduly vague.<sup>37</sup> In the first amendment area, vagueness in a statute proscribing certain conduct is as fatal as an outright prohibition of the conduct involved.<sup>38</sup> Vagueness is particularly suspect where the expression is sought to be subjected to some form of prior restraint.<sup>39</sup> The danger inherent in this type of restriction is that the communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination of its first amendment status is made.<sup>40</sup>

The form of prior restraint most commonly found in airport regulations is the requirement that those wishing to use the terminals for expressive activities obtain a permit from a specific municipal officer before any proselytizing begins. If these regulations leave the decision whether to grant or withhold a license in the

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<sup>35</sup> See Comment, *Constitutional Law: A New Test for Overbreadth*, 13 WASHBURN L.J. 524, 529 (1974).

<sup>36</sup> 413 U.S. at 615.

<sup>37</sup> A vagueness challenge rests ultimately on the procedural due process requirement of notice; an ordinance is unconstitutional if people of common intelligence must necessarily guess at its meaning and differ as to its application, or if it allows arbitrary and erratic enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Zwickler v. Koota*, 389 U.S. 241 (1967). The difficulty in determining which laws fit this definition can be observed in the Court's debate in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), centering around the word "annoying."

<sup>38</sup> See *Gooding v. Wilson*, 405 U.S. 518 (1972); *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969). See also note 37 *supra*.

<sup>39</sup> *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). See also notes 16-17 *supra*.

<sup>40</sup> *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). An example of indirect discouragement was found in *Talley v. California*, 362 U.S. 60 (1960), which invalidated a Los Angeles ordinance requiring the name and address of the sponsor to be on any handbill distributed.

discretion of the relevant officer, they will not survive a constitutional challenge.<sup>41</sup>

The Supreme Court has set up procedural safeguards necessary for a prior restraint to survive constitutional attack.<sup>42</sup> Where a state seeks to prohibit speech before it occurs, the burden to show the necessity of restraints is on the government, and the licensor must not be given the ability to grant or deny permits in a discriminatory manner.<sup>43</sup> In addition, the administrator's decision cannot be final; an opportunity for a judicial determination in an adversary proceeding is required before or shortly after any restraint on expression.<sup>44</sup>

The second ground for invalidating ordinances limiting first amendment freedoms is that of insufficient government interest. Only a compelling state interest in regulating the activity can justify such limitation.<sup>45</sup> Ordinances usually permissible under the police

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<sup>41</sup> *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Kunz v. New York*, 340 U.S. 290 (1951); *Largent v. Texas*, 318 U.S. 418 (1943); *Lovell v. Griffin*, 303 U.S. 444 (1938).

<sup>42</sup> *Freedman v. Maryland*, 380 U.S. 51 (1965).

<sup>43</sup> *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

<sup>44</sup> The San Bernadino Mall Ordinance has been cited as a model in this area, with the criticism that the City, not the permittee, should be required to file suit:

The Chief of Police may make his recommendation for revocation to the Mayor and Common Council by filing a written motion of charges with the City Clerk who shall set a hearing before the Mayor and Common Council no later than the next Council meeting for which the agenda has not yet been closed. The City Clerk shall give a ten (10) day notice of the date, place and time of the hearing and a copy of the charges to the permittee by mailing such notice and charges to the permittee ten (10) days prior to the hearing.

The Mayor and Common Council shall hear all evidence submitted by the Chief of Police and the permittee. The permittee may cross-examine the witnesses called by the Chief of Police. The permittee may be represented by counsel. After all of the evidence has been submitted, the Mayor and Common Council shall, within five (5) days after the hearing, either revoke or refuse to revoke the permit. The City Clerk shall, within three (3) days after the decision of the Mayor and Common Council, notify the permittee, in writing, of the decision by depositing the notice in a United States mail box, postage prepaid, addressed to the permittee.

If the Mayor and Common Council revoke the permit, such revocation shall not be effective until ten (10) days after the mailing of such decision to the permittee during which period the permittee may file an action in a court of competent jurisdiction contesting the decision. The revocation shall not become effective after such filing until such court renders a judicial determination upholding the validity of the decision.

Plaintiffs' Response to Defendants' John Carr Affidavit, Exhibit C, *International Soc'y for Krishna Cons., Inc. v. Rochford*, 425 F. Supp. 734 (N.D. Ill. 1977).

<sup>45</sup> *NAACP v. Button*, 371 U.S. 415 (1963). See also note 46 *infra*.

power become invalid when applied to religious canvassing.<sup>46</sup> To be constitutional, an ordinance must be an impartial one designed to safeguard the competing rights of others.<sup>47</sup> The government interest must be unrelated to the suppression of free expression, and the regulation must contain no more restrictions than those essential to furthering that interest.<sup>48</sup>

The laws which most often survive a constitutional challenge are those which restrict only the time, place, or manner of first amendment conduct.<sup>49</sup> Within the time, place, and manner framework are two potential modifiers of first amendment freedoms. One is the concept of the public forum: a given location, or part of the location, may be deemed suitable or unsuitable for freedom of expression. The second is the evolving body of law protecting the individual's right to privacy, including the problem of the captive audience. The right to free expression does not necessarily include the right to force speech on an unwilling audience.

The concept of the public forum finds its basis in the idea that freedom of speech secures to speakers some right to use public places for expression. Traditionally, streets and parks have been the poor man's printing press,<sup>50</sup> and the courts have generally

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<sup>46</sup> See *Jones v. City of Opelika*, 316 U.S. 584 (1942). Compare *Breard v. Alexandria*, 341 U.S. 622 (1951). This is also true in a number of other situations. Anti-litter regulations have been universally condemned when applied to persons distributing handbills. See, e.g., *Schneider v. State*, 308 U.S. 147 (1939). The motive of traffic control has only been upheld when crucial to public safety rather than desirable to avoid congestion. See *International Soc'y for Krishna Cons., Inc. v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972). Neither is protection of the public from fraud or crime a sufficient government interest where the power of censorship is involved. See *Niemotko v. Maryland*, 340 U.S. 268 (1951). Nor may speech be prohibited merely because it might be offensive to some of the hearers. See *Cohen v. California*, 403 U.S. 15 (1971).

<sup>47</sup> *International Soc'y for Krishna Cons., Inc. v. Conlisk*, 374 F. Supp. 1010 (N.D. Ill. 1973). See also *United States v. O'Brien*, 391 U.S. 367 (1968); *Schneider v. State*, 308 U.S. 147 (1935).

<sup>48</sup> *United States v. O'Brien*, 391 U.S. 367 (1968). This requirement stems from the principles underlying the overbreadth decisions. See text accompanying notes 29-36 *supra*.

<sup>49</sup> This exception originated in *Cox v. New Hampshire*, 312 U.S. 569 (1941), in which the Court upheld an ordinance requiring parade permits.

<sup>50</sup> *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). See also *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12: "[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer."

recognized the importance of first amendment rights in these locations: "[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."<sup>51</sup>

A finding that an area is public, however, does not guarantee its availability as a forum;<sup>52</sup> it also has to meet a test of appropriateness. Forum status therefore depends on a number of considerations: type of area,<sup>53</sup> size, location, customary use, and the community needs which the place serves. The character of the location, the pattern of usual activity, and the type of people who use the area are all influential in determining whether a given location is an appropriate site for communication of views.<sup>54</sup> Where the problem is conflict between free speech and the primary use of the area, the court must assess the extent to which that use will be disrupted if access for free expression is permitted.<sup>55</sup>

The problem becomes more acute when access to non-traditional forums such as airports is demanded. It has been held that a library is a public forum<sup>56</sup> and that the courtyard of a jail is not.<sup>57</sup> In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,<sup>58</sup> it was held that a shopping center was the functional equivalent of a business district and therefore a proper forum for first amendment activities. The Court held that free speech may not be abridged in appropriate places on the ground that alternate forums are available.<sup>59</sup> Four years later, however, *Logan Valley* was "distinguished"; the majority decided that speech must be related to the forum's operation and that the existence of alternate forums is relevant.<sup>60</sup> Then,

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<sup>51</sup> *Hague v. CIO*, 307 U.S. at 515-16.

<sup>52</sup> *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

<sup>53</sup> Areas considered have included parks, terminals, shopping centers, and streets.

<sup>54</sup> *Niemotko v. Maryland*, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring); *Collin v. Chicago Park Dist.*, 460 F.2d 746 (7th Cir. 1972); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 89 (2d Cir.), cert. denied, 393 U.S. 940 (1968).

<sup>55</sup> *Wolin v. Port of New York Auth.*, 392 F.2d at 89.

<sup>56</sup> *Brown v. Louisiana*, 383 U.S. 131 (1966).

<sup>57</sup> *Adderly v. Florida*, 385 U.S. 39 (1966).

<sup>58</sup> 391 U.S. 308 (1968).

<sup>59</sup> *Id.*

<sup>60</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

in *Hudgens v. NLRB*<sup>61</sup> the Court announced that it had in effect overruled *Logan Valley* and said that first amendment rights had "no part to play" in a private shopping center.<sup>62</sup> Thus, the Supreme Court appears to be moving in the direction of restricting access to nontraditional forums, particularly those which are privately-owned.

The status of terminals serving various modes of travel has not been considered by the Supreme Court, but various state and federal courts have dealt with the issue. The general consensus seems to be that terminals are appropriate forums, but that regulations may be placed on "expressive" uses of the terminal. Public forum status has been extended to a railroad station<sup>63</sup> and to a municipal bus terminal.<sup>64</sup> In carefully considering the problem in *Wolin v. Port of New York Authority*, the Second Circuit found that a bus terminal is not unlike a small city.<sup>65</sup> Further, the primary activity for which a terminal is designed is attended with crowds, unrest, and less than perfect order; there would be little unusual in the disturbance created by those using the area as a forum. The court found the requisite relationship between speech and forum in that the terminal was the place where the desired audience could be found. The decision did allow for possible restrictions, however: "the Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, . . . and the specific places in the building where the rights of expression may be exercised."<sup>66</sup>

A few courts have directly considered whether the municipal airport can be a forum, and all have held that it is to be treated as public for first amendment purposes.<sup>67</sup> This is true even if the

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<sup>61</sup> 424 U.S. 507 (1976).

<sup>62</sup> *Id.*

<sup>63</sup> *In re Hoffman*, 64 Cal. Rptr. 97, 434 P.2d 353 (1967).

<sup>64</sup> *Wolin v. Port of New York Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

<sup>65</sup> *Id.* at 89.

<sup>66</sup> *Id.* at 94.

<sup>67</sup> *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *International Soc'y for Krishna Cons., Inc. v. Engelhardt*, 425 F. Supp. 176, 180 (W.D. Mo. 1977). Airports, however, have been held to be private property for other purposes. *See Continental Bus Systems, Inc. v. City of Dallas*, 386 F. Supp. 359 (N.D. Tex. 1974) (private for purposes of commerce clause).

airport is miles from town and relatively free from public attractions such as restaurants and boutiques.<sup>68</sup> The matter received the most extended consideration in *International Society for Krishna Consciousness v. Dallas-Fort Worth Regional Airport Board*.<sup>69</sup> The district court rejected analogies to libraries, prisons, shopping centers, and city streets,<sup>70</sup> considering instead cases concerning other airports and company towns.<sup>71</sup> It found it unlikely that the Airport Board could justify a complete ban on first amendment activities. The court held that to justify any restrictions on leafletting, the airport must prove that such activities in fact obstruct airport traffic.<sup>72</sup> The opinion noted, however, that regulations necessary for the management of the airport would be permitted, and that some areas may be kept free from solicitation.<sup>73</sup> In short, the public forum theory offers only limited possibilities for curbing airport solicitation, but does not rule out regulation completely.

Another potential limitation on airport evangelists comes from the evolving body of law concerning the individual's right to privacy.<sup>74</sup> This theory is undergirded by principles of philosophy and public policy, although its constitutional origins are somewhat vague.<sup>75</sup> The group with the strongest claim to protection outside

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<sup>68</sup> *International Soc'y for Krishna Cons., Inc. v. Engelhardt*, 425 F. Supp. 176 (W.D. Mo. 1977).

<sup>69</sup> 391 F. Supp. 606 (N.D. Tex. 1975).

<sup>70</sup> *Id.*

<sup>71</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973).

<sup>72</sup> 391 F. Supp. at 612.

<sup>73</sup> *Id.*

<sup>74</sup> The reasons given for protecting privacy include the theory that the individual should be free to choose what he sees or hears and that some kinds of communication are so intrinsically offensive to large numbers of people that their expression constitutes an act of aggression more akin to conduct than speech. See Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U.L. REV. 153 (1972). Others see it as a fight for freedom of the mind. See C. Black, *He Cannot Choose But Hear: The Might of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953). From a policy standpoint, some jurists hold that the nature of modern society means that humans are rarely free from distractions; hence what autonomy remains must be carefully guarded. *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970); *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 467 (Douglas, J., dissenting).

<sup>75</sup> Some writers believe that the right stems from the liberty clause of the fifth amendment. See Recent Decisions, *Lehman v. City of Shaker Heights*, 13 DUQ. L. REV. 1003 (1975). The first, fourth, and ninth amendments have also been

the home from the exercise of the first amendment rights of others is the captive audience. To be truly "captive," a person must be so situated as to have no alternative but to remain, no choice but to hear and see what is said and shown.<sup>76</sup> And while most privacy cases center on the home, the "right to be let alone" has been extended to public places for certain captive audiences.

In the "loudspeaker cases," one group's right to privacy was recognized as a limit on another's right to a public forum.<sup>77</sup> Although in one case the Supreme Court invalidated an ordinance which completely banned the use of amplification devices,<sup>78</sup> in another it sustained the application of a Trenton, New Jersey, ordinance which prohibited "loud and raucous noises" coming from loudspeakers on vehicles.<sup>79</sup> This was done in the name of the unwilling listener: "[I]n his home or on the street he is practically helpless to escape this interference with his privacy . . . ."<sup>80</sup>

Even more applicable to the airport situation are the cases dealing with captive passengers. The landmark case in this area is the much-criticized *Lehman v. City of Shaker Heights*,<sup>81</sup> in which the Court found that the constitutional right of passengers to be free from speech outweighed the petitioner's right to free speech. The Court held, therefore, that the city politician had no right to buy space for campaign posters on city buses and that the bus was not a public forum.<sup>82</sup> The passengers' right of privacy, even outside the home, outweighed the first amendment rights of the politician.

### *B. ISKCON v. Rochford*

Against this background, the district court in *ISKCON v. Rochford* dealt at length with the issue of vagueness and did not reach

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suggested as sources of privacy rights. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>76</sup> Douglas wrote: "[T]he man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen." *Public Util. Comm'n v. Pollak*, 343 U.S. at 469 (emphasis in original).

<sup>77</sup> *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1948).

<sup>78</sup> *Saia v. New York*, 334 U.S. at 560.

<sup>79</sup> *Kovacs v. Cooper*, 336 U.S. at 89.

<sup>80</sup> *Id.* at 87.

<sup>81</sup> 418 U.S. 298 (1974).

<sup>82</sup> Because commercial advertising was allowed on the buses, this case has been criticized as denying equal access on the basis of content. Such criticism, however, does not deal with *Lehman's* privacy holding per se.

the complexity of the public forum and privacy questions. Although the Chicago ordinance was much more specific than its predecessors, the court held it to be unconstitutionally vague.<sup>83</sup> Such phrases as "persons authorized by law to distribute literature," "commercial purposes," and "noise . . . [or] other disturbance"<sup>84</sup> were found to be dangerously unclear. The court also objected to the ordinance's failure to specify to which areas of the Chicago airports the regulations referred.<sup>85</sup>

The court's treatment of the public forum and privacy issues was summary. The former was dismissed in a single sentence: "Without question, the First and Fourteenth Amendments apply to government-owned airports like Meigs, Midway and O'Hare."<sup>86</sup> The latter was included by inference in the court's discussion of first amendment rights. It stated that cities may protect their citizens from "undue annoyance" without mentioning the foundation of that right.<sup>87</sup>

The interests of the captive audience were not analyzed by the *Rochford* court. Purportedly to protect the captive audience and transportation function of the airport, persons distributing literature were banned by the Chicago ordinance from departure lounges and the concourses leading to them, from security areas, ticket counters, baggage pickup areas, washrooms, areas leased to concessionaires, elevators, escalators, doors, vestibules, and lines.<sup>88</sup> The court may have feared that this did not leave any real forum. More restricted prohibitions in the interests of "captives" might survive, however. Dicta in some airport cases indicate that proselytizing may be prohibited in narrow corridors leading to departure gates and at check-in counters and their lines.<sup>89</sup> Washrooms, because of similar factors of congestion and compulsion, may fall into the same category. In another case, a district court found the rights of airport lessees important enough to require their joinder

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<sup>83</sup> 425 F. Supp. at 740-43.

<sup>84</sup> Airport Regulations, § III. See note 3 *supra*.

<sup>85</sup> 425 F. Supp. at 740.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 739.

<sup>88</sup> Airport Regulations, § I. See note 3 *supra*.

<sup>89</sup> *Chicago Area Military Project v. City of Chicago*, 508 F.2d at 926; *International Soc'y for Krishna Cons. v. Dallas-Fort Worth Regional Airport Bd.*, 391 F. Supp. at 612.

as indispensable parties.<sup>90</sup> Some regulation may therefore be permissible in the interests of airlines and concessionaires.

The issue becomes at what point persons are so confined and the expression so objectionable that the state has a compelling interest in protecting their privacy. The situation in which the target of communication is physically captive<sup>91</sup> should be distinguished from times when the target could "turn off" the message by walking away, averting his eyes, or exercising some sort of selective perception. When the target (in the airport, the traveler) is unable in any way to escape the communication, he should be protected by law. Suppression of the communication itself, however, will be allowed only as a last resort when less restrictive alternatives have failed.<sup>92</sup>

The public forum issue was summarily disposed of by the court in *Rochford*. The finding of a public forum, however, does not foreclose an inquiry into appropriateness. Narrow regulations of time, place, and manner which serve the purpose of preserving safety and the airport's utility as a part of public transportation will be permissible.<sup>93</sup> The Seventh Circuit has held that specified areas of a park, a traditional public forum, can be exclusively designated for non-speech activities as long as alternate areas in the same park with the same potential for communication are opened.<sup>94</sup> This principle would also support an ordinance which prohibited evangelism in certain areas so long as sufficient public areas remain open to Krishna-type activities. A privately-owned airport might even claim to be immune to first amendment claims, given the Supreme Court's decision in *Hudgens v. NLRB*,<sup>95</sup> the most recent shopping center case.

The outcome of *ISKCON v. Rochford* points the way to an acceptable balance between the rights of travelers and solicitors. When combined with the concepts of privacy and the public forum,

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<sup>90</sup> *International Soc'y for Krishna Cons., Inc. v. New York Port Auth.*, 425 F. Supp. 681 (S.D.N.Y. 1977).

<sup>91</sup> A person may be considered "captive" when he cannot leave the place or is being pursued.

<sup>92</sup> *Van Nuys Publishing Co. v. City of Thousand Oaks*, 5 Cal. 3d 819, 489 P.2d 809, 97 Cal. Rptr. 777 (1971), *cert. denied*, 405 U.S. 1042 (1972).

<sup>93</sup> *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976).

<sup>94</sup> *Collin v. Chicago Park Dist.*, 460 F.2d 746, 760-61 (7th Cir. 1972).

<sup>95</sup> 424 U.S. 507 (1976). See text accompanying notes 58-62 *supra*.

a workable statute might emerge which would look something like this:

### I. PREAMBLE

In order to balance the right of the traveling public and those who have a right to be in public places to publicize their views, the following regulations are adopted, to be effective immediately. These regulations are intended to—

- (a) assure fair use of airport facilities by all groups;
- (b) protect the primary function of the airport, that is, its service to travelers; and
- (c) discourage harassment of persons so situated that they have no choice but to listen to all comers and are in fact a captive audience.

### II. DEFINITIONS

Whenever they appear in these regulations, the following words shall be defined as they are defined in this section—

(a) check-in counters—ticket sales counters, flight and baggage check-in counters, and ticket validation/seat selection counters in the airport.

(b) emergency conditions—those conditions when the presence of dangerously large crowds presents a significant hazard to the safety of all people in the airport. This shall include—

(1) hazardous weather conditions such that the resulting flight delays have caused the total number of people in the airport terminal to exceed the maximum number permitted by fire and safety regulations;

(2) other conditions which cause the total number of people in the airport terminal to exceed the maximum number permitted by fire and safety regulations; and

(3) situations where threats of violence to the airport or the people in the airport make it imperative that all public announcements made within airport terminals be heard.

(c) public areas of the airport—all areas of the airport except stores, offices, restaurants, and food counters.

(d) persons wishing to use airport facilities to publicize their views—all persons wishing to distribute or sell literature, solicit contributions, or communicate their ideas.

(e) captive audience—person(s) so situated that they have no choice but to see and hear what is shown and said, who cannot avoid the proffered communication by moving to a different location.

### III. PROCEDURE

(a) Each person who wishes to use airport facilities to publicize his views must register with the airport manager immediately upon arrival. The word "register" shall describe the following process: each person wishing to use airport facilities to publicize his views must, immediately upon arrival at the airport each day, go to the office of the airport manager. The person must give his name to the airport manager and indicate the approximate area in which he will be located that day. The airport manager will give each person permission to carry on his activities.

(b) Should the airport manager wish to revoke the permission to use airport facilities given in accordance with section (a) above, the following procedures must be adopted: The airport manager may make his recommendation for revocation to the mayor and common council by filing a written motion of charges with the city clerk who shall set a hearing before the mayor and common council no later than the next council meeting for which the agenda has not yet been closed. The city clerk shall give a ten (10) day notice of the date, place, and time of the hearing and a copy of the charges to the permittee by mailing such notice and charges to the permittee ten (10) days prior to the hearing.

The mayor and common council shall hear all evidence submitted by the airport manager and the permittee. The permittee may cross-examine the witnesses called by the airport manager. The permittee may be represented by counsel. After all of the evidence has been submitted, the mayor and common council shall, within five (5) days after the hearing, either revoke or refuse to revoke the permit. The city clerk shall, within three (3) days after the decision of the mayor and common council, notify the permittee, in writing, of the decision by depositing the notice in a United States mail box, postage prepaid, addressed to the permittee.

If the mayor and common council revoke the permit, such revocation shall not be effective until ten (10) days after the mailing of such decision to the permittee during which period the permittee may notify the city clerk that he wishes to contest the decision. In this case the city must file an action in a court of competent jurisdiction in order to enforce the revocation. The revocation shall not become effective after such filing until such court renders a judicial determination upholding the validity of the decision.

(c) In section (b) above "permittee" shall indicate the person wishing to use airport facilities to publicize his views. "Permit" shall refer to the permission given by the airport manager to so use the airport.

#### IV. USE OF THE AIRPORT

All persons wishing to use airport facilities to publicize their views may do so in the public areas of the airport with the following exceptions—

(a) In order to protect the constitutional privacy rights of the captive audience, persons wishing to use airport facilities to publicize their views may not do so in, or within five (5) feet of, the following:

- (1) washrooms;
- (2) departure lounges;
- (3) check-in counters;
- (4) anti-hijack security equipment; and
- (5) persons waiting in line at the above-listed areas.

(b) In order to protect the safety and security of all persons in the airport, it shall be unlawful for any person, alone or in concert with others, to engage in publicizing his views in the airport in such a manner as to unreasonably interfere with free ingress or egress to and from any airport facility, or to unreasonably interfere with the transaction of airport business, or to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto.

(c) In order to protect the safety and security of all persons in the airport, all persons using airport facilities to publicize their views may be asked to temporarily cease carrying on such activities should emergency conditions exist. Permission to resume such activities shall be automatically granted as soon as the emergency conditions no longer exist.

#### V. NARROW CONSTRUCTION

These regulations shall be narrowly construed so as to protect the first amendment rights of those wishing to publicize their views at the airport and shall be applied only to insure the safe and efficient functioning of the airport and the rights of travelers.

There are, of course, no guarantees that these regulations will survive judicial scrutiny, particularly on vagueness grounds. However, they seem to have a better chance of survival than their predecessors.

The preamble is much like that in the Chicago ordinance. It omits or amends language which was objected to by the *Rochford* court and tries to tie the interest asserted by the airport more directly to the ideas of the public forum and captive audience. A benign purpose, however, cannot save the regulations if they are

otherwise objectionable.<sup>96</sup> The definition section is intended to cure some of the vagueness problems inherent in earlier regulations by clarifying some words and phrases which were thought to be ambiguous.

The use of a preregistration procedure may present problems. The Supreme Court has invalidated a law solely because it required all handbills distributed to contain the name and address of the sponsor.<sup>97</sup> The provision here, however, will probably survive for two reasons. First, the Supreme Court is no longer as willing to find "chilling effects" on first amendment freedoms as it once was.<sup>98</sup> Second, the airport manager is required to grant permission for the applicant to carry on his activities. Before such permission can be revoked there must be both administrative and judicial procedures assuring a fair hearing to all parties.<sup>99</sup>

The limitation of forum status to public areas also seems justifiable. Those locations which are privately-owned should fall under the protection given private property such as shopping centers.<sup>100</sup> Also, the interests of lessees may be deserving of protection.<sup>101</sup> In *ISKCON v. Rochford*, the plaintiffs did not seek access "to private areas such as stores, offices, and counter-space."<sup>102</sup>

The proposed regulations limit the "captive audience" areas to places where the person accosted has no choice but to remain. Passengers are required to go through the various phases of check-in, and should someone be approached at such a time he could not escape. Privacy interests should therefore come into play and allow this limited restriction on proselytizing. It should be noted that the areas thus excluded are intended to be small ones with ample space remaining for speakers to use. The five foot limitation is not meant to be a "mathematical straightjacket,"<sup>103</sup> but a guideline to

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<sup>96</sup> See, e.g., *Interstate Circuit v. City of Dallas*, 390 U.S. 676, 688-89 (1968).

<sup>97</sup> *Talley v. California*, 362 U.S. 60 (1960).

<sup>98</sup> See text accompanying notes 29-36 *supra*.

<sup>99</sup> The procedure used is closely adapted from the San Bernadino Mail Ordinance. See note 44 *supra* and text accompanying notes 42-44 *supra*.

<sup>100</sup> See text accompanying notes 58-62 *supra*.

<sup>101</sup> *International Soc'y for Krishna Cons., Inc. v. New York Port Auth.*, 425 F. Supp. 681, 685-86 (S.D.N.Y. 1977).

<sup>102</sup> Plaintiff's Reply to Summary Judgment Opposition, *International Soc'y for Krishna Cons., Inc. v. Rochford* at 15, 425 F. Supp. 734 (N.D. Ill. 1977).

<sup>103</sup> *Medrano v. Allee*, 347 F. Supp. 605, 624 (S.D. Tex. 1972), *aff'd in part, vacated in part*, 416 U.S. 802 (1973).

provide appropriate standards for enforcement which are not unduly vague. It is not intended that airport police make their rounds with a tape measure, but that the captive audience be adequately protected.

Protection of public safety has been recognized as a sufficiently compelling government objective to justify certain narrow regulations.<sup>104</sup> The provision included here, protecting entrances and exits and the flow of traffic, is modeled after a Mississippi law which was upheld by the Supreme Court in 1968.<sup>105</sup> Likewise the provision for emergency conditions, properly limited, seems reasonable. Similar restrictions on demonstrations have been allowed due to conditions such as rush hour traffic.<sup>106</sup>

In addition to the regulations listed above, each airport might add a tailor-made clause protecting the ability of that particular airport to function, provided that it can show a compelling interest in doing so. For example, an airport with particular security problems might set a maximum number of persons who may engage in first-amendment activities at any specific time.<sup>107</sup> Absolute limits on numbers, however, are only permissible when they are no more restrictive than is essential to promote the government interest involved and when that interest is a permissible one such as safety, security, or physical space. There must also be provisions for waiver of such limits when applicants can show that their activities would be carried out in such a way as to render unlikely any substantial risk to the public.<sup>108</sup>

It has been suggested that what is required is, in effect, a set of Robert's Rules of Order for the public forum, "albeit the designing of such rules poses a problem of formidable practical difficulty."<sup>109</sup> Proposed guidelines include a premise that no person should be insulated from the initial impact of any kind of communication, but that the law should protect his right to escape a continued bombardment by that communication if he wishes to be free from

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<sup>104</sup> See notes 20, 46 *supra*.

<sup>105</sup> MISS. CODE ANN. § 2318.5 (Supp. 1966) (current version at MISS. CODE ANN. § 97-7-61 (1972)), upheld in *Cameron v. Johnson*, 390 U.S. 611 (1968).

<sup>106</sup> *Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975).

<sup>107</sup> *Wolin v. Port of New York Auth.*, 392 F.2d at 94.

<sup>108</sup> See *Quaker Action Group v. Morton*, 516 F.2d at 731-32.

<sup>109</sup> Kalven, *supra* note 50.

it.<sup>110</sup> Substantial privacy interests may not be invaded in an essentially intolerable manner.<sup>111</sup> So long as the unwilling listener can avoid the communication by reasonable effort, he may not demand that the speaker and his willing listeners avoid him. Once an individual rejects a message, however, the government may protect him from further exposure by insisting that some avenue of escape be held open.

The limits of the ordinance suggested will doubtless prove unsatisfactory to those who find contact with airport proselytizers distasteful. The importance of the right of free expression, however, dictates that any balancing of the interests of travelers and Krishnas be done with the balancer's thumb on the side of freedom of expression. The first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will be, folly; but we have staked upon it our all."<sup>112</sup>

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<sup>110</sup> Haiman, *supra* note 74, at 193.

<sup>111</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>112</sup> *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).



# **Current Literature**

