

## THE PUBLIC FORUM DOCTRINE AND PUBLIC HOUSING AUTHORITIES: CAN YOU SAY THAT HERE?

In two cases, the U.S. Court of Appeals for the 11th Circuit has applied the so-called public forum doctrine under the First Amendment, and has upheld the power of public housing authorities to control what was said and when it was said on their properties.<sup>1</sup> However, the Supreme Judicial Court of Massachusetts took exception with those holdings, and found that a housing authority's attempt to limit the speech rights of persons on its premises to be violative of the First Amendment.<sup>2</sup> Other courts, including the U.S. Supreme Court, have become involved with the issue. This article will review briefly the status of the public forum line of cases under the First Amendment, and then consider these conflicting decisions with a view to the public policy issues raised by this interesting question of the free speech rights of tenants of subsidized housing. While it is true that under the classic public forum line of analysis the government can often restrict or prohibit speech on property it owns and operates, where that public property is the homes of poor families or elderly and appears to be a typical neighborhood, a different answer may be necessary, as the Massachusetts court so held.

First, however, a brief review of what is a public housing authority is in order. Federal statutes create a funding mechanism by which local entities are able to buy, build and operate various housing programs for the poor.<sup>3</sup> The local housing authority takes this money, perhaps together with state or local funds,<sup>4</sup> and creates apartment buildings of various sorts, ranging from high rises in massive complexes to small townhouses in the country<sup>5</sup> which are made available to families, elderly or disabled individuals who meet the various regulations governing tenant selection.<sup>6</sup> In most respects, these public housing authority developments resemble privately owned housing, and are of course, the homes of the residents of those developments.

**A. The Government's Right to Control First Amendment Activities on Property It Owns:  
The Public Forum Doctrine.**

Beginning with *Perry Education Association v. Perry Local Educators' Association*<sup>7</sup>, the U.S. Supreme Court has handed down a series of cases implementing a tripartite analysis of claims involving First Amendment challenges to restrictions on the use of government owned property for speech activities. In doing so it has established what has become known as the public forum analysis. This analytic methodology is designed to “strike a balance between the public’s right of access to public property for expressive activities and the government’s interest in limiting the property’s use based on the character of the property at issue.”<sup>8</sup>

In *Perry*, a school district had granted to the teachers’ union, as part of a collective bargaining agreement, the exclusive right to access the interschool mail system and teacher mailboxes within the system.<sup>9</sup> A rival union challenged this practice, seeking similar access.<sup>10</sup> The court found that there was no violation of the First Amendment.<sup>11</sup> In its reasoning, the court recognized three different categories of publicly owned property, or public forums: traditional or quintessentially public fora, limited public fora, and nonpublic fora.<sup>12</sup> A traditional public forum is one that “by long tradition or by governmental fiat [has] been devoted to assembly and debate....”<sup>13</sup> A limited public forum is one that is “generally open to the public even if [the entity] was not required to create the forum in the first place.”<sup>14</sup> A nonpublic forum is one that “is not by tradition or designation a forum for public communication....”<sup>15</sup> This analysis followed from the fact that the government in this type of case is not acting as the sovereign, but as the proprietor of property. “[T]he state, no less than a private property owner,

has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>16</sup>

In a public forum, the government landowner may limit speech and impose content-based exclusions from the forum only upon a showing of a compelling state interest and that the rule in issue is narrowly drawn to achieve that end.<sup>17</sup> Further, content-neutral regulations of the time, place, and manner of expression are permissible only when they are narrowly tailored to a significant governmental interest, and the regulations leave open ample alternative channels of communication.<sup>18</sup> In limited public fora, the government is bound by the same rules as in the general all purpose public forum. However, it is permitted to limit the purpose of the forum, that is, limit the forum’s use to certain groups only, or for expression on certain subjects only.<sup>19</sup>

In non-public fora, the rules are different. Because the First Amendment does not “guarantee access to property simply because it is owned or controlled by the government”<sup>19</sup>, in addition to time, place, and manner restrictions, the government may “reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>20</sup>

Where the government has fully dedicated property it owns and controls to expressive use, only the most limited and important interests will support closing expressive activities in that forum. In limited public forums, a particular range of expressions will be allowed, subject to those same stringent constraints on restricting speech. But in non-public fora, outright bans on speech can be imposed based merely on a reasonable relation between the restriction and the nature of the property.<sup>21</sup>

Thus in *Perry* the court found that the internal mail facility at the school could be reserved for the use of the union which represented all teachers in the city, and access by a competing union which did not officially represent the entire body of teachers was not required.<sup>22</sup> As the court summed up in *Perry*,

When speakers and subjects are similarly situated, the State may not pick and chose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.<sup>23</sup>

Immediately after *Perry* the court struck down a statute prohibiting picketing on the public sidewalks surrounding the Supreme Court building, finding the sidewalks are the type of government owned property historically dedicated to unlimited free speech. Accordingly, the sidewalks were public forum where the state could not ban picketing.<sup>24</sup> However, a time limitation on the use of public parks was upheld despite the parks nature as a public forum, as such limitation was a reasonable time, place, manner restriction which was content neutral, left open other avenues of communication, and was designed to support the state's interest in the use of public parks.<sup>25</sup> The Supreme Court has also held that a city could ban the posting of signs on public property for the esthetic and economic interests of eliminating clutter and visual blight.<sup>26</sup> At issue was the placing of signs on street light posts within the city. The court held that street light posts were not a type of property historically dedicated to for public communication and thus were not a public forum.<sup>27</sup>

In determining whether the property in question is or is not a public forum, the governmental owner's intent is a key factor. In *Cornelius v. NAACP Legal Defense & Ed. Fund*,<sup>28</sup> the Supreme Court found that a charity campaign, conducted on federal property, was

not a public forum. As such, restrictions on the number and type of charities allowed to participate and the length of the messages was proper under the mere reasonableness standard.<sup>29</sup> In doing so the court noted that it will not reach to find a public forum “in face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activities.”<sup>30</sup>

Thus, even in what might at first blush appear to be an area by tradition dedicated to communication activities and thus a public forum, such as sidewalks, if the location of the sidewalk is such that it evidences an intent not to hold it open to communicative activities, the court will find even these areas to be a nonpublic forum. Sidewalks in front of post offices, needed to insure efficient operation of the mail system, could be restricted from speech activities, and such a restriction would be upheld unless it proved to be “arbitrary, capricious, or invidious”.<sup>31</sup> In *U.S. v. Kokinda*,<sup>32</sup> the court again addressed the issue of speech on sidewalks, this time on a sidewalk leading to the US Post Office. The plurality found that the postal sidewalk, lying entirely within the property of the Post Office, was a nonpublic forum, and thus the ban on solicitations on the sidewalks of the property was reasonable to insure efficient operation of the postal office.<sup>33</sup> The test used to determine whether the restriction is reasonable or not was whether it was “arbitrary, capricious, or invidious”.<sup>34</sup>

Similarly, the sidewalk in front of a publicly owned airport was not found to be a public forum. Rather, the court found that this type of property had not been dedicated from time immemorial to expressive use by the government.<sup>35</sup> As the sidewalks were not public fora, the ban on solicitations thereon was upheld as a reasonable restriction on the use of the property.<sup>36</sup> However, the majority went on to find that an outright ban on the free distribution of literature on

the property was not reasonable, as it presented few problems other than perhaps litter.<sup>37</sup>

In a fractured opinion that produced no majority, the U.S. Supreme Court has upheld some restrictions even in a public forum. The court upheld a regulation which banned all political speech, but only political speech, within a 100 foot area surrounding the entrance of a polling place.<sup>38</sup> The plurality opinion noted that this was without doubt a content-based restriction, but found that the regulation served a compelling state interest, and that it was sufficiently narrowly tailored.<sup>39</sup>

#### **B. The Government's Right to Control First Amendment Activities In Public Forums or on Property it Does Not Own.**

While governmental efforts to restrict speech activities in nonpublic fora have been routinely upheld as we have seen, similar efforts in other areas have just as routinely been met without success. In *Lovell v. Griffin*,<sup>40</sup> and its progeny, the court addressed the right of municipalities to restrict speech activities on their streets and sidewalks. Such efforts have generally been doomed to failure. This is so because such general streets and sidewalks have since the beginning of our nation's history been the quintessential public forum for the exercise of free speech rights.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.<sup>41</sup>

Thus, in *Martin v. Struthers*, the Court rejected the constitutionality of a regulation which banned door to door solicitation within the City of Struthers, Ohio. Again speaking in sweeping

language, the Court noted

For centuries it has been the common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants.<sup>42</sup>

Likewise, content-related partial bans on the use of the streets and sidewalks for expressive activity have had a hard row to hoe to pass constitutional muster. Ordinances that prohibit picketing on a public way within a set distance of a school except for peaceable labor picketing failed to get over the constitutional hurdle.<sup>43</sup> A ban on picketing on the sidewalks surrounding the US Supreme Court building was struck down as it was not a reasonable time, place, manner restriction limited to serve a significant government interest.<sup>44</sup> A regulation which banned only certain types of news racks on sidewalks in Cincinnati was not permissible.<sup>45</sup> Similarly, a regulation which banned charitable solicitations on a door to door basis unless at least 75% of the receipts were used for charitable purposes was struck down as violative of the First Amendment.<sup>46</sup> Such results can even be found in a case involving not publicly owned streets or sidewalks, but privately-owned company town streets. The outright bans on the distribution of religious literature on privately owned sidewalks and streets which in all significant respects were identical to a public town sidewalks and streets has been held to violate the First Amendment.<sup>47</sup>

In *Lamb's Chapel v. Center Moriches*,<sup>48</sup> the Supreme Court struck down a total ban by the school district on using district property for religious purposes, as such a ban was not viewpoint neutral.

**C. Initial U.S. Supreme Court Attention to Governmentally-owned Housing and the First Amendment: *Tucker v. Texas*.**

The U.S. Supreme Court has on one occasion addressed the specific situation of a public housing authority (or at least what was called a housing authority) and attempts to restrict speech on that property. In *Tucker v. Texas*,<sup>49</sup> the Supreme Court addressed an appeal from the County Court of Medina, Texas in which the Plaintiff Tucker had been convicted of, essentially, trespass after notice.<sup>50</sup> Tucker was a Jehovah's Witness engaged in the distribution of religious literature to "willing recipients".<sup>51</sup> The locale of his activities was the Hondo Navigation Village.<sup>52</sup> The village was owned by the Federal Government and was constructed as part of the WWII defense effort.<sup>53</sup> A war time statute had created the Federal Public Housing Authority to create housing for the defense workers. The court noted that "According to all indications the village was freely accessible and open to the public and had the characteristics of a typical American town".<sup>54</sup> The village manager order Tucker to discontinue his religious activities on the premises, and when Tucker refused, his arrest followed.<sup>55</sup>

The court held that there was no principled difference between the case at bar and the *Marsh* case, the difference simply being that instead of a private corporation owning the town, the federal government owned the town.<sup>55</sup> "This difference does not affect the result."<sup>56</sup> The court held, some thirty years prior to the *Perry* decision, that "neither Congress nor the Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment."<sup>57</sup>

Thus, in the first housing authority case to come before the Supreme Court, long before



the development of the public forum doctrine, the Court struck down a ban on the distribution of religious materials.

**D. The Eleventh Circuit's Approach to the Problem.**

In *Crowder v. Housing Authority of the City of Atlanta*<sup>58</sup> and in *Daniel v. City of Tampa*<sup>59</sup>, the Eleventh Circuit had before it cases arising out of public housing authorities attempts to control the use of their property for certain expressive activities. In *Crowder*, the tenant attempted to hold Bible study meetings in the common facility of the apartment building he lived in, which was owned by the Atlanta Housing Authority (AHA).<sup>60</sup> Crowder wanted to use both the building's auditorium and its library.<sup>61</sup> After some complaints Crowder's activities were initially forbidden; then a tenant vote was held on whether and when to permit the meetings, resulting in Crowder being restricted to holding his activities on Friday nights only.<sup>62</sup> When Crowder attempted to hold a meeting at another time, he was arrested for violation of a lawful order to leave.<sup>63</sup>

The Eleventh Circuit began its analysis by reviewing the public forum doctrine under *Perry*. It held that the auditorium was a limited public forum, as it was opened by the AHA for a wide range of expressive activities, including religious services.<sup>64</sup> The library was found to be a non-public forum, as it was at best irregularly and infrequently used by the tenants for any type of meeting.<sup>65</sup> Given the nature of the property, the Circuit held that the initial complete ban on all meetings run by Crowder was not reasonable nor a valid time, place, and manner restriction.<sup>66</sup> Likewise, the court held that the tenant majority vote requirement was an improper content based decision prohibited by the First Amendment.<sup>67</sup> The Circuit held that the Friday night restriction was also improper. Even if the restriction was assumed to be content neutral, it had to be a time,

place, manner restriction which was narrowly tailored to serve a significant governmental interest.<sup>68</sup> “Because the facilities were not in constant use during the daytime, the Friday-night-only restriction was not narrowly tailored to serve the substantial government interest in avoiding scheduling conflicts.”<sup>69</sup> Finally, addressing the specific arrest of Crowder, the court held that since the library was a non-public forum, and was being used at the time of the arrest to temporarily store furniture, the managements actions were “reasonable and lawful.” on that date.

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A year later, the Eleventh Circuit returned to this problem in the *Daniel* case. The case began when Daniel sought a preliminary injunction from the federal district court. Daniel was a member of a black rights organization who wished to engage in door to door political expression within two Tampa Housing Authority developments.<sup>71</sup> The developments had a history of serious drug and crime problems, in particular crime caused by non-residents, which led the Housing Authority to create a policy barring anyone from being on the property who was not specifically “authorized, licensed, or invited”.<sup>72</sup> Daniel challenged the policy as being overbroad and a violation of his First Amendment rights.<sup>73</sup> The District Court, upholding the Magistrate Judge’s recommendation, issued the preliminary injunction. <sup>74</sup> The District Court relied upon *Martin v. Struthers* as creating a right in the homeowner to decide whether or not to receive distributors of literature. Thus, Daniel had shown a likelihood of success on the merits, warranting the issuance of an injunction.<sup>75</sup> This was despite the fact that both the magistrate and the District Court held that the THA property was a non-public forum.<sup>76</sup>

Daniel’s success was short-lived. When the case came on for trial on the merits, the Authority prevailed before a different district court judge.<sup>77</sup> The trial court decision begins by

noting that it is far from clear that the forum analysis is applicable in the first instance, as Daniel's physical presence on the property, which was the root cause of his arrest for trespassing, was in and of itself, expressive conduct.<sup>78</sup> Assuming Daniel's claim could be so construed, the court held that the property of the Authority was neither a traditional public forum nor a designated (limited) public forum. The purpose of the Authority's property was to be the private residences of low income individuals, not for the public exposition of ideas, and thus was not a designated forum.<sup>79</sup> The court contrasted the property with traditional forums, such as public streets and parks, noting that the Authority had never allowed activities such as solicitation, canvassing or the distributing of literature on its property. Accordingly, it was a non-public forum.<sup>80</sup> The court held that the policy "easily" met the requirement that it be reasonable and not content based, and thus withstood constitutional scrutiny. The court therefore entered judgment as a matter of law for the city at the conclusion of the plaintiff's case.<sup>81</sup>

Not surprisingly, the case went up on appeal to the 11<sup>th</sup> Circuit. The circuit court affirmed the decision.<sup>82</sup> The court reviewed and applied the public forum doctrine, and agreed with the district court that the property in issue was a nonpublic forum.<sup>83</sup> The court noted in support of this analysis that the housing authority's mission is to provide safe housing for its residents, that access to the property is controlled and limited to residents, invited guests, and those conducting official business.<sup>84</sup> The court held the access restrictions were content neutral, and a reasonable means of combating the crime within the Authority's property. Accordingly, the matter passed constitutional muster.<sup>85</sup>

#### **E. The Massachusetts Contrary Approach to the Problem.**

The Massachusetts Supreme Judicial Court addressed this issue in *Walker v. Georgetown*

*Housing Authority*.<sup>86, 87</sup> The plaintiff Walker was a tenant of the GHA who challenged the ban imposed by the Authority on door-to-door campaigning and soliciting within an elderly development.<sup>88</sup> The trial court granted summary judgment to the tenant under both the Federal and State constitutions, finding that the policy violated the free speech rights of the tenant.<sup>89</sup> The Authority appealed. The Supreme Judicial Court upheld the decision of the trial court, under both the First Amendment and the state constitution.<sup>90</sup> The court began by noting that a similar ban imposed by a municipality on all door-to-door canvassing would not stand constitutional scrutiny.<sup>91</sup> As the court then stated, “We reject the authority’s claim that its streets and sidewalks and the doorways of its apartment buildings are not areas to which the same rights [as exist with respect to a municipality] apply.”<sup>92</sup> The court relied heavily on *Martin v. Struthers* for this position, and rejected the Authority’s position that the streets and sidewalks of its development were a non-public forum.<sup>93</sup> The court initially declined to adopt the public forum doctrine as a decisional tool under the state constitution.<sup>94</sup> However, under the federal claim, the court immediately found the streets and sidewalks to “fall squarely within the classification of a public forum.”<sup>95</sup>

The authority is a public entity. Its property is publicly owned. There is no apparent distinction between its streets and sidewalks and those of a private development. A technical distinction that its ways are not accepted public ways but rather appear to be private ways open to the public makes no difference. The constitutional right of the authority’s tenants to receive communications may not be abridged by the blanket prohibition of campaigning and solicitation.<sup>96</sup>

Rather than looking at the intent of the governmental entity with regard to the property (as modern federal precedent required), the Massachusetts court took a very dogmatic approach to the issue. It would appear that short of creating gated communities with check points, or similar frank differentiation from the surrounding streets, the Massachusetts court would not find

housing authority streets and sidewalks to be anything other than prototypic public fora, regardless of the intent of the housing authority.<sup>97</sup> Public ownership with a facial similarity to typical streets lead to the conclusion that the area was a prototypic public forum. No evidence was cited that housing property had been the type of property historically reserved for and used for expressive purposes. In reaching this absolutist conclusion, the Massachusetts court directly attacked the reasoning and position of the 11<sup>th</sup> Circuit, and by inference, that of the U.S. Supreme Court. “[T]he reasoning of the *Daniel* case is questionable. It seems that, because the authority had limited access to its property, the court concluded that the property was not a public forum. The proper question, it seems to us, was whether the authority had a right to limit access in the first place.”<sup>98</sup> The SJC’s opinion is a direct challenge to the core analytic methodology of the public forum doctrine, as the touchstone of said analysis is what is the intent of the governmental entity with regard to property it owns - rather than property owned by others.

#### **F. The Fifth Circuit.**

The Fifth Circuit has also addressed this problem. In *Vasquez v. Housing Authority of the City of El Paso*, first the District Court for the Western District of Texas, and then a panel of the Fifth Circuit dealt with a First Amendment challenge to a no trespass regulation adopted by the Housing Authority of the City of El Paso (HACEP). The District Court upheld the regulation.<sup>99</sup> Factually the case closely resembled the Massachusetts *Walker* case. Vasquez was a non-resident who want to go door-to-door within a HACEP development to campaign for a county office.<sup>100</sup> The development was a typical housing development bounded by public streets, with some public streets running through the development.<sup>101</sup> The Authority allowed

residents and certain “legitimate” non-residents on the property and to go door-to-door, but otherwise denied access to the property.<sup>102</sup> Vasquez was denied the right to go door-to-door campaigning and a resident, De La O, alleged he was denied the right to receive such campaigning.<sup>103</sup> The District Court began with a review of the Supreme Court public forum caselaw, and particularly noted the 11<sup>th</sup> Circuit’s *Daniel* decision. The court rapidly found that the development was a non-public forum.<sup>104</sup> Accordingly, the court turned to the issue of whether or not the regulations were reasonable. Noting that the regulations combated crime, that there was ready access to city streets, that tenants could specifically invite campaigners into the property, and were content neutral, the regulations passed muster.<sup>105, 106</sup>

The matter was appealed to the Fifth Circuit.<sup>107</sup> The majority opinion also began by repeating the now familiar outline of the Supreme Court’s forum analysis.<sup>108</sup> The majority quickly agreed that the HACEP developments were non-public forums.<sup>109</sup> The key factors in this decision were that residency was limited to a certain class of people, that there were generally no public streets or parks within the developments, it was created for the purpose of providing affordable housing to the low income, and that the government did not create the housing to provide a public meeting place.<sup>110</sup> As the majority held, “this [purpose] necessarily mandates a finding that the HACEP developments differ in character from the areas previously categorized by the Court as designated public fora.”<sup>111</sup>

Despite finding that HACEP developments were nonpublic fora, the court went on to find that the authority’s regulations were not reasonable, and thus did not pass even minimum rationality review.<sup>112</sup> While the regulations were view point neutral, the regulations were not reasonable in the circumstances. The court agreed that safety and crime prevention were

legitimate purposes for the regulations.<sup>113</sup> The court noted that the developments resembled private neighborhoods in the city, and that residents were permitted under the regulations to campaign and distribute literature on a door-to-door basis, subject to identification, prior permission and time restrictions.<sup>114</sup> Additionally, certain guests and were permitted to enter. In light of these facts, the court stated that “we are persuaded beyond peradventure that the wholesale exclusion of political candidates and their volunteers from this category [of permitted campaigners] unreasonably and unnecessarily interferes with what may well be the primary connection between many of HACEP’s residents and the democratic process.”<sup>115</sup>

The dissent pointed out that under *Cornelius* and the other Supreme Court case law, the regulations merely needed to be reasonable, not the most reasonable or the only reasonable limitation.<sup>116</sup> The dissent would find that the differentiation made by the authority based on the identity of the speaker to be reasonable, and therefore would uphold the regulations.<sup>117</sup>

Following the issuance of this opinion, the 5<sup>th</sup> Circuit granted a request for rehearing *en banc* and vacated the panel opinion.<sup>118</sup> Apparently, the named plaintiff then died, and a motion to substitute parties was denied, leading to the appeal being dismissed as moot prior to *en banc* reconsideration of the issue.<sup>119</sup>

The Fifth Circuit did eventually return to this issue in the related case of *De La O v. HACEP*.<sup>120</sup> It did so in the appeal from the related district court case filed by the widow of a plaintiff in the *Vasquez* appeal.<sup>121</sup> After HACEP prevailed in the District Court on the same basis as it had previously done so, this second appeal followed. While the appeal was pending, the housing authority amended its regulations to now allow non-residents to go door to door for political or religious activities within its developments.<sup>122</sup>

The Fifth Circuit rejected a mootness challenge made in light of the amendments, and began its constitutional analysis by noting that the plaintiff, a non-campaigning resident, had the same First Amendment protections as a receiver of information as the actual campaigners would possess.<sup>123</sup> The Court then toured the landscape of the public forum doctrine, and noted that public housing developments have been repeatedly held to constitute non-public fora.<sup>124</sup> Noting that the housing authority primary purpose was to house needy individuals and families and not to provide a facility for the expression of ideas, or a meeting place for the populace, the court held that “it seems obvious, therefore, that for purposes of our further analysis, HACEP’s facilities are non-public fora.”<sup>125</sup>

Addressing the issue of whether or not the revised regulations passed muster, the circuit held that it was beyond question that the regulations were content neutral, and thus passed scrutiny if they were reasonable in light of the purpose of the forum. The housing authority’s interest in crime prevention was obviously weighty, and there clearly existed multiple alternative channels of communication, and the burden on the plaintiffs minimal.<sup>126</sup> The regulations were constitutionally valid.

Turning to the problem of the original regulations, the Fifth Circuit noted that its prior panel in *Vasquez* had found the regulations an unreasonable restriction, even for a non-public forum. However, this panel did not adopt that position. The panel did note that these prior regulations presented a “closer question”, but held that “in light of the overriding need to provide safe housing, they are constitutional”, with one exception.<sup>127</sup> The panel keyed in on an issue not previously discussed, that being whether the requirement that the authority must pre-approve the content of any flyer or handout violated the First Amendment.<sup>128</sup> Finding that it is “undeniable”



that view point restrictions on content would violate the Constitution, the case was remanded for the district court to make finding on that specific issue.<sup>129</sup>

### **G. The Supreme Court Revisits The Issue.**

In 2003 this issue percolated its way back to the Supreme Court in *Virginia v. Hicks*.<sup>130</sup> The case took a long route to get to the Supreme Court. The first reported decision was out of the Virginia Court of Appeals in 2000. In this initial decision, a panel of the Court of Appeals addressed a fairly typical factual situation. A development of the Richmond Redevelopment and Housing Authority was deeded by the City of Richmond certain former city streets.<sup>131</sup> The Authority posted no-trespassing signs on the streets, and Hicks was given a no trespassing order by the Authority.<sup>132</sup> Hicks was eventually arrested for violating the order and challenged the constitutionality of the trespass policy in his criminal trial.<sup>133</sup> The policy indicated that non-residents who were invited to the property were not affected by the policy, nor were those on the premises for legitimate business, and further there was a process for having a barment order lifted.<sup>134</sup> The development was the site of significant drug and criminal activity.<sup>135</sup> There was also a process for requesting permission to access the property to distribute flyers or other materials.<sup>136</sup>

The majority opinion found that the policy did not violate the First Amendment speech provisions. Relying upon the *Daniel* opinion, the majority found, with little discussion, that the premises were a non-public forum and the trespass policy to be reasonable and content neutral.<sup>137</sup> The dissent however, would find that the property was a traditional public forum.<sup>138</sup> The dissent noted particularly that the streets were not gated or barricaded and remained open to all vehicular traffic and the sidewalks open to all passers-through.<sup>139</sup> In light of these facts, the dissent would

hold that while the “grounds and buildings of a public housing development are a ‘non-public forum’ designed to provide safe housing for its residents, the public streets and sidewalks” were public forum. The dissent distinguished *Daniel* and relied upon the *Marsh* decision to support its approach.<sup>140</sup>

Review *en banc* by the Court of Appeals followed.<sup>141</sup> The *en banc* court held that the barment-trespass procedure violated the First Amendment and reverse the underlying criminal conviction.<sup>142</sup> In a 6-5 decision, the majority applied the Public Forum doctrine to analyze the matter. The majority noted (reminiscent of the Massachusetts court) that the “streets and sidewalks surrounding Whitcomb Court did not lose their public forum status when the City of Richmond deeded them to the RRHA and put some signs on the street indicating they were now private property.”<sup>143</sup> Accordingly, when the strict scrutiny standard of review was applied, the no trespass policy did not pass muster.<sup>144</sup>

The dissent would have rejected the plaintiff’s challenge as an improper collateral challenge on his barment status.<sup>145</sup> Additionally, the minority would have found the barment rule not overbroad, as its legitimate scope exceeded any impermissible application.<sup>146</sup> Finally, the dissent would find that the physical characteristics of the property were sufficient to establish the area as a non-public forum and the restrictions on speech reasonable, limited and justified, thus surmounting the constitutional hurdle.<sup>147</sup>

Naturally, an appeal to the Supreme Court of Virginia followed. The Virginia Supreme Court only reached the overbreadth argument and on that basis, reversed and remanded the matter.<sup>148</sup> The court noted that in its view, the U.S. Supreme Court has consistently held that governmental policies which grant officials broad and unfettered discretion to regulate speech

violate the overbreadth doctrine.<sup>149</sup> After review of the factual record, the Supreme Court of Virginia concluded that the RRHA official, Rodgers, did have “unfettered discretion to determine not only who has a right to speak on the Housing Authority’s property, but she may prohibit speech that she finds personally distasteful or offensive even though such speech may be protected by the First Amendment. She may even prohibit speech that is political or religious in nature. However, a citizen’s First Amendment rights cannot be predicated upon the unfettered discretion of a governmental official.”<sup>150</sup> The majority specifically noted but did not reach the public forum doctrine arguments raised by the parties and the courts below.<sup>151</sup>

The dissent to the opinion would have found that Hicks did not have standing to raise a facial challenge to the trespass policy. The dissent notes that by its terms, the policy is directed not at pure speech, but at conduct, i.e., trespassing.<sup>152</sup> As such, the dissent opines that the court should have applied a different standard, that being “where conduct and not merely speech is involved.... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”<sup>153</sup> A facial challenge will not lie where the policy is not substantially overbroad in a relative sense. Applying this standard, the dissent found that the policy was not overbroad, and thus Hicks could not raise a facial challenge.<sup>154</sup>

The matter then reached the U.S. Supreme Court. Justice Scalia, for a unanimous court, reversed the judgment of the Virginia Supreme Court, holding that the no trespass policy was not constitutionally overbroad.<sup>155</sup> The court began by narrowly defining the issue before it to be the facial validity of the trespass policy under the overbreadth doctrine.<sup>156</sup> The Supreme Court reviewed the factual history and noted particularly that Hicks was not engaged in constitutionally protected conduct when he was arrested.<sup>157</sup> In analyzing the matter, the court reiterated its

overbreadth jurisprudence and stressed that a law's application to protected speech under the First Amendment be substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation."<sup>158</sup>

Applying the rule set out, the Supreme Court noted that the policy, written and unwritten, did not appear to implicate First Amendment activities, as the policy *in toto* included such protected activities within the scope of the provision for entry for legitimate business or social purposes.<sup>159</sup> Even as applied to post no trespass notice entries for First Amendment covered activities, the court stated that such punishment is directed not at the protected activity - speech - but the non-protected non-expressive conduct of re-entry.<sup>160</sup> Accordingly, the Supreme Court held that Hicks had failed to show that the trespass policy "prohibits a 'substantial' amount of protected speech in relation to its many legitimate applications."<sup>161</sup> The court reversed the Virginia Supreme Court and remanded the matter for further proceedings.<sup>162</sup>

On remand, the Virginia Supreme Court rejected Hicks' remaining First Amendment challenge, that being that the policy was unconstitutionally vague.<sup>163</sup> Applying well settled law holding that a plaintiff may not challenge the facial vagueness of a law as applied to the conduct of others where he has engaged in some conduct that is clearly proscribed by law, the Virginia Supreme Court held that the no-trespass policy could not have been clearer regarding Hicks' conduct. Accordingly, his vagueness challenge failed, and at long last, his trespass conviction was upheld.<sup>164</sup>

## **H. CONCLUSION.**

The issue of the use of no-trespass orders and the public forum doctrine, as well as related issues beyond the scope of this article, has received varied academic review, from a frank “advocacy article” on how to oppose these orders,<sup>165</sup> to sweeping calls for legislative reforms,<sup>166</sup> to various case reviews.<sup>167</sup>

There are several starting points to be recalled. Essentially every court to address this issue has applied the U.S. Supreme Court’s public forum doctrine without reservation, with one notable caveat. In *Walker v. Georgetown Housing Authority*, the Massachusetts Supreme Judicial Court explicitly refused to adopt this doctrine for use under the state constitution.<sup>168</sup> In fact, the Massachusetts court even questioned the validity of this system of analysis under the federal case law.<sup>169</sup>

It seems clear that what is needed in deciding such cases is a clear and detailed review of the facts involved and the specific nature of the premises involved, under the U.S. Supreme Court precedent. The Massachusetts court rejected this approach, adopted by all other courts. Relying heavily upon *Martin v. Struthers*, the *Walker* court simply rejected the contention that a public housing authority’s property differed at all from the property of any municipality.<sup>170</sup> The Massachusetts court focused almost exclusively on the fact that the housing authority is a public entity.<sup>171</sup> The court suggests that a public entity should not be entitled to limit access to its property at all, or in other words, that the intent of the governmental entity should not be material.<sup>172</sup> In doing so, the Massachusetts court relied upon *Tucker* (government village case) and *Marsh* (company town case). The Massachusetts court challenged the analysis used by the Eleventh Circuit in deciding the *Daniel* case: “the reasoning of the court in *Daniel* case is questionable. It seems that, because the authority had limited access to its property, the court

concluded that the property was not a public forum. The proper questions, it seems to us, was whether the authority had a right to limit access in the first place.”<sup>173</sup>

Yet, the U.S. Supreme Court has made clear that it is essential, in deciding cases involving the free speech use of publically owned property, to look to the intent of the government owner, and the historical use of the property.<sup>174</sup> While Massachusetts does not strictly follow this methodology, all the other major opinions have done so. Of course, as noted above, applying this doctrine does not mean that the housing authority necessarily prevails in all cases, nor should its application lead to such skewed results. A nuanced, public forum analysis, carefully reviewing all factual elements, including the intent of the governmental entity, the nature of and historic use of the specific property (i.e., possible different treatment for an auditorium versus a library), and the specific proposed access best balances the rights and needs of all the parties.

Additionally, as the Supreme Court has recently reaffirmed, courts must keep in mind that there is a difference between the government acting as sovereign, and the government acting as landowner,<sup>175</sup> a difference that the Massachusetts SJC may well not accept.<sup>176</sup> There is a difference in kind between situations where the government regulates expressive activities on property of others, and situations where the government regulates such activities on its own property.

Applying the public forum doctrine is not a guarantee that the public housing authority will be able to restrict its property in any way it believes is justified. As the *Crowder*, *Daniel* and *Vasquez* opinions indicate, the circuit courts have not been reluctant to strike down restrictions, in whole or in part, even in non-public forums,<sup>177</sup> where such restrictions are not

tailored to meet the governmental intent and simply sweep too broadly. A total ban on campaigning and soliciting can certainly be seen as not even a reasonable restriction tailored to the problem sought to be addressed by the authority, and may not pass even minimal rationality review. The use of a fact specific approach to the analysis of barment orders or other similar restrictions to access and use of public housing property for expressive purposes, rather than a fairly absolutist approach, - if it is public it must be open - adopted by the Massachusetts court, is a guarantee that the court will closely look at the nature of the property in issue, the problem being addressed, and the nature of the proposed solution.<sup>178</sup> By undertaking a detailed review of the property, the intended use, the access requested, and the need for the access in a historical context is fully in keeping with our constitutional tradition of balancing conflicting rights and responsibilities.<sup>179</sup>

To the extent that courts, such as Massachusetts, would find the fact that a street or sidewalk within a housing development that appears similar to those of the municipality (perhaps containing only no trespass signs) to be dispositive in concluding that a bar to entry in such areas breaches the First Amendment, the courts seem to be inviting a policy of segregating or gating off public housing from the neighborhoods in which it sits. If the only way to distinguish the interior of a housing development from other public spaces or thoroughfares for First Amendment purposes is to create physical barriers to entry, one must ask what impression is being given concerning the residents of such housing? Further, significant attempts to limit access to housing areas creates their own considerable legal problems, as such attempts conflict with other statutory and constitutional rights of public housing tenants.<sup>180</sup>

A careful balancing of the rights of the governmental entity as property owner, not as

sovereign, the rights of all the tenants, even if those rights conflict, and the rights of those who seek to pursue First Amendment activities within a housing development is the most reasonable approach to dealing with a complex public policy concern. The general history of the First Amendment has shown that such rights are not absolute, and the considered approach of the courts under the public forum doctrine is the best analytic approach to resolving these complicated issues.



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1.

*Crowder v. Housing Authority of Atlanta*, 990 F.2d 586 (11th Cir. 1993); *Daniel v. City of Tampa, Florida*, 38 F.3d 546 (11th Cir. 1994).

2.

*Walker v. Georgetown Housing Authority*, 424 Mass. 671, 677 N.E.2d 1125 (1997).

3.

See e.g.

4.

See e.g. Mass. Gen. Laws c. 121B.

5.

*Walker*, 424 Mass. at 672, n.2, 677 N.E.2d at 1126, n.2.

6.

CFR ; 760 CMR 5.00.

7.

460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983).

8.

*Jews for Jesus, Inc. V. Mass. Bay Transit Authority*, 984 F.2d 1319, 1323 (1st Cir. 1993).

9.

460 U.S. at 40.

10.

460 U.S. at 41.

11.

460 U.S. at 55.

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12. 460 U.S. at 44-46.
13. 460 U.S. at 45.
14. *Id.*
15. *Id.* Selective access to a property does not transform a nonpublic forum into a public forum. 460 U.S. at 47.
16. 460 U.S. at 46 (quotations and citations omitted).
17. 460 U.S. at 45.
18. *Id.*
19. 460 U.S. at 46. For example, the forum can be reserved for student groups at the school, *Widemar v. Vincent*, 454 U.S. 263 (1981), or for discussion of school board business only, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.*, 429 U.S. 167 (1976).
19. *United States Postal Service v. Council of Greenburgh Civic Ass'ns.*, 453 U.S. 114, 129 (1981).
20. *Perry*, 460 U.S. at 46 (citation omitted).
21. “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.”

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460 U.S. at 49 (footnote omitted).

22.

“But the internal mail system is not a public forum. As we have already stressed, when government property is not dedicated to open communication the government may - without further justification- restrict use to those who participate in the forum’s official business.” 460 U.S. at 53 (footnote omitted).

23. 460 U.S. at 55.

24.

*United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L.Ed.2d 736 (1983).

25.

*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

26.

*Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984).

27.

466 U.S. at 814-815, 104 S.Ct. at 2133-2134.

28.

473 U.S. 788, 105 S.Ct. 3439 (1985).

29.

Id. The court has elaborate in this fashion:

The Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.... Nor is there a requirement that the restriction be narrowly tailored or the Government’ interest to be compelling.... The reasonableness of the Government’s restriction of access to a nonpublic forum must be assessed in light of the purpose of the forum and all the surrounding circumstances.

*Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 474 U.S. 788, 808-809, 105 S.Ct. 3439 (1985).

30.

473 U.S. at 803. As the First Circuit Court of Appeals has stated, “these cases suggest that

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courts should hinge their analysis largely on whether the government intended that the property become a designated public forum.” *AIDS Action Committee of Mass., Inc. V. MBTA*, 42 F.3d 1, 11 (1st Cir. 1994)(emphasis in original).

31.

*U.S. v. Kokinda*, 493 U.S. 807, 110 S.Ct. 3110, 3119-3124 (1989); *see also Greer v. Spock*, 424 U.S. 828 (1976)(sidewalks on government reservation not public forum).

32.

493 U.S. 807 , 110 S.Ct. 3115 (1990).

33.

493 U.S. at ---, 110 S.Ct. At 3119-3124. The plurality was composed of Rehnquist, C.J., and O’Connor, White, and Scalia, JJ. They found that there was no dedication of the sidewalk to unlimited solicitations despite the allowance of some posting of notices on bulletin boards adjacent thereto. Justice Kennedy, concurring, found that even if the sidewalk was a public forum, the regulation was a valid time, place, manner restriction on speech, especially as it left open the right to speak and distribute literature on the premises.

34. --- U.S. at ---, 110 S.Ct. at 3119. The plurality also specifically rejected the proposition that all sidewalks open to public use by a governmental entity were necessarily public forum just because the sidewalk resembled the sidewalks on public ways. 110 S.Ct. at 3120.

35. *International Society for Krishna Consciousness, Inc. V. Lee*, 505 U.S. , 112 S.Ct. 2701, 2706 (1992).

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36. *Id.*

37. *Lee v. International Society for Krishna Consciousness, Inc.*, 505 U.S. , 112 S.Ct. 2709 (1992)(per curium).

38. *Burson v. Freeman*, 504 U.S. , 112 S.Ct. 1846 (1992).

39. 504 U.S. at , 112 S. Ct. at 1857. Justice Scalia, concurring in the judgment would find that the area in issue was not a ‘traditional public forum’, as polling places had traditionally not been a public forum. Therefore the regulation was a reasonable regulation of a nonpublic forum. 112 S. Ct. at 1859.

40. 303 U.S. 444 (1938).

41. *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939).

42.

319 U.S. 141 (1943). The court, quoting its earlier opinion in *Schneider v. State*, 308 U.S. 147, 164 (1942) explained the rationale for this view:

While door to door solicitation of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.... “Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.”

319 U.S. at 145. See also *Jameson v. Texas*, 318 U.S. 413 416 (1942)( Ban on orderly distribution of religious leaflets on public streets violated First Amendment. “One who is rightfully on a street which the state has left open to the public carries with him the right to

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express his views in an orderly fashion.”); *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993)(statute may not ban all begging and soliciting on streets despite concerns about fraud, intimidation, coercion, harassment, and other criminal conduct.)

The court added, again in broad brush strokes,

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

319 U.S. at 146-147.

43. *Police Dept. Of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 33 L.Ed. 1313 (1943). (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content....Necessarily then under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.... Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”).

44. *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

45. *City of Cincinnati v. Discovery Network, Inc.*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

46. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622 (1980). *See*

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also *Bellotti v. Telco Communications, Inc.*, 650 F.Supp. 149 (D. Mass. 1986).

47. *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the property where the ban on the distribution of religious literature had occurred

has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, [and] a sewage disposal plant.... A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman.... The Town and the surrounding neighborhood... cannot be distinguished from the Gulf property by anyone not familiar with the property lines....

326 U.S. at 502. Striking down the ban on distribution within the company town, the court stated that “[T]he right to exercise the liberties safeguarded by the First Amendment lies at the foundation of free government by free men.” 326 U.S. at 509 (internal quotations omitted).

48. 508 U.S.     , 113 S. Ct. 2141, 124 L.Ed. 2d 352 (1993). *See also Rosenberger v. University of Virginia*, 509 US     , 115 S. Ct. 2510 (1995)(reviewing public forum doctrine).

49. 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946).

50. 326 U.S. at 517-518.

51. 326 U.S. at 518.

52. *Id.*

53. *Id.* *See* 42 U.S.C.A. §§ 1521-1553.

54. 326 U.S. at 518-519. The manager testified at trial that a regulation promulgated by the Washington D.C. office gave him full authority to regulate the conduct of those living in the village, and that he did not allow preaching without a permit issued in his discretion. *Id.*

55. 326 U.S. at 519. The court accepted the state court's decision that the manager had the

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authority noted, but stated in a footnote that there was no such regulation it could find in its research.

55. 326 U.S. at 520.

56. *Id.*

57. *Id.*

58. 990 F.2d 586 (11<sup>th</sup> Cir. 1993).

59. 38 F.3d 546 (11<sup>th</sup> Cir. 1994), cert denied 515 U.S. 1132, 115 S. Ct. 2557 (1995).

60. 990 F.2d at 589.

61. *Id.*

62. *Id.*

63. 990 F.2d at 590.

64. 990 F.2d at 591.

65. *Id.*

66. 990 F.2d at 592.

67. *Id.*

68. *Id.*

69. 990 F.2d at 593.

70. *Id.* Even if the court assumed that the library was a limited public forum, the court would find that the use of the library by others pursuant to a first come, first served basis to avoid scheduling conflicts was a permissible content neutral restriction on the use of the forum, and such a policy would withstand strict scrutiny review. *Id.*

71. *Daniel v. City of Tampa, Fla.*, 818 F.Supp. 1491, 1492-3 (M.D. Fl. 1993).



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72. 818 F.Supp. at 1492.

73. *Id.*

74. 818 F.Supp. at 1494.

75. 818 F.Supp. at 1493-1494.

76. 818 F.Supp. at 1494. The Court rejected, however, Daniel's argument that he had a First Amendment right to distribute his materials and engage in expressive conduct on other common area portions of the Authority's property apart the actual apartment entrances. The Court similarly rejected the void for vagueness claim. *Id.*

77. *Daniel v. City of Tampa, Fla. (II)*, 843 F.Supp. 1445 (M.D. Fl. 1993)(Morton, J.).

78. 843 F.Supp. at 1447.

79. *Id.*

80. *Id.* The court also noted that the lack of a formal written policy forbidding such activities was not the equivalent of a designation allowing such activities.

81. *Id.* The court wrote:

Simply put, the public's compelling interest in keeping out dangerous drug dealers and addicts far outweighs Daniel's desire to post fliers or leaflets on Housing Authority property. Daniel is provided a alternative public forum only yards away [the city streets], which he has used extensively and without incident in the past. To the extent that the enforcement of the trespass statute constitutes a time, place, or manner restriction, it is a slight one, and in any event amply justified.

843 F.Supp. at 1448. The court went to reject the overbreadth challenge, finding that the First Amendment impact of the trespassing policy was not substantial when judged in relation to its plainly legitimate sweep, and thus not overbroad, citing *Broaderick v. Oklahoma*, 413 US 601,

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93 S. Ct. 2908, 37 L.Ed.2d 830 (1973).

Interestingly, although the decision in *Daniel II* came down seven months after *Crowder*, the District Court did not cite to the *Crowder* decision.

82. *Daniel v. City of Tampa (III)*, 38 F.3d 546, 548 (11<sup>th</sup> Cir. 1994).

83. 38 F.3d at 550.

84. *Id.*

85. *Id.* Daniel had argued that *Martin v. Struthers* controlled the decision of the case. The Circuit disagreed. “The [Supreme] Court’s opinion in *Martin* rests upon the premises that a city may not ‘substitute the judgment of the community for the judgment of the individual householder,’ and divest the homeowner of the decision of whether to speak with the canvasser. This concern is not implicated where, as here, the regulated property is government-owned.” 38 F.3d at 549, n. 7.

86. 424 Mass. 671, 677 N.E.2d 1125 (1997).

87. The author was counsel for the Housing Authority in this case.

88. 424 Mass. at 672, 677 N.E.2d at 1126.

89. 424 Mass. at 673, 677 N.E.2d at 1126-1127.

90. 424 Mass. at 674, 677 N.E.2d at 1127.

91. *Id.*

92. *Id.*

93. 424 Mass. at 674-675, 667 N.E.2d at 1127-1128. The SJC quoted from *Martin* with approval:

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“For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community.” *Martin v. Struthers*, , *supra*, 319 U.S. 141, 63 S. Ct. 862, 87 L.Ed. 1313.

94. 424 Mass. at 675, 677 N.E.2d at 1128.

95. *Id.*

96. 424 Mass. at 676, 667 N.E.2d at 1128. (Footnote omitted).

97. *But see McKenna v. Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981) and *Lancor v. Lebanon*, 760 F.2d 361,363 (1<sup>st</sup> Cir. 1985)(severe restrictions on access infringe tenants constitutional and/or statutory rights.). Interestingly, the SJC in attempting to distinguish *Daniel* stated that the GHA had not offered any public safety justification for its barring policy. 424 Mass. at 676, n. 10. However, earlier in the opinion the court had noted that the record below showed that the board adopted the regulation “in response to tenants’ concerns about safety, privacy, and peace and quiet.” 424 Mass. at 673, n. 5.

98. 424 Mass. at 676, n.10, 677 N.E.2d at 1128, n.10 (citation omitted).

99. 103 F.Supp.2d 927 (W.D. Tex. 2000).

100. 103 F.Supp.2d at 929.

101. *Id.*, n. 1.

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102. 103 F.Supp.2d at 929-930.

103. *Id.*

104. 103 F.Supp.2d at 933. (“the court pauses only momentarily to conclude that HACEP’s complexes are “non-public forums.”)

105. 103 F.Supp.2d at 933.

106. In a related case, the same District Court judge reached the same conclusions as in this matter. In *De La O v. HACEP*, 316 F.Supp.2d 481 (W.D. Tex. 2004), the court had before it essentially an identical claim as in *Vasquez*, with the exception of there not being a plaintiff who was an actual political candidate. 316 F.Supp. 2d at 484, n.4. The court again found that the HACEP properties were non-public forums and that the restrictions imposed by the Authority were both view point-neutral and reasonable, and accordingly passed First Amendment muster. 316 F.Supp. 2d at 487. The court also rejected an overbreadth challenge to the restrictions, finding that the authority rules did not tread upon any expression or associational rights. 316 F.Supp. 2d at 488. Further, the District Court rejected an equal protection challenge, finding no constitutionally protected category of individuals to be involved and that the restrictions were rationally related to the goals of the HACEP. 316 F.Supp. 2d at 488-489. An appeal followed. 419 F.3d 495 (5<sup>th</sup> Cir. 2005). See note 117, *infra* and related text.

107. 271 F.3d 198 (2001), vacated, rehearing *en banc* granted *sub nom* *De La O v. Housing Authority of the City of El Paso*, 289 F.3d 350 (5<sup>th</sup> Cir. 2002), order denying motion to substitute party an granting motion to dismiss appeal as moot, No. 00-50702 (5<sup>th</sup> Cir., 9/23/02), *cert. denied* 539 US 914, 123 S.Ct. 2274 (2002)(the docket indicates that after the petition of *en banc*

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rehearing was granted and the matter was re-argued, the matter was dismissed as moot following De La O's death.)

108. 271 F.3d at 202.

109. 271 F.3d at 202-203.

110. *Id.*

111. *Id.* (footnote omitted).

112. 271 F.3d at 203.

113. 271 F.3d at 204.

114. *Id.*

115. 271 F.3d at 205 (footnote omitted). The 5<sup>th</sup> Circuit went on to note that requiring political campaigners to seek the same authorization as other individuals allowed on the property for legitimate business would be reasonable in light of the goals of crime prevention. *Id.*

116. 271 F.3d at 208 (Barksdale, J., dissenting).

117. 271 F.3d at 209.

118. 289 F.3d 350 (5<sup>th</sup> Cir. 2002).

119. Docket No. 00-50702 (5<sup>th</sup> Cir., 9/23/02), *cert. denied* 539 US 914 (2003); see *De La O v. HACEP*, 417 F.3d 495, 498 (5<sup>th</sup> Cir. 2005).

120. 417 F.3d 495 (5<sup>th</sup> Cir.), *cert. denied* U.S. , 126 S.Ct. 808 (2005).

121. 417 F. 3d 495, 498; appealed from 316 F.Supp.2d 481 (W.D. Tex. 2004); see N. 105, *supra*.

122. 417 F.3d at 499.

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123. 417 F.3d at 502; *see also Walker v. Georgetown Housing Authority*, 424 Mass. at 674, 677 N.E.2d at 1127.

124. 417 F.3d at 503, and n. 13. Interestingly, the court did not cite the *Walker v. Georgetown Housing Authority* decision which held that the housing development area there in dispute was a public forum.

125. 417 F.3d at 503.

126. 417 F.3d at 503-504.

127. 417 F.3d at 507-508.

128. 417 F.3d at 507.

129. 417 F. 3d at 507-508

130. 123 S. Ct. 2191 (2003).

131. 33 Va.App. 561, 565, 535 S.E.2d 678, 680 (2000).

132. *Id.*

133. 33Va.App. at 567, 535 S.E.2d at 680.

134. *Id.*

135. *Id.*

136. *Id.*

137. 33 Va.App. at 571-572, 535 S.E.2d at 683. The majority went on to also reject a First Amendment right of association challenge to the trespass policy, as well as a vagueness/overbreadth challenge.

138. 33 Va.App. at 575, 535 S.E.2d at 685 (Coleman, J., dissenting).

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139. *Id.*

140. 33 Va.App. at 579-582, 535 S.E.2d at 686-688). The dissent concluded that any attempt to turn what had been without question a traditional public forum when a city street into a non-public forum simply failed on these facts.

141. 36 Va.App. 49, 548 S.E.2d 249 (2001).

142. 36 Va.App. at 52, 548 S.E.2d at 251.

143. 36 Va.App. at 59, 548 S.E.2d at 254. “Because the street appear no different from other streets in Richmond and serve the same function they did prior to ‘privatization’, ‘we can discern no reason they should be treated any differently’ from any other street or sidewalk.” *Id.* (citation omitted).

144. 36 Va.App. at 62, 548 S.E.2d at 256.

145. 36 Va.App. at 65, 548 S.E.2d at 257.

146. 36 Va.App. at 68, 548 S.E.2d at 259.

147. 36 Va.App. at 39, 548 S.E.2d at 260-261.

148. 264 Va. 48, 58, 563 S.E.2d 674, 680 (2002).

149. 264 Va. at 56, 563 S.E.2d at 678 (collecting citations).

150. 264 Va. at 60, 563 S.E.2d at 681.

151. *Id.*

152. 264 Va. at 63, 563 S.E.2d at 683.

153. *Id.* (citing to *N.Y. v. Ferber*, 458 U.S. 747, 770, 102 S.Ct. 3348 (1982)).

154. *Id.* The dissent went on to note that even a facial challenge should have been analyzed

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under the public forum doctrine. 264 Va. at 64-65, 563 S.E.2d at 683-684. Then the dissent noted that since Hicks was not engaged in speech or expressive association at the time of his arrest (he was delivering diapers to his child), the only constitutional right Hicks could raise was that of intimate association. 264 VA. at 66, 563 S.E.2d at 684. Visiting family members and delivering diapers has not been recognized as a fundamental right under the Fourteenth Amendment. Therefore, a rational basis test is applied to test the constitutionality of the application of the policy to Hicks. The policy here easily met this rational basis test. 264 Va. at 66, 563 S.E.2d at 685-686.

155. *Virginia v. Hicks*, 539 U.S. 113, 123 S.Ct. 2191 (2003).

156. 539 U.S. at 115.

157. 539 U.S. at 118.

158. 539 U.S. at 119-120 (citations omitted). Hicks bore the burden of proving that substantial overbreadth existed. 539 U.S. at 122.

159. 539 U.S. at 122-123.

160. 539 U.S. at 123. “Punishing its [the trespass policy] violation by a person who wishes to engage in free speech no more implicates the *First Amendment* than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hick’s non-expressive *conduct* - - his entry in violation of the notice-barment rule - - not his speech , for which he is punished as a trespasser.” (Emphasis in original).

161. 539 U.S. at 124. Indeed, the court went on to state that “Rarely, if ever, will an



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overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).”

*Id.*

162. 539 U.S. at 124. The court did note that specific applications of the policy that violate the First Amendment could still be addressed through as-applied constitutional challenges, rather than the “strong medicine” of the overbreadth doctrine.

163. *Commonwealth v. Hicks*, 267 Va. 573, 596 S.E.2d 74 (2004).

164. 267 Va. at 580-581, 596 S.E.2d at 77-78. The Virginia Supreme Court went on to also reject Hicks’ Fourteenth Amendment substantive due process challenge based upon the claimed right of intimate association. (Hicks was claiming a right to visit his child and the child’s mother to deliver diapers.) The court concluded that Hicks had failed to prove any such relationship actually existed. 267 Va. at 585, 596 S.E.2d at 80. Further, even if the relationship existed, the no trespass order did not infringe upon the relationship as Hicks was free to exercise his associational rights, just not on the property of the Housing Authority. *Id.* A review of the issues raised by associational rights challenges to no trespass orders is beyond the scope of this article.

165. E. Goldstein, Note: Kept Out: Responding to Public Housing No-Trespass Policies, 38 Harv. C.R.-C.L. L. Rev. 215 (2003).

166. D. Lazarus, Note: Here Comes the Neighborhood - Virginia v. Hicks and How the New

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York Legislature Should Empower Law Enforcement with More Powerful Trespass-Barment Statutes as a Tool to Combat Crime in Public Housing Projects, 29 Seton Hall Legis. J. 315 (2004).

167. C. Pelliccioni, Comment: Political Speech in the Nonpublic Forum: Can Public Housing Facilities Limit Access to Political Canvassers?, 53 Case W. Res. L. Rev. 569 (2002); P. Flanagan, Note: Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past, 79 Notre Dame L. Rev. 383 (2003); N. Soonpa, Fifth Circuit Survey: Civil Rights Cases, 34 Tex. Tech. L. Rev. 597, 606-609 (2003); The Supreme Court, 2002 Term: Leading Cases, I. Constitutional Law: 3. Trespass Policies, 117 Harv. L. Rev. 359 (2003); G. Beck, Ban Lists: Can Public Housing Authorities Have Unwanted Visitors Arrested?, 2004 U.Ill. L. Rev. 1223 (2004).

168. 424 Mass. at 675. “We need not decide whether we would find the Supreme Court’s public, non-public, and limited public forum classifications instructive in resolving free speech rights under our Declaration of Rights.”.

169. Id., at n. 9. “There is concern about these classifications.”, citing International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683-685, 112 S. Ct. 2701, 2708, 120 L.Ed.2d 541 (1992)(Kennedy, J., concurring), and L.H. Tribe, American Constitutional Law, §12-24, at 993 (2d Ed. 1988).

170. 424 Mass. at 674 - 675.

171. 424 Mass. at 676. “The authority is a public entity. Its property is publicly owned. There

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is no apparent distinction between its streets and sidewalks and those of a private development. A technical distinction that its ways are not accepted public ways but rather appear to be private ways open to the public makes no difference. The constitutional right of the authority's tenants to receive communications may not be abridged by the blanket prohibition of campaigning and solicitation.”

172. 424 Mass. at 675- 677.

173. 424 Mass. at 676, n.10.

174. See notes 7-40, *supra*.

175. *Dept. of Housing and Urban Dev. v. Rucker*, \_\_\_\_\_ US \_\_\_\_\_, 122 S.Ct. 1230 (2002).

176. Query whether the Massachusetts Supreme Judicial Court will formally reject the public forum doctrine under the state constitution when this issue next reaches that court.

177. *See also Concerned Residents of Taylor-Wythe v. New York City Housing Authority*, 1996 U.S. Dist. LEXIS 11460 (S.D. NY 1996)( NYCHA's restrictions reserving the community center, a non-public forum, to official tenant organizations valid); *Daily v. New York City Housing Authority*, 221 F.Supp.2d 390 (S.D. NY 2002)(ban on religious, bible study meetings even in nonpublic or limited public forum (community center) not viewpoint neutral, nor reasonable.).

178. *E.g.* Id.

179. Id.

180. See note 96, *supra*.