YET ANOTHER FOX IN THE HEN HOUSE: GOVERNMENT PROTECTION OF ARTISTIC EXPRESSION WITHIN PRIVATELY OWNED PUBLIC SPACES

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To what extent should the state be empowered to regulate privately owned public spaces, such as shopping malls, for the purpose of protecting artistic expression? As framed, the issue does not necessarily focus our attention on either federal or state governments, even though *Pruneyard Shopping Center v. Robins*[1] made clear that the powers of federal and state governments to protect free expression within privately owned public spaces are not identical.

This subject marks the enormous distance First Amendment jurisprudence has traveled during this century. Traditional First Amendment problems concern potential government censorship of quintessential political speech. Our topic differs from the traditional paradigm in two respects. First, the topic suggests that we consider the government a potential ally, as opposed to a potential opponent, of free expression. Second, the topic focuses our attention on the public display of art as opposed to written or verbal speech.

The idea that the government should be empowered to regulate privately owned public spaces in the name of artistic expression is menacingly seductive. It takes little effort to conjure up images of private entities censoring art which is to be displayed in privately owned public spaces. The suggestion almost seems to ask: what is wrong with permitting the state to limit the influence of prejudice, intolerance, ignorance, and stupidity, at least as it is aimed at curtailing horrible abuses by private orthodoxies in our privately owned public spaces? But like so many tempting apples in the Garden of Eden, this one is poisoned.

Before explaining why the government should not have the power to regulate privately owned public spaces in the name of protecting artistic expression, one must note two problems of defi-

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[1] 447 U.S. 74 (1980).

nition inherent in the proposal. First, distinguishing art from other modes of expression may be quite difficult. Consider this example. On New Year's Day, I saw the Robert Rauschenberg Retrospective at the Guggenheim Museum. Rauschenberg, who created "Combines," which are three-dimensional colored objects inscribed with painted images, tells this story.[2] When he exhibited these stunning works with artists who worked in a two, as opposed to a three-dimensional format, he was told that his "Combines" were sculptures, not paintings. When he displayed his "Combines" in an exhibition featuring conventional sculptures, he was told that his "Combines" were paintings, not sculptures. As the anecdote suggests, it can be difficult to distinguish painting from sculpture, even though they are two traditional modes of artistic expression. If this is true, as it was in Mr. Rauschenberg's case, it is questionable whether we can reach a workable consensus about the concept of art. Thus, by art, do we mean only paintings, or do we include sculptures, architecture, drawings, photography, films, performance art, and possibly cartoon drawings? To the extent that we consider empowering the government to protect free expression of artists, we put a premium on defining the concept of art, which would be quite difficult.

The second definitional problem concerns the concept of "privately owned public spaces." If we are going to consider empowering the government to intrude into zones previously free of regulation in order to protect artistic expression, then we must first define the concept of "privately owned public spaces." The proposal to the panel suggests that shopping malls are the prototypical example of a privately owned public space that would be subject to such regulation. But what other privately owned public spaces will be encompassed? Surely a lawful regulation cannot be written which applies solely to shopping malls, enclosed or not. Consider two examples. A Park Avenue office tower houses the international headquarters of a major corporation. In its entrance lobby, art is routinely exhibited. This art is fully visible from the sidewalk and street. Should the State of New York have a say in what art is hung in this highly visible space? Alternatively, should Governor George E. Pataki of New York, who hit the Achille's heel of intellectual freedom recently when he criticized State University officials for sponsoring a conference which discussed controversial sex issues,[3]

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[2] For a brief review of Rauschenberg and his "Combines" see Robert L. Pincus, *Artist Still Combines Known Ideas, Original Vision*, THE SAN DIEGO UNION-TRIBUNE, March 29, 1998, at 2.

[3] Governor George E. Pataki, state lawmakers, and conservative groups criticized the

be empowered to review judgments of curators at the Metropolitan Museum of Art to assure that the Museum does not improperly censor what is exhibited? I doubt that many, who might otherwise favor government regulation of shopping malls, would favor the government sticking its nose into the museum tent to assure that artistic expression is not limited. Are there differences among these forums that warrant limiting government regulation to the shopping malls? Perhaps there are, but I am not convinced.

Having raised these few problems of definition, I do not wish to rest on them. I have more significant concerns that prompt me to be skeptical about giving the state a role in protecting artistic expression in privately owned public spaces.

I begin with the important tenet that there is no necessary connection between individual liberty, or more precisely, the public display of art, and a democratic order.[4] As Isaiah Berlin has reminded us, the answer to the question "[w]ho governs [us]?"[5] is logically distinct from the question, "[h]ow far does government interfere with [us]?"[6] Thus, it is conceivable that an intolerant majority in a democracy could deprive some citizens of many liberties, and that an enlightened despot might allow her subjects a large measure of personal freedom. Because there is nothing intrinsic to a democratic order that guarantees a preconceived zone of individual liberty, any democratic order must structure and limit government power to preserve and protect liberty.

In the United States, we seek to accomplish this end by using many familiar devices. We divide governmental power horizontally into "Our Federalism,"[7] and vertically by the Separation of Powers doctrine. We curtail the reach of government power, most notably by the Bill of Rights,[8] and we empower a press, under the First Amendment,[9] to report on public matters and to search out abuses of power. We maintain a powerful private sector that counter-balances public power. We assume that government power to regulate expression should be sharply limited, because free expression is important to the flourishing of the individual, the vigor of the democratic process, and the general welfare of society. These as-

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State University of New York at New Paltz after details emerged regarding a conference held on November 1, 1997 which included seminars about lesbianism, sadomasochism, and sex toys. *A $350,000 Gift for SUNY*, N.Y. TIMES, Dec. 14, 1997, at 1, *available in* 1997 WL 8016532.

4 *See* Isaiah Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 130 (1969).

5 *Id.*

6 *Id.*

7 *See generally* Younger v. Harris, 401 U.S. 37, 44 (1971).

8 U.S. CONST. amend. I-X.

9 *Id.* amend. I.

sumptions do not give rise to an absolute right of expression, but they support the imposition of sharp limitations on the power of government to regulate expression, artistic or otherwise.

It is against these considerations that we must assess the proposal that the government be empowered to regulate private spaces previously immune from regulation in order to assure artistic expression. When I do that, I find the proposal flatly inconsistent with our traditional axiom. Traditionally, government regulation of expression in private spaces is considered an encroachment on — not an enhancement of — liberty. But the proposal flips the traditional formula on its head and urges that we consider government power to regulate expression within private spaces as an ally of free expression. From my perspective, this would be letting the fox in the hen house.

The proposal may not be an oxymoron, but I have a hard time thinking of it as otherwise. Only two reasons come to mind that might cause me to reconsider this conclusion. First, if it were clear beyond doubt that narrow-minded private entities had overwhelming control over important public spaces and were seriously stifling the public display of art, I might be more open to find ways in which the government might assist in protecting free expression. I do not, however, think that we face such a serious condition of repression. Second, if I were convinced that legal criteria could be defined to limit government power so that its exercise would enhance the public display of art in privately controlled public spaces, I might be more sympathetic to the proposal. Allow me to explain why I am not so persuaded.

It is proposed that the government have the power to prevent mall owners from improperly censoring the images they display publicly. But what is obnoxious censorship? If we were concerned with political speech, we might feel confident that offensive censorship by mall owners could be defined as censorship based on content. Thus, as in *Pruneyard Shopping Center v. Robins*,[10] California required mall owners to permit the distribution of pamphlets within the mall, subject only to time, place, and manner restrictions. However, what comparable standard would the government employ in deciding whether a mall owner improperly declined to permit the display of a particular exhibition? Consider the following example. A mall owner regularly mounts exhibitions celebrating the wilderness, in the hope that the art will enliven public awareness about the value of the wilderness. Now suppose an artist

[10] 447 U.S. 74 (1980).

whose works celebrate industrialization, especially in developing economies, wants to mount an exhibition of his works in the mall. The mall owner rejects the proposed exhibition. What position should the state assert if it used *Pruneyard* as its guide? If the mall owner rejects the proposed exhibition because he disagrees with the artist's political claim that industrialization benefits developing economies, perhaps the state should intervene on the ground that the mall owner discriminated against the proposed exhibition because of the content of its message. But if the rejection results from aesthetic considerations, perhaps the state should allow the mall owner's judgment to stand.

Neither result seems satisfactory. Sustaining mall owner judgments when they are ostensibly based on aesthetic grounds would only invite rejections by mall owners based on these grounds. In contrast, reversing mall owner judgments based on the content of an artist's work, puts a premium on defining what constitutes content in art, and on differentiating content from aesthetic judgments. These two matters would be difficult to define and defend.

If we did not use *Pruneyard* as our guide, we might direct the government to sustain any discriminating judgment that was reasonable. This deferential standard would insulate mall owners' judgments from reversal. The result would be that government efforts at protecting artistic freedom in public spaces controlled by private entities would be ineffective.

The area between these two extremes, one requiring the mall owner to display more or less whatever art is presented, the other essentially requiring the government to defer to a mall owner's decision, is likely to be treacherous. I cannot imagine what the standard might be. I suspect that all it would accomplish would be to substitute the judgment of government officials for that of mall owners in deciding what art should be displayed. I do not perceive any virtue in such a regime. However, I can perceive a distinct disadvantage, at least as far as artistic expression is concerned. If malls are preserved as private havens, there will likely be some diversity of judgment as to what type of art should be hung. Indeed, if I am correct, the idea that government intervention into privately controlled public spheres for the purpose of curtailing the tyranny of orthodoxy will likely boomerang and result in the imposition of the government's orthodoxy.

If we should not trust the government with protecting the display of art in privately owned public spaces, whom should we trust? I believe that we should trust our culture. I will make this point somewhat indirectly.

A central problem of free speech jurisprudence is whether free speech rights should be extended to political groups whose beliefs are antithetical to a democracy and who might destroy a democratic order if properly elected. Justice Jackson, fresh from his experience at the Nuremberg trials, thought that such an idea was ludicrous. As he wrote in his dissenting opinion in *Terminiello v. Chicago*,[11] protesting the Court's reversal of a breach of the peace conviction: "[I]f the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact."[12] Not surprisingly, Justice Black had a different attitude. As he wrote in his dissent in *Dennis v. United States*:[13] "I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our notions of mere 'reasonableness.' . . . The Amendment as so construed is not likely to protect any but those 'safe' or orthodox views which rarely need its protection."[14]

In commenting on this free speech problem, the journalist I.F. Stone wrote that the issue presented "two dangers."[15] On the one hand there is "the danger that fascist or revolutionary movements may utilize the basic freedoms of the Constitution to destroy it."[16] On the other hand, there is the risk that government officials "will abuse this power [to censor] and limit the open discussion which is the foundation of a free society."[17] Stone conceded that the choice was "difficult" because . . . the dangers either way are real enough. But you cannot have freedom without the risk of its abuse. The men who wrote the Bill of Rights were willing to take their chances on freedom."[18] In this passage Stone sounds like a student of Holmes' dissent in *Gitlow v. People of New York*,[19] in which Holmes wrote: "If in the long run the beliefs expressed in the proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[20]

In the debate over whether to grant freedom of speech to groups who might use it to destroy the Constitution, I side with Justices Holmes and Black, as well as I.F. Stone. I do so, not only

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11 337 U.S. 1 (1949).
12 *Id.* at 37 (Jackson, J., dissenting).
13 341 U.S. 494 (1951).
14 *Id.* at 580 (Black, J., dissenting).
15 I.F. STONE, THE TRUMAN ERA 109 (1972).
16 *Id.*
17 *Id.*
18 *Id.* at 110.
19 268 U.S. 651 (1925).
20 *Id.* at 673 (Holmes, J., dissenting).

because of the dangers inherent in entrusting the government with the power to censor political speech, but because there is a more effective way to nurture freedom and free institutions than permitting the government to limit freedom in the name of security. This point was eloquently made by Judge Learned Hand in a speech he delivered in Central Park on May 21, 1944, when the Nazi threat to liberty was still alive. He said:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help. While it lies there it needs no constitution, no law, no court to save it.[21]

We should take Judge Hand's advice to heart. If we trust our culture (as opposed to relying on government regulation) to preserve our democratic order in the face of extremist groups who speak freely and peacefully, though they might seek to subvert the constitutional order if elected, I see no reason not to trust our culture (as opposed to government regulation) to provide substantial forums that display art in such variety that it infuses our culture with freshness and challenge.

Government orthodoxy is the quintessential oppressor of free expression, artistic or otherwise. The *Pruneyard* decision sought to avoid that pitfall by allowing the government to intrude into the private sphere, only to enforce a neutral stance by mall owners with regard to the content of the message of people who wish to distribute pamphlets within malls. There is no comparable position for the government to take with regard to the public display of art in privately owned public spaces. Although the values of the private sector leave much to be desired, I do not see government intrusion in the name of artistic freedom as enhancing the public display of artistic expression. Indeed, it would have the opposite consequence.

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[21] LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 189-90 (3d ed. 1960) (address given at the "I am an American Day" Ceremony held in Central Park, New York City, May 21, 1944).