

LISTSERV

Is "Stick 'em Up!" Protected Free Speech?

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"Speech" is being defined more and more broadly on a daily basis as First Amendment cases make their way through the courts. The 2015 Supreme Court ruling in *Reed v. Town of Gilbert* dramatically advanced this trend. A topic frequently discussed on the listserv, the First Amendment and Freedom of Speech recently came to light again following a ruling in *Homeless Helping Homeless v. City of Tampa.*

As noted by one IMLA listserv contributor, although federal District Court Chief Judge Steven Merryday ruled against Tampa's "Anti-Solicitation Ordinance" in *Homeless Helping Homeless*, he let the *Reed* decision--and the justices who decided that case--have it, in no uncertain terms:

> *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), an opinion accompanied by three distinct concurring opinions joined by a total of seven justices and an opinion adjudicating a sign-ordinance dispute, appears to govern this action. In other words, an opinion that resolves a dispute about parishioners temporarily planting some small signs directing people to a church service is written in such sweeping terms that the opinion appears to govern a dispute about an ordinance that regulates face-to-face demands for money from casual passers-by. This action illustrates (as Reed illustrates) the frailties of governing discrete local issues, which are otherwise decided by local officials subject to periodic election, by force of intermittently issued decrees, which are conveyed as constitutional directives; which are issued by a majority (or, sometimes, only a plurality) of nine lawyers serving during "good behavior"; and which are uttered in the course of resolving a different dispute in another locality. Nonetheless, this order dutifully applies Reed and resolves the present dispute against the City and in favor of Homeless Helping Homeless. Without Reed, which governs for the moment (despite prominently featuring the badges of a transient reign), I would follow Judge Easterbrook in Norton v. City of Springfield, 768 F. 3d 713 (7th Cir. 2014), and similar decisions, and I would uphold the City's ordinance, which results from a constructive and demonstrably benign legislative attempt to manage fairly and humanely a tangible and persistent problem in a manner narrowly and artfully tailored to fit the compelling facts in the affected community.

It is clear that Judge Merryday did not like having to follow the *Reed* decision. Indeed, it can be seen by some as one in a line of cases too broadly sweeping in its after-effects. In light of *Reed* and *Homeless Helping Homeless*, and the line of cases which appear to extend "Freedom of Speech" to the inclusion of acts as well as speech, consider the following query: If "Freedom of Speech" protects the act of solicitation, could the same analysis also be extended to protect he act of robbery? Preposterous? Maybe, but consider the analysis:

Under many ordinances, both solicitation and robbery are criminal charges presumably enacted for the general safety and welfare of the citizens;

In soliciting, the speech "Can you spare a dollar?" is presumably followed by the act of a person handing money to the speaker;

In robbery, the speech "Stick 'em Up!" is presumably followed by the act of a person handing money to the speaker;

In both cases the person who is asked for money may be very uncomfortable and may act by giving money out of fear;

An unwelcome solicitation has a chance to become violent, as does a robbery;

If free speech "overrules" the crime of soliciting, why couldn't the same analysis be used to overrule the crime of robbery?

Again, it may sound far-fetched but the analysis is fairly similar. Yes, I do say this essentially in jest, but the question is exactly how far will speech be extended to include acts? At what point (if ever) will going beyond words be going too far? Understand, I'm not necessarily advocating against a broad definition, but "speech" has been extended to include: repeated unwanted visits from door to door vendors, blocking sidewalks and roads, using the bathroom on the statehouse grounds and littering a neighborhood with flyers that blow all over the place. Each of these protected actions clearly includes more than just words.

There are plenty of judges and legal minds who believe that the implications of *Reed* have far reaching effects. Some examples of this are shown below, as reported in a recent *New York Times* article:

Recently, an appeals court in Richmond, Va., agreed that *Reed* had revised the meaning of content neutrality. "*Reed* has made clear," the court said, that "the government's justification or purpose in enacting the law is irrelevant" if it singles out topics for regulation. The court struck down a South Carolina law that barred robo-

calls on political and commercial topics but not on others.

In another case, a federal judge in New Hampshire relied on *Reed* to strike down a law that made it illegal to take a picture of a completed election ballot and show it to others. "As in Reed," Judge Paul Barbadoro wrote, "the law under review is content-based on its face because it restricts speech on the basis of its subject matter."

In a concurrence in the *Reed* decision, Justice Stephen G. Breyer suggested that many other laws could be at risk under the majority's reasoning, including ones concerning exceptions to the confidentiality of medical forms, disclosures on tax returns and signs at petting zoos.

Stay tuned for more as various federal courts work through these cases in the aftermath of *Reed*. Clearly, not all judges are thrilled with the decision and the resulting trends.

In this age of what seems like daily news items related to a public tragedies in one place or another, a quick listserv survey of colleagues reveals that almost everyone has law enforcement presence at their regular council meetings. Many report the Chief of Police regularly attends as a department head, but some report slightly higher levels of security.

One colleague reports: " We have metal detectors at the front doors and City marshals attend every Council meeting – it is part of our standard operating procedure. The Mayor also has police officers assigned to her for security that attend as well."

Others report:

"The police chief and fire chief (also a peace officer) attend every meeting as department heads. If we have an idea that there may be a controversial agenda item, or we have word that someone may be coming to make trouble, we will have additional officers present."

"We have routinely have 1-2 peace officers who attend as part of our SOP, but no metal detectors. When we know there will be a large gathering, we typically will request an increase in the number of officers in attendance."

"We have a metal detector and city marshal at every meeting."

"We have 1 or 2 police officers at each Council meeting – another 1 or 2 if there is a particularly contentious issue or an unusually large crowd is expected. We also have 1 or 2 at each Planning Commission meeting."

Sadly, one colleague reports that:

Our city used to be entirely open, but a few years ago a man walked into the Democratic state headquarters a few blocks from City Hall and shot a former state senator (and party chair) dead. So, the City imposed pass cards for all employees, and involved visitor's passes for visitors. We also have two entrances to City Hall for the public that have a metal detector in place. We were in a meeting a couple of years ago when the metal detector picked up on a long knife someone had, and he got extremely angry. Fortunately, the chief of police was in the meeting, and he anger subsided rapidly when he got to the door.

It is a sign of the times, I suppose, that these measures are necessary. I urge everyone to take security issues seriously, and review your emergency operations procedures on a regular basis. Sure, the grumbling is bound to take place, but preventing an incident such as cited above is of paramount importance.

As a profession, I think we need to pause, take a breath and not forget to have a little fun every now and then. The whole legal profession should not become a billable hours contest. There is enough pressure packed into the practice of law that many states now have CLE requirements that must (in some fashion) address substance abuse and mental health issues among lawyers. This is a shame, and I know a few lawyers who have retired and lamented that "The fun has been taken out of the practice of law."

Well, thankfully as one avenue of enjoyment for those of us who belong to IMLA, we have the Water Cooler. If you don't know, the Water Cooler was founded by New Jersey's Bill Kearns years ago for the purpose of discussing a variety of topics (most unrelated to the law) in an atmosphere of "Courtesy, Civility and Collegiality." It provides a momentary break from day to day activities and inserts a little "fun" into our professional lives.

During the IMLA Annual Meeting in San Diego this Fall, 18 of us gathered around the table for the 5th Annual Water Cooler Reunion. This annual event represents the one time of the year where our relationship is not virtual, but becomes reality as we meet face to face. I started this reunion back in 2012 at the Annual Meeting in Austin, and it has grown since that time. We've been to B.D. Riley's in Austin, Foley's in San Francisco, Pratt Street Ale House in Baltimore, The Hofbrau House in Las Vegas, and most recently met at The Field, an Irish Pub / Restaurant in the heart of San Diego's Gas Lamp District.

Representatives from Wisconsin, Georgia, Missouri, South Carolina, Kansas, Louisiana, Texas, New York and Canada, as well as some spouses and children, were on hand to share in the fun conversation and great food in the upstairs private room. Non-legal discussions covered college preparations for kids, travel plans and vacations, the birth of grandchildren (pictures were passed around, of course), and athletics. On top of all this, the food and drinks were outstanding! A nod to Chuck Thompson for recommending the venue. It provided a great atmosphere for the annual event, and hopefully we can keep it up. I look forward this event annually, as it is attended by folks who have become some of my best friends.

Of course, the 6th Annual Water Cooler Reunion comes our way during the week of October 14 through October 18th as IMLA visits Niagara Falls, Ontario, for its 82nd Annual Conference. The location and time/date are yet to be determined, but if you can make it to this event it has proven to be quite fun. Of course to make it, you need to register for and attend the Annual Conference. Please do so if at all possible. Support IMLA!

From the "Can You Believe It?" corner, an area city recently had an inquiry from a citizen who wanted to know if they should report getting scammed in a dope deal. Of course, the local police was response was "Yes, tell us all about this person from whom who you bought drugs."

In my fair city, we had a lady come through the metal detector safely as she headed into court. She then handed her purse to the police officer to have the contents reviewed. Upon opening the purse, the officer immediately saw in plain view a bag of marijuana. The officer asked "What are you doing with this?" The reply: "Oh, I forgot about that. Can I take it back outside?"

The prosecution rests, your honor... ML