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First Amendment Public Forum Analysis: Restrictions on the Right to Receive Information Upheld in Kreimer v. Bureau of Police

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NOTE

First Amendment Public Forum Analysis: Restrictions on the Right to Receive Information Upheld in *Kreimer v. Bureau of Police*

In *Kreimer v. Bureau of Police for the Town of Morristown*,[1] the United States Court of Appeals for the Third Circuit reversed a district court's decision which held unconstitutional a set of regulations pertaining to patron conduct in a public library that had closed its doors to a homeless man.[2] In rejecting the district court's standard of review, the court of appeals delved further into controversial public forum analysis[3] in an attempt to balance an individual's First Amendment right to receive information[4] with the government's in-

1. 958 F.2d 1242 (3d Cir. 1992).

2. Kreimer v. Bureau of Police, 765 F.2d 181 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992).

3. The controversy stems from what some scholars consider irrelevant and haphazard application of public forum analysis in First Amendment cases. *See* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234 (1984) (contending that public forum analysis diverts attention from real First Amendment issues); *see also* Peter Jakab, Note, *Public Forum Analysis After* Perry Education v. Perry Local Educators' Association*—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 551 (1986) (contending that analysis leaves lower courts without a conceptual method for categorizing public property).

4. For a detailed description of the evolution of the right to receive information, see generally Eric G. Olsen, Note, *The Right to Know in First Amendment Analysis*, 57 TEX L. REV. 505 (1979). For decisions on this matter, see Martin v. City of Struthers, 319 U.S. 141 (1943) (holding that the First Amendment includes the right to receive information as well as the freedom to speak); Lamont v. Postmaster General, 381 U.S. 301 (1965) (holding statute

terest in providing a proper atmosphere within a public library.[5] By classifying a public library as a limited public forum, the court of appeals extended the government's ability to restrict an individual's First Amendment rights.[6] In attempting to strengthen the structure of public forum analysis by further delineating the categories of public places, the *Kreimer* decision ironically demonstrates that public forum analysis has lost some if its usefulness in dealing with First Amendment issues.

The Joint Free Public Library of Morristown and Morris Township[7] established a patron policy that prohibited certain behavior within the library.[8] Richard R. Kreimer, whose frequent and disruptive presence originally alerted the library staff to the need for such a policy, is a homeless man who lives in public places within the town.[9] Kreimer's conduct, cataloged over a seven-month period, included such behavior as staring at a librarian for two ninety-minute periods, exuding an offensive odor, acting with hostility towards the library director and following a patron who had left the library.[10] This activity led to his expulsion on two occasions after the rules were implemented.[11] Seeking to have the regulations held unconstitutional, Kreimer consulted the ACLU and filed a *pro se* complaint, alleging, in part, that the rules were facially invalid under the First Amendment's right to receive information.[12] The defendant sought summary judgment on the facial validity of the rules and a mandatory injunction requiring Kreimer to exit the library upon command.[13]

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requiring Postmaster General to deliver mail containing communist propaganda only upon addressee's written request unconstitutional as a limitation on the exercise of the addressee's right to receive information); Stanley v. Georgia, 394 U.S. 557 (1969) (holding First Amendment right to receive information includes right to private possession of obscene materials).

5. *Kreimer*, 958 F.2d at 1246.

6. *Id.*

7. The statutory language creating the library states that "[a]ny two or more municipalities may unite in the support, maintenance and control of a joint free library for the use and benefit of the residents of such municipalities." N.J. STAT. ANN. § 40:54-29.3 (West 1991).

8. *Kreimer*, 958 F.2d at 1247.

9. *Id.* at 1247.

10. *Id.*

11. *Id.*

12. Kreimer also sought to have the regulations abolished as violations of the overbreadth doctrine, the vagueness doctrine of the First Amendment, and the New Jersey Constitution. As these arguments are not pertinent to public forum analysis, they will not be discussed in this note.

13. *Kreimer*, 765 F. Supp. at 183. In his cross-motion for summary judgment, Kreimer requested that the court enter a declaratory judgment holding that the library's patron policy violated his rights under the New Jersey and United States Constitutions; an injunction barring the enforcement of Rules 1, 5, 9, and the unnumbered paragraphs; and finally, an injunction prohibiting the recurrence of any such policies designed to bar homeless people. *Id.*

The district court sided with Kreimer and held that certain paragraphs of the regulations were "null and void on their face and unenforceable."[14] The district court properly held that the patron policy, which governs access to reading materials, implicated Kreimer's right to receive information, a penumbral First Amendment right.[15] In evaluating the restriction of this right, however, the district court improperly applied the public forum analysis.[16] In classifying the library as a traditional public forum, similar to a park or street, the district court used the strictest standard of review. Under this standard the regulations failed to pass constitutional muster.[17] The court of appeals, however, held that the library was a limited public forum which called for a two-tier standard of review,[18] and, consequently, the court of appeals found the regulations constitutional.[19]

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14. *Kreimer*, 958 F.2d at 1250. The regulations are as follows:

> 1. Patrons shall be engaged in activities associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials shall be required to leave the building.
>
> . . . .
>
> 5. Patrons shall respect the rights of other patrons and shall not harass or annoy others through noisy or boisterous activities, by staring at another person with the intent to annoy that person, by following another person about the building with the intent to annoy that person, by playing audio equipment so that others can hear it, by singing or talking to others or in monologues, or by behaving in a manner which reasonably can be expected to disturb other persons.
>
> . . . .
>
> 9. Patrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building.
>
> Any patron not abiding by these or other rules and regulations of the library shall be asked to leave the library premises. Library employees shall contact the Morristown Police if deemed advisable.
>
> Any patron who violates the Library rules and regulations shall be denied the privilege of access to the Library by the Library Board of Trustees, on recommendation of the Library Director. Any patron whose privileges have been denied, may have the decision reviewed by the Board of Trustees.

Id. at 1248.

15. *Id.* at 1251. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that it is well established that the Constitution protects the right to receive information and ideas). *See also supra* note 4 and accompanying text.

16. Public forum analysis is used to determine the level of restriction the government may enforce. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), the Court held that the character of the property determines the limits government may impose. In breaking public property into three categories the Court hoped to simplify the analysis. *See also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 796 (1985) ("[T]he extent to which the Government may limit access depends on whether the forum is public or nonpublic.").

17. Kreimer v. Bureau of Police, 765 F. Supp. 181, 187 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992).

18. Kreimer v. Bureau of Police, 958 F.2d 1242, 1259 (3d Cir. 1992).

19. *Id.* at 1261.

It has always been accepted that the government can place certain time, place and manner restrictions on an individual's First Amendment rights in order to balance community interests.[20] For example, restrictions can make it illegal to drive a sound truck through a neighborhood in the middle of the night.[21] What has been extensively questioned, though, is the degree of restriction the government may impose.[22] In an effort to develop a more systematic approach, courts began looking at the nature of the public property to determine the justifiable level of regulation. This concept was first developed in *Hague v. C.I.O.*,[23] where the United States Supreme Court stated that streets and parks have from time immemorial been a part of the rights and liberties of citizens. This marked an about-face change from the Court's holding in *Davis v. Massachusetts*[24] that a flat ban on speech in the Boston Commons would be acceptable.[25] Courts continued to develop the public forum methodology which was eventually pulled together in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*[26] *Perry* revealed that First Amendment analysis had developed into a type of "geographic"[27] approach, with three individual categories of forums.

The traditional public forum has existed time out of mind as a place for communicative ideas, and any government imposed restriction is subject to a very strict examination.[28] Courts have required restrictions to satisfy a four-part test.[29] They must be narrowly tailored, serve a compelling governmental interest, leave open ample alternative channels of communication, and be content neutral.[30]

Restrictions on a designated public forum, a place established by a state for public expression such as a public university, require the same strict scrutiny as restrictions on a traditional public fo-

20. R. Allan Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931, 947 (1969).

21. Horning, *supra* note 20 at 947.

22. *See generally*, Harry Kalven, Jr., *The Concept of the Public Forum*: Cox v. Louisiana, 1965 SUP. CT. REV. 1.

23. 307 U.S. 496 (1939).

24. 167 U.S. 43 (1897).

25. Jakab, *supra* note 3, at 547.

26. 460 U.S. 37 (1983).

27. Farber & Nowak, *supra* note 3, at 1220.

28. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (observing that the rights of government to limit expression in a traditional public forum are sharply circumscribed).

29. *Id.*

30. *Id. See* Elisabeth A. Langworthy, Note, *Time, Place or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127, 130 (1983).

rum.[31] While a state need not permanently keep the forum accessible to the public, it is bound by the same four-part test as long as it does maintain the forum.[32] In contrast, a nonpublic forum is public property that does not have communication or expression as its main purpose, such as an army base.[33] The regulation of a non-public forum need only pass a reasonableness test.[34] Notably, since the time of *Perry*, no restrictions concerning a nonpublic forum have been found unreasonable.[35]

Since *Perry*, courts have created a sub-category to the designated public forum in order to better target the analysis.[36] This newest classification, termed a limited public forum, "is created when government opens a nonpublic forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects."[37] If the speech being regulated is the type of expression for which the forum was created, then the same strict test from the traditional and designated forums will be applied. However, if the speech is not the type of expression for which the forum was created, then the reasonableness test is used.[38]

In applying the *Perry* analysis, the court of appeals in *Kreimer* rejected the district court's conclusion that a public library was a traditional public forum. The court of appeals stated that a "patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in any other conduct that would disrupt the quiet and peaceful library environment."[39] The court then reviewed the characteristics of a designated forum and the latest analytical developments since *Perry*,[40] both of which suggest that the governmental intent in opening the forum is of the greatest importance in determining the nature of the

31. *Perry*, 460 U.S. at 45. *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater is a designated public forum); Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n., 429 U.S. 167 (1976) (school board meeting qualifies as designated public forum); Widmar v. Vincent, 454 U.S. 263 (1981) (public university is a designated public forum).

32. *Perry*, 460 U.S. at 46.

33. *Kreimer*, 958 F.2d at 1256. *See, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966) (considering prison nonpublic forum because protest speech seen as inconsistent with prison purposes).

34. *Kreimer*, 958 F.2d at 1258 (3d Cir. 1992).

35. *See* Jakab, *supra* note 3, at 550.

36. *Kreimer*, 958 F.2d at 1256.

37. Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991).

38. *Kreimer*, 958 F.2d at 1260.

39. *Id.* at 1256.

40. The emerging concept of the limited public forum was brought to the fore in Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985).

forum.[41] The court employed the factors of prior history, policy and practice used in *Cornelius v. NAACP Legal Defense & Education Fund*[42] to determine if the library was intended to be open to "assembly and debate as a public forum."[43] Relying most heavily on the library rules,[44] the court of appeals concluded that the library was not intended to be an arena for all expression, just for the communication of the written word.[45] The process of so narrowly defining the library's function enabled the court to pigeonhole the library into the newly established category of a limited public forum.[46] As such, the library need only allow activity consistent with the written communication of ideas, which may be regulated subject to the four-part test. In addition, unorthodox library behavior may be more freely restrained, subject only to the reasonableness test.[47]

In the view of the court of appeals, Rules 1 and 5[48] of the library patron policy regulate conduct incompatible with the written receipt of information, such as noisy and boisterous activity.[49] Thus the court applied the reasonableness test and found Rules 1 and 5 to be a reasonable means to prohibit disruptive behavior.[50]

In analyzing the library's Rule 9, which regulates permitted conduct, both the district court and the court of appeals applied the same stricter four-part test, yet achieved strikingly opposite results. Both parties agreed that Rule 9, the so-called "hygiene test,"[51] was content neutral, thus eliminating the need for the courts to discuss this prong.[52] The district court had held that the government could only have a significant interest when the regulated behavior actually

41. *Kreimer*, 958 F.2d at 1259.
42. 473 U.S. 788 (1985).
43. *Id.* at 1258 (quoting *Cornelius*, 473 U.S. at 802).
44. See *supra* note 14, for the text of the rules. It is curious that the court chose this path since the rules themselves were at the center of the controversy and the Supreme Court had already addressed the issue in Brown v. Louisiana, 383 U.S. 131 (1966), which held that while a library sit-in may have been unnerving, it did not exceed the appropriate limits of misbehavior.
45. *Kreimer*, 958 F.2d at 1260.
46. *Id.* at 1261.
47. This new category represents a fusion of the public and nonpublic forums by adopting a test from each category. The limited public forum serves as a type of compromise, through which courts can analyze forums possessing qualities from each extreme.
48. *See supra* text accompanying note 14.
49. *Kreimer*, 958 F.2d at 1262.
50. *Id.*
51. One scholar has warned of the danger of restricting speech on the basis of taste, suggesting that the "legitimation of regulation on grounds of taste would reinforce those attitudes and thereby support one of the strongest causes of the intolerance of unorthodox ideas." Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 484 (1985).
52. *Kreimer*, 958 F.2d at 1262.

disrupted the forum.[53] The court relied on case law which had held that behavior must cause "material and substantial disruption"[54] that rises above mere annoyance or disquietude.[55]

Because the district court determined that a person's body odor did not constitute an actual disruption,[56] it held that the policy did not "reasonably effectuate its stated goal of preserving the good order of the Library."[57] The court of appeals dismissed this reasoning on two grounds. First, it dismissed the need for actual disruption by determining that *Tinker v. Des Moines School District*[58] and *Grayned v. City of Rockford*,[59] the cases primarily relied upon by the district court, did not rest on such a holding.[60] The court also noted that several other library rules, such as the number of books that can be borrowed, regulate non-disruptive behavior.[61] Additionally, the court held that rule 9 *does* in fact regulate disruptive behavior since the odor must rise to the level of a nuisance before expulsion can occur.[62] This finding allowed the court to determine that a significant governmental interest was involved.[63] This analysis is crucial, as the outcome of a case often largely depends on how the court determines what is significant.[64] The court also determined that the district court improperly applied the narrowly tailored test, stating that the proper test is to see if library order would be achieved less effectively without the rule.[65] In light of this minimal scrutiny, the court easily found Rule 9 sufficiently narrow.[66]

The final prong of the test requires that the individual who has had his rights restricted at least retain alternative channels of com-

53. *Kreimer*, 765 F. Supp. at 188.

54. *Id.* at 191 (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509 (1969)). *See also* Grayned v. City of Rockford, 408 U.S. 104 (1982) (validating anti-noise ordinance because state courts impose actual disruption standard).

55. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971) (holding annoyance statute invalid as an unascertainable standard).

56. *Kreimer*, 765 F. Supp. at 189.

57. *Id.*

58. 393 U.S. 503 (1969).

59. 408 U.S. 104 (1982).

60. *Kreimer*, 958 F.2d at 1263 n.25.

61. *Id.*

62. *Id.* at 1624 n.28.

63. *Id.*

64. Langworthy, *supra* note 30, at 131.

65. Kreimer v. Bureau of Police, 958 F.2d 1242, 1264 (3d Cir. 1992) (quoting Ward v. Rock Against Racism, 4921 U.S. 781, 799 (1989) which held that municipal noise regulation designed to ensure that music performances in band shell did not disturb surrounding residents, by requiring performers to use sound system provided by city, did not violate free speech).

66. *Kreimer*, 958 F.2d at 1264.

munication.[67] The district court reasoned that while many people could receive information from other sources, or cleanse themselves so as to comply with the rule, homeless people like Kreimer had neither of these avenues open to them; therefore the lower court declared Rule 9 invalid.[68] The magnitude of the right to receive information, and the importance of maintaining a means of access to information, lies in the fact that the right to receive information elevates the chances of the poor and homeless to better themselves.[69] Conceding this problem,[70] the court of appeals nonetheless stated that this fact was irrelevant and that Mr. Kreimer's alternative channel is to comply with the rule, in spite of the court's knowledge that the avenue was clearly *not* available to him.[71] As if to bolster this weak position the court quickly changed gears and applied a balancing test, judging that the cumulative rights of the other patrons and staff outweighed Kreimer's First Amendment rights.[72]

The court of appeals then applied questionable reasoning in the balancing test when it gave excessive weight to the rights of the patrons and staff. It is not a matter of one person's inclusion resulting in the deprivation of the rights of others, since no one except Kreimer was being forced to leave the library. It is rather Kreimer's right to receive any information at all which should be weighed against the incremental decrease in a patron's enjoyment of his or her right. At most this hygiene rule affects a patron's right by making him or her change seats, while it completely eliminates Kreimer's rights.[73] Analyzed in this framework, it is difficult to see how the court reached its conclusion.

While the reversal of the district court on Rules 1 and 5 can be attributed to the forum reclassification of the library, which led to the application of a different standard, the reversal on Rule 9 analyzed under the same four-part test, provides insight into the current status of First Amendment analysis. To begin with, while the courts have tried to adopt a systematic review with the four-part test, there still remains a great deal of fluidity and malleability in the stan-

67. *See supra* note 30 and accompanying text.

68. *Kreimer*, 765 F. Supp. at 189.

69. For an in-depth discussion of this area, see generally Horning, *supra* note 20.

70. *Kreimer*, 958 F.2d at 1264.

71. *Id.* at 1265.

72. *See id.* at 1265-66.

73. Perhaps Justice Brennan expressed this concern best: "Surely that minor inconvenience is a small price to pay for the continued preservation of so precious a liberty as free speech." Lehman v. City of Shaker Heights, 418 U.S. 298, 320-21 (1974) (Brennan, J., dissenting).

dards. Also, the continuing expansion of the categories suggests that the use of public forum analysis is inadequate for determining First Amendment issues.[74] One scholar has suggested that instead of further confining First Amendment analysis by the creation of more sub-categories, courts should attempt to formulate a more abstract theory in order to accommodate the wide range of scenarios likely to confront courts in the future.[75] While public forum analysis continues to be widely used, its application has led to some interesting results. For example, a welfare department's waiting room has been deemed a traditional public forum,[76] while certain sidewalks have been grouped in the nonpublic forum category.[77]

While the popularity of public forum analysis remains high, the outcome of *Kreimer* suggests that, as more and more public places become categorized, the usefulness of the model will diminish. Lower courts are already having to deal with conflicting precedent, demonstrating that the fixation on this model has distracted courts from the real issue of First Amendment analysis: reconciling the exercise of an individual's freedom of speech with the interests of society.

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74. Jakab, *supra* note 3, at 551.
75. Jakab, *supra* note 3, at 550.
76. Albany Welfare Rights Org. v. Wyman, 493 F.2d 1319 (2d Cir. 1974).
77. U.S. v. Kokinda, 497 U.S. 720 (1990).