DEMONSTRATORS AND THE CONSTITUTION:
A LEGAL OVERVIEW

The free speech guarantees of the U.S. Constitution (First Amendment) and the California Constitution (Article I, Sections 2 and 3) apply to all forms of informational activities and demonstrations, *e.g.*, rallies and marches; and picketing, leafleting, and petitioning.[1] These constitutional protections mean that, while government can impose " time, place, and manner" restrictions on these activities, it cannot prohibit or regulate them based on the content of the speech, or in a way that will prevent meaningful and effective communication.

This outline discusses how these constitutional principles apply to various types and locations of activity and suggests arguments that can be used (in court or directly with the police or city officials) to maximize the scope of these activities. Although we have made every effort to ensure that this document is accurate and up-to-date (as of January 2008), please remember that the law is always changing and that the application of legal principles can be uneven, and in any event always depends on the specific facts and circumstances of a particular situation. Citations to court opinions and other legal authorities are in the endnotes; most of the cases and statutes discussed in this guide are available on the Internet.[2]

I. TYPES OF FREE SPEECH ACTIVITY

"Speech" and "conduct" are key words. The closer your activity is to "pure speech," the less the government can interfere and regulate. The scope for restriction increases as the activity is seen as "speech plus," *i.e.*, the speech includes "conduct" that may interfere with traffic or disturb others. For example, the government can regulate marching down a public street more than it can regulate leafleting on the sidewalks, which is considered nearly "pure speech."

A. MARCHES AND RALLIES

Marches on public sidewalks or streets and rallies at suitable public places --such as parks or plazas -- cannot be absolutely prohibited. However, the government may impose reasonable time, place, and manner regulations.[3] This is usually done through local ordinances that require advance approval in the form of a permit for the march or rally. But the government may not require a permit for small marches or demonstrations that do not "realistically present serious traffic, safety, and completing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks."[4] Generally, this means that if marchers will proceed on a sidewalk and obey traffic signals, a permit will not be required.

Constitutional arguments are crucial in challenging burdensome restrictions on marches or rallies, which may be imposed by a permit ordinance or by a police officer's ad hoc order. You can oppose restrictions by arguing that: (1) they go beyond time, place, and manner regulations; (2) they are not necessary or even reasonable for any legitimate governmental purpose, *e.g.*, traffic control; and/or (3) they will interfere with effective and meaningful communication. Below are examples of types of restrictions that you may face when applying for a permit involving free speech activities.

1. Excessive Discretion – When First Amendment activities are involved, a permit ordinance must have precise and specific standards for determining whether the permit will be issued or denied. A common defect in local permit ordinances is that they have only vague standards (*e.g.*, "will not disturb others," "in the public interest") or no standards at all, leaving the permit decision to the broad discretion of a public official. Such an ordinance is unconstitutional on

its face.[5] Under California law, you cannot be criminally punished for violating or disregarding a permit ordinance or court injunction that is unconstitutional on its face.[6]

2. Advance Notice – Most permit ordinances require that the application be submitted a certain number of days in advance. Any advance notice period beyond a few days can be challenged as unnecessary for traffic control or public protection, and unreasonably burdensome on the exercise of First Amendment rights by preventing demonstrations in timely response to emerging events or crises.7

3. March Route – Attempts to limit marches to routes far from downtown crowds or main streets, or to place a rally in an obscure city park, can be challenged as preventing effective communication with the public. A demonstration should be allowed to take place within "sight and sound" of its intended audience or the object of the protest, *e.g.*, city hall or the site of a conference or meeting.[8]

4. Financial Requirements – Demonstrators are increasingly confronted with various financial requirements including: (a) liability insurance to protect the city from any claims arising from the event;[9] (b) a "hold harmless" agreement signed by a "financially responsible" individual that promises to indemnify the city for any liability arising out of the event;[10] (c) an advance deposit of a certain amount (sometimes called a "performance bond") to pay for any property damage or clean-up costs; or (e) payment for costs of police protection or overtime.[11]

While courts have upheld reasonable permit fees that cover the actual costs of processing and applications, more burdensome charges have been successfully challenged in some cases as unreasonable time, place and manner restrictions of speech. Arguments that have been accepted by courts include the following:

(a) The imposition and amount of the fee are not based on objective criteria but vest too much discretion in city officials;

(b) The regulation is content-based (rather than content-neutral[12]) because the amount or premium charged increases if the event is controversial or a hostile reaction is anticipated, thereby requiring more police;[13]

(c) The regulation is not narrowly tailored because other non-financial alternatives could protect the city's legitimate interests;

(d) The regulation does not include a mandatory waiver for groups that cannot afford the financial charge or insurance premium and that have no other way to publicize their views;[14]

(e) The regulation is discriminatory because the charge has not been levied on similar, non-controversial events; or

(f) There is no legal justification for requiring or imposing strict liability on the demonstrators with an indemnification agreement, as their liability, at most, should extend to injuries caused by their own actions or negligence (and not, for example, from a pothole in the street or a hostile counter-demonstration).[15]

5. Past Conduct – Prior instances of illegal activity or disruption during marches or rallies are not alone grounds to deny a permit.[16] Nor can the government refuse to issue a permit unless organizers promise that no illegal conduct will occur.[17]

6. Discriminatory Enforcement – If a restriction has not been imposed on similar events in the past, you can argue that you are being discriminated against because of the content of your message, in violation of your constitutional rights of free speech and equal protection of the laws.[18]

B. PICKETING, LEAFLETING, AND SPEECHES

No permits or advance notice can constitutionally be required for picketing and leafleting on public sidewalks, or even door-to-door; nor should a permit be required for merely making a speech from public property.[19] As long as there is room for passersby and entrances are not obstructed, the police should not be able to limit the number of participants or onlookers or otherwise unreasonably restrict picket lines or leafleters.[20] Similarly, the government may not arbitrarily ban the use of tables to display literature or information.[21] Also, leafleters and speakers can approach willing pedestrians to hand them a leaflet and engage in conversation.[22]

C. SOUND EQUIPMENT AND DRUMS

Amplified speech is a protected form of expression, and the use of individual bullhorns may not necessarily require a permit.[23] However, to the government may completely ban sound trucks "amplified to a loud and raucous volume" from city streets.[24] Thus a permit may be required to use sound trucks or loudspeaker equipment. Also, excessively loud noise, with or without sound equipment, could subject demonstrators to charges of disturbing the peace if it is intended to disturb and not to communicate.[25] Similar rules apply to musical instruments that protestors are using to highlight their message. Thus, restrictions on drums or other instruments are only valid if they are narrowly tailored to prevent excessive noise.[26]

D. SOLICITATION OF FUNDS

Solicitation of funds from the public is protected First Amendment activity.[27] It is probably unconstitutional to require a permit to sell newspapers in the streets.[28] However, the U.S. Supreme Court has considered solicitation of money as a more disruptive activity (in certain locations) than other forms of speech, such as leafleting, and has thus allowed it to be regulated more strictly.[29] Other forms of solicitation, particularly door-to-door, are often regulated by local ordinances, and a permit may be required. Such permits, however, cannot impose burdensome, expensive, or unreasonable conditions on the solicitors.[30]

E. CIVIL DISOBEDIENCE

Civil disobedience is the active refusal to obey certain laws as a form of protest, generally without resorting to physical violence. Those participating in civil disobedience may be arrested and should be aware of the legal and practical consequences. Potential arrestees should familiarize themselves with probable arrest charges and court outcomes. They should also learn how to minimize the risks of extended police custody by avoiding certain charges and carrying reliable identification. Although California law prohibits most employers from even asking applicants about arrests that did not result in a conviction,[31] people who later apply for jobs with the federal government, as

police officers, or in sensitive positions may be asked about arrests, not just convictions. There may be greater consequences for those with outstanding warrants (as the warrant may cause the police not to release them) and non-citizens (because police may communicate the arrest to Immigration and Customs Enforcement, triggering immigration issues). Potential criminal charges are listed below.

F. CAVEAT: CRIMINAL PENALTIES

The line between lawful protest and civil disobedience is often in the eye of the beholder, and when the eye belongs to the police, there is the possibility protected expression will be viewed as criminal activity. The following are some of the California statutes that are often invoked against demonstrators:

(1) Resisting arrest or delaying a peace officer (Penal Code Section 148)
(2) Disrupting a public meeting (Penal Code Section 403)
(3) Riot and unlawful assembly (Penal Code Sections 404-408)
(4) Failure to disperse (Penal Code Sections 409, 416)
(5) Disturbing the peace (Penal Code Section 415)
(6) Trespass (Penal Code Section 602)
(7) Refusal to obey a peace officer who is enforcing the Vehicle Code (Vehicle Code Section 2800(a))

These statutes cannot be applied to demonstrators in order to prevent the exercise of legitimate communication or free speech activities.[32] Police use of official powers to warn, cite, or arrest in order to deter the exercise of free speech rights constitutes a First Amendment violation if it would deter or chill speech by a person of ordinary firmness, and such deterrence was a substantial or motivating factor in the police conduct.[33] Thus a demonstration cannot be deemed an "unlawful assembly" or "disturbing the peace" unless it is "directed to inciting or producing imminent lawless action," or is for the purpose of committing a criminal act.[34] Picketers or leafleters cannot be charged with "obstruction" unless they intentionally and maliciously block pedestrians, which is distinct from attempting to engage pedestrians in conversation.[35]

II. LOCATIONS FOR FREE SPEECH ACTIVITY

A. PUBLIC FORUMS

Traditional sites for free speech activity are public sidewalks, streets, and parks. Questions may arise as to whether such activity can take place at other types of public (*i.e.*, government-owned) property, or even private property open to the public.[36]

1. Federal Forum Analysis – The question of whether speech activity can take place at a particular location, or what type of regulations can be imposed on speech at that location, partly depends on whether the location is deemed a "public forum." To analyze speech on government property, the U.S. Supreme Court has adopted a forum analysis based on three categories: (a) the "traditional public forum," (b) the "designated public forum," and (c) the "nonpublic forum."[37]

First, a public street, sidewalk, or park is considered a "traditional public forum" where speech cannot be prohibited, except through reasonable time, place, and manner restrictions.[38] Downtown

pedestrian malls and other areas that are, by law, open to the public may also constitute public fora, even when privately owned or managed.[39] These forums receive the greatest protection, and any regulation or discrimination based on the content of the message is presumptively invalid.[40]

Second, where the government has intentionally opened up a nontraditional public forum for some or all of the public to conduct speech activity, the property is a "designated public forum," regulated under the same standards as a traditional public forum.[41] Examples include plazas in front of public buildings, public auditoriums, or display spaces on the outside of city buses that have been opened up for non-commercial speech.[42]

Third, if government property is considered a "nonpublic forum," it receives the least protection, and speech bans or restrictions will be upheld as long as they are reasonable and do not discriminate based on the viewpoint of the speech (*e.g.*, favoring Republicans over Democrats).[43] Examples of property considered nonpublic forums under the federal standard include military bases, airport terminals, and a walkway leading up to the door of a post office.[44]

2. California Compatibility Test – Several courts have held that the California Constitution (Article 1, Section 2) provides more protection for speech in public spaces than does the First Amendment.[45] Expressive activity should not be completely prohibited in a publicly owned space unless it is "basically incompatible" with the normal activity of the particular location.[46] Under this "compatibility test," courts have permitted leafleting in a train station, in the visitor parking lot of a prison, and in the parking lot of San Francisco's Cow Palace, as well as the placement of written material by protestors in the visitor center of the Lawrence Livermore Laboratory.[47] Courts will generally be more willing to allow non-disruptive expressive activity at a particular location when that location is the actual or symbolic target of the protest or is otherwise an especially appropriate place for the leafleting or protest.

B. PRIVATE PROPERTY

1. Federal Rule – The traditional rule has been that the First Amendment does not give a right to access or use private property for expressive activity. While the government cannot prohibit door-to-door canvassing or picketing in residential areas,[48] the normal laws of trespass apply to give private owners the power to bar free speech activity from their property.[49] The U.S. Supreme Court has held that there is no First Amendment right to engage in communication in shopping center parking lots and malls.[50]

2. California Balancing Test – In a significant departure from federal constitutional law, the California Supreme Court ruled (and the U.S. Supreme Court affirmed) in the *Pruneyard* case that Article I, Sections 2 and 3 of the California Constitution protect free speech activity in the common areas of shopping centers and shopping malls.[51] The Court stressed the importance of shopping centers in contemporary society as gathering places for large numbers of people.[52] Since the owners had given the public unlimited access to the center, they could not completely exclude members of the public who wanted to engage in speech that would not interfere with the center's primary commercial purposes.

Although *Pruneyard* established a state constitutional right to exercise free speech on certain private property, it did not delineate the scope of that right. Later cases have held that whether a particular

mall must allow expressive activity depends on a balancing test that takes into consideration the nature and primary use of the property, the extent and nature of the public invitation to use the property, and the relationship between the speech message and the purpose of the property's occupants.[53] Subsequent Court of Appeal decisions have applied *Pruneyard* to large shopping malls and even to a smaller mini mall.[54] However, the Courts of Appeal have refused to extend *Pruneyard* to parking lots and walkways of medical office buildings or to private sidewalks directly in front of large, free-standing stores like Traders Joes and Costco.[55] *Pruneyard* is most likely to apply where a mall has "common areas that would invite the public to meet, congregate, or engage in other activities typical of a public forum."[56] The key test is whether, "considering the nature and circumstances of the private property, it has become the functional equivalent of a traditional public forum," as discussed above.[57]

Under *Pruneyard*, shopping centers can impose reasonable time, place, and manner regulations on free speech uses of their facilities.[58] Many large malls have responded by imposing lengthy and burdensome rules that require a permit obtained in advance. Most of these rules have been upheld by the courts, including designated free speech areas, strict numerical limits on petitioners (*e.g.* no more than two persons at one table), prior approval of signs and literature, cleaning deposits, a prohibition on soliciting donations, and a complete blackout period from Thanksgiving to Christmas.[59] The courts have also ruled that advocacy groups do not have the right to stand in front of a particular store in the mall.[60] However, malls may not impose restrictions that unreasonably interfere with effective communication (such as placing the free speech area far away from the shoppers) or that are unreasonably vague or leave too much discretion to the to the mall owner.[61] For example, a complete ban on leafleting during the holiday season should only be allowed if the mall can show that the increased seasonal crowds justify it.[62] A mall's rules should be reduced to writing so that applicants can know what is allowed.[63]

A recent California Supreme Court decision places limits on shopping center regulations of speech and may undermine some of the restrictions approved by the lower courts above. In *Fashion Valley Mall v. NLRB*,[64] the Court struck down a shopping center regulation that prohibited a union from handing out leaflets to promote a boycott of one of the stores in the mall. The Court held that this regulation was a content-based restriction that would only be legal if it was needed to promote the compelling interests of the mall.[65] Significantly, the Court explicitly rejected the argument that the mall's purpose to maximize profits was a compelling interest that outweighed the union's speech interests. The Court extended that reasoning to conclude also that a ban against any solicitations of donations inside the mall was too broad, and overruled an earlier lower court decision that had upheld a similar ban as justified by the mall's business interests.[66]

Persons who persist in exercising their free speech rights on private property in violation of these rules may be excluded from all or part of the mall. However, neither store employees nor the police can arrest a person for trespass in an area open to the general public unless the person is interfering with the establishment's business:

> A protestor who refuses to comply with reasonable "time, place, and manner" restrictions can, in appropriate circumstances, be enjoined by the landowner from carrying out expressive activities, or even ejected from the premises; but the refusal to comply does not constitute misdemeanor trespass *unless* it consists of intentional interference with the landowner's business through the obstruction or intimidation of its customers.[67]

III. CONTENTS OF SPEECH

The government generally cannot regulate the contents – as opposed to the time, place, and manner -- of speech. But the courts have held that the First Amendment does not protect certain categories of speech, including libel and slander, obscenity, "fighting words," "true threats,"[68] and incitement of illegal action.[69] The government can prohibit even pure speech that falls within one of these categories, although even in this area it may not discriminate against disfavored topics or viewpoints.[70] "Fighting words" and incitement are often relevant to demonstrations and are briefly discussed below.

A. FIGHTING WORDS

The so-called "fighting words" doctrine is directed at words that by "their very utterance inflict injury or tend to incite an immediate breach of the peace."[71] The doctrine has been disfavored by the courts in recent years, particularly when the speech is not directed at a particular individual.[72] Furthermore, police officers in particular are required to be trained to deal with verbal abuse, and thus epithets directed at them should not be chargeable as breaches of the peace.[73] Nonetheless, California law still prohibits using "offensive words in a public place which are inherently likely to provoke an immediate violent reaction," and courts have upheld convictions under this provision for conduct ranging from screaming obscenities at a neighbor to challenging police officers to fight.[74]

Remember, though, that the reaction of a hostile audience cannot transform protected speech into "fighting words."[75] The obligation of the police should be to control the crowd and not permit a "hecklers veto" on unpopular speech.[76] Thus, even such provocative actions as burning the United States flag are protected by the First Amendment.[77] This notion, however, has not been consistently applied in the courts.

B. INCITEMENT OF ILLEGAL ACTIVITY

This category has been traditionally used against "subversives," and became a Cold War weapon against Communists whose advocacy created a "clear and present" danger of the overthrow of the government. Courts have narrowed this category to protect advocacy when it concerns ideas or future illegal events.[78] The present test is that the government may not "forbid or proscribe advocacy of the use of force or of violating the law except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action."[79]

ENDNOTES

[1] The California Supreme Court has held that the state constitutional guarantees of freedom of speech and press are "more definitive and inclusive" than the First Amendment of the U.S. Constitution. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 908 (1979) [hereinafter *Pruneyard*], *aff'd*, 447 U.S. 74 (1980); *see also Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004); *Los Angeles Alliance For Survival v. City of Los Angeles*, 22 Cal. 4th 352, 366 (2000). Throughout this discussion, however, references to the "First Amendment" will include the counterpart state constitutional guarantees.

[2] A useful guide to basic legal terminology, research, and Internet resources – with links to cases and codes on the Web -- can be found at http://www.publiclawlibrary.org/research.html#codes . A more detailed guide is at http://www.aallnet.org/chapter/scall/locating.htm.

[3] *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995); *Ctr. for Bio-Ethical Reform v. City and County of Honolulu*, 455 F.3d 910, 919 (9th Cir. 2006); *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 857-58 (9th Cir. 2004) (California Constitution).

[4] *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039, 1040-43 (9th Cir. 2006).

[5] *See, e.g., Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (holding that time, place and manner regulations must contain "adequate standards to guide the official's decision and render it subject to effective judicial review").

[6] *People v. Gonzalez*, 12 Cal. 4th 804, 823 (1996); *In re Berry*, 68 Cal. 2d 137, 145-46 (1968).

[7] *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1044-46 (9th Cir. 2006); *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984); *Svc. Employee Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 973 (C.D. Cal. 2000).

[8] *Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001); *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1229 (9th Cir. 1990); *Galvin v. Hay, 374 F.3d 739, 750 (9th Cir. 2004)*; *Chico Feminist Women's Health Ctr. v. Scully*, 208 Cal. App. 3d 230, 246 (1990).

[9] *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1056 (9th Cir. 2006) (holding that, to extent that insurance and hold harmless provisions of events ordinance applied to expressive activity, such provisions were content and viewpoint neutral and thus did not violate First Amendment).

[10] *Id.* at 1053 n.27 (holding that indemnification provision of events ordinance was not preempted because city did not attempt to expand its statutory immunities).

[11] *Long Beach Lesbian and Gay Pride v. City of Long Beach*, 14 Cal. App. 4th 312, 335-36 (1993).

[12] *Food Not Bombs*, 450 F.3d at 1049 (holding that departmental service fee of city's events ordinance was content-neutral and therefore did not violate First Amendment).

[13] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992).

[14] *See Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985); *Nemo v. City of Portland*, 910 F.Supp. 491, 497-98 (D.Or. 1995).

[15] *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985); *Long Beach Lesbian and Gay Pride*, 14 Cal. App. 4th at 338 (1993); *Svc. Employees Int'l Union*, 114 F Supp 2d at 975; *but see Gerritsen v. City of Los Angeles*, 994 F.2d 570, 578-79 (9th Cir. 1993) (upholding performance bond for use of park bandstand).

[16] *See United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir. 1999) (holding that National Park Service violated First Amendment by denying permit to demonstrate on ground of "clear and present danger," because group had trespassed into nearby uninhabited housing during previous protests); *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1996).

[17] *Baugh*, 187 F.3d at 1043.

[18] *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994); *Galvin v. Hay*, 361 F.3d 1134, 1146 (9th Cir. 2004).

[19] *Watchtower Bible and Tract Soc'y of New York v. Village of Stratton*, 536 U.S. 150, 165-66 (2002); *Marsh v. State*, 326 U.S. 501, 504 (1946); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

[20] *Davis v. Francois*, 395 F.2d 730, 735 (5th Cir. 1968); *Ex parte Bell*, 19 Cal. 2d 488, 497 (1942); *but see Blasecki v. Durham*, 456 F.2d 87, 92 (4th Cir. 1972) (holding that ordinance prohibiting more than fifty people from assembling at small downtown park was rationally related to legitimate purpose and supported by compelling interests).

[21] *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F.3d 784, 799 (9th Cir. 2006).

[22] In *Hill v. Colorado*, 530 U.S. 703 (2000), the U.S. Supreme Court upheld a state law that protected persons entering abortion clinics by establishing 8' "floating buffer zones" around persons entering a medical facility. The Court's opinion is based largely on the particular vulnerability of people seeking medical attention and the need to allow unimpeded access to health-care facilities, as well as its view that the law did not prohibit handing a leaflet to a person willing to take it.

[23] *Saia v. People*, 334 U.S. 558, 562 (1948); *Stokes v. City of Madison*, 930 F.2d 1163, 1168-69 (7th Cir. 1991); *Maldonado v. Monterey County*, 330 F.Supp. 1282, 1286 (N.D. Cal. 1971) (the "absolute prohibition of the use of loudspeaking equipment on the public roadways is unconstitutional.").

[24] *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949).

[25] *Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1161-62 (9th Cir. 2007); *In re Brown*, 9 Cal. 3d 612, 618-20 (1973). In California, it is a misdemeanor if one "maliciously and willfully disturbs another person by loud and unreasonable noise." Penal Code Section 415(2).

Special restrictions on noise may apply at particular locations such as schools or courts. *Grayned v. City of Rockford*, 408 U.S. 104, 110-11 (1972); *Braxton v. Mun. Ct.*, 10 Cal. 3d 138, 149 (1973).

[26] *See United States v. Doe*, 968 F.2d 86, 87 (D.C. Cir. 1992) ("There can be no question that beating a drum in the context of a clearly identified anti-war demonstration is expressive conduct protected by the First Amendment."); *Lionhart v. Foster*, 100 F.Supp.2d 383, 387-88 (E.D. La. 1999).

[27] *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988) ("the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away"); *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1108 (9th Cir. 2003) ("solicitation is an expressive activity, and hence is protected under the First Amendment").

[28] *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

[29] *Int'l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 683 (1992) (upholding ban on solicitation in an airport terminal) [hereinafter *ISKCON*]; *see also S.O.C. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir. 1998) ("the Constitution . . . accords less protection to commercial speech than to other constitutionally safeguarded forms of expression").

[30] *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1552 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987); *ACLU of Nevada v. City of Las* Vegas, 466 F.3d 784, 792 (9th Cir. 2006).

[31] *See* Cal. Labor Code § 432.7(a).

[32] *See U.S. v. Lopez*, 474 F.3d 1208, 1211 (9th Cir. 2007) ("A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right.") (internal quotation marks and citation omitted).

[33] *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

[34] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996); *In re Brown*, 9 Cal. 3d 612, 623 (1973).

[35] *Jennings v. Super. Ct.*, 104 Cal. App. 3d 50, 56 (1980).

[36] *Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 943 (9th. Cir. 2001) (holding sidewalk in front of hotel, constructed privately by hotel to replace a public sidewalk that existed on the site, was a public forum).

[37] *ISKCON*, 505 U.S. at 678-79; *PMG Int'l Div. v. Rumsfeld*, 303 F.3d 1163, 1169-70 (9th Cir. 2002).

[38] *Pinette*, 515 U.S. at 761; *Ctr. for Bio-Ethical Reform*, 455 F.3d at 919.

[39] *See American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003); First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002).

[40] *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 654 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

[41] *Khademi v. S. Orange County Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1024 (C.D. Cal. 2002).

[42] *Perry Educ. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 50 (1983); *S.E. Promotions v. Conrad*, 420 U.S. 546, 556 (1975); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 977 (9th Cir. 1998).

[43] *PMG Int'l Div.*, 303 F.3d at 1170-71.

[44] *ISKCON*, 505 U.S. at 680 (holding that airport terminals are nonpublic forums); *U.S. v. Kokinda*, 497 U.S. 720, 727 (1990) (holding that postal sidewalk is nonpublic forum); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 804-05 (1985) (holding that federal charity drive is nonpublic forum); *Make the Road by Walking v. Turner*, 378 F.3d 133, 145 (2d Cir. 2004) (holding that welfare waiting rooms are nonpublic forums).

[45] *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 856 (9th Cir. 2004); *Univ. of Cal. Nuclear Weapons Labs Conversions Project v. Lawrence Livermore Lab*, 154 Cal. App. 3d 1157, 1169 (1984); *Prisoners Union v. Dep't of Corrections*, 135 Cal. App. 3d 930, 941 (1982); *see In re Hoffman*, 67 Cal.2d 845 (1967).

[46] *Kuba*, 387 F.3d at 857; *Carreras v. Anaheim*, 768 F.2d 1039, 1044 (9th Cir. 1985) (*abrogated in part by Los Angeles Alliance For Survival*, 22 Cal. 4th 352 (abrogating part of *Carreras* decision that held that "singling out for regulation speech that involves soliciting donations" constituted content-based discrimination).

[47] *Kuba*, 387 F.3d at 857; *Univ. of Cal. Nuclear Weapons Labs Conversions Project v. Lawrence Livermore Lab*, 154 Cal. App. 3d 1157, 1169 (1984); *Prisoners Union v. Dep't of Corrections*, 135 Cal. App. 3d 930, 941 (1982); *see In re Hoffman*, 67 Cal.2d 845 (1967).

[48] *See, e.g., Watchtower Bible and Tract Soc'y of New York v. Village of Stratton***,** 536 U.S. 150, 165-66 (2002). The government may prohibit demonstrators that are targeting a particular person from standing directly in front of that person's residence. *See Frisby v. Schultz*, 487 U.S. 474 (1988). Lower courts are divided as to how far a law can push protestors away from a residence. *Compare City of San Jose v. Superior Court*, 32 Cal.App.4th 330 (1995) (upholding 300-foot buffer zone) *with Klein v. San Diego County*, 463 F.3d 1029, 1034-37 (9th Cir. 2006) (suggesting that government may only prohibit protestors from being directly in front of residence).

[49] *See Lloyd Corp. v Tanner***,** 407 U.S. 551, 570 (1972).

[50] *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976). This decision, however, left open the door for the NLRB to permit employees involved in a labor dispute to engage in informational activity on their employer's property.

[51] *Robbins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 905 (1979), affirmed by *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[52] *Pruneyard*, 23 Cal.3d. at 910.

[53] *Van v. home Depot*, 155 Cal. App 4th 1375, 1384 (2007); *Trader Joe's Co. v. Progressive Campaigns*, 73 Cal. App. 4th 425, 433 (1999).

[54] *Slauson Partnership v. Ochoa*, 112 Cal. App 4th 1005, 1028-89 (2003).

[55] *Allred v. Harris*, 14 Cal app 4th 1386, 13 88, 1392; *Trader Joe*'s, 73 Cal App 4th 425; *Costco v. Gallant*, 96 cal. App 4th 740,755. However, these decisions have been called into question by the Supreme Court's recent decision in *Fashion Valley Mall, LLC v. N.L.R.B.*, __ Cal.4th ___, 69 Cal.Rptr.3d 288, 300-302, 172 P.3d 742 (Cal. Supreme Court December 24, 2007), where the Court cited with approval earlier decisions which upheld the constitutional rights of union organizers to picket and leaflet on private property in front of individual retail stores. 69 Cal.Rptr.3d at 293-98. Although the *Fashion Valley* dissent states that the majority's discussion of these older cases should not be taken to indicate approval of their precise holdings, *id*. at 311-312 (Chin, J., dissenting), the majority opinion does not suggest that it agrees with this statement.

[56] *Albertson's*, 107 Cal.App.4th at 122. These areas would include "plazas, walkways, or central courtyards for patrons to congregate and spend time together." *Id.* at 119; *see id.* at 121 (characterizing "the functional equivalent of a traditional public forum as a place where people choose to come and meet and talk and spend time."); *Van*, 155 Cal.App.4th at 1388-89.

[57] *Albertson's, Inc. v. Young*, 107 Cal.App.4th 106, 117 (2003).

[58] *Pruneyard*, 23 Cal 3d. at 910; *see also Union of Needletrades v. Super. Ct.*, 56 Cal. App. 4th 996 (1997).

[59] *See Union of NeedleTrades*, 56 Cal. App 4th 996; *H-CHH Associates v. Citizens for Representative Government*, 193 Cal. App 3d 1193 (1987), disapproved on related grounds by *Fashion Valley Mall v. NLRB*, as discussed below.

[60] *Van v. Home Depot*,155 Cal. App4th 1375; *Albertson's* 107 Cal. App 4th at 122, 131.

[61] *H-CHH Associates*, 193 Cal.App.3d at 1210-21.

[62] *See Union of Needletrades*, 56 Cal. App.4th at 1014*; H-CHH Associates*, 193 Cal.App.3d at 1220.

[63] *H-CHH Associates*, 193 Cal.App.3d at 1220.

[64] *Fashion Valley Mall, LLC v. N.L.R.B.*, __ Cal.4th ___, 69 Cal.Rptr.3d 288, 172 P.3d 742 (Cal. Supreme Court December 24, 2007). The Court decided *Fashion Valley* by a 4-3 majority; the dissent would have overruled *Pruneyard* completely.

[65] *Id*. at 301-302.

[66] *Id.* at 302 n.12 (disapproving *H-CHH Associates*, 191 Cal.App.3d 1193.

[67] *Hamburg v. Wal-Mart Stores, Inc.*, 116 Cal.App.4th 497, 509 (2004).

[68] For an extended discussion of what constitutes a "true threat," see the various opinions in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*,290 F.3d 1058 (9th Cir. 2002).

[69] *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

[70] *Virginia v. Black*, 538 U.S. 343, 361-63 (2003).

[71] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[72] *See Cohen v. California*, 403 U.S. 15, 19 (1971); *Gooding v. Wilson*, 405 U.S. 518, 528 (1972).

[73] *Houston v. Hill*, 482 U.S. 451, 461 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

[74] Penal Code Section 415(3); *In re Alejandro G.*, 37 Cal.App.4th 44 (1995); *In re John V.*, 167 Cal.App.3d 761 (1985).

[75] *See Nationalist Movement*, 505 U.S. at 134-35; *Ovadal v. City of Madison, Wisconsin*, 416 F.3d 531, 537 (7th Cir. 2005).

[76] *Gregory v. Chicago*, 394 U.S. 111, 112-13 (1969); *Ovadal v. City of Madison, 469 F.3d 625, 630 (7th Cir. 2006).*

[77] *Texas v. Johnson*, 491 U.S. 397 (1989).

[78] *See Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Yates v. U.S.*, 354 U.S. 298, 320-21 (1957), *overruled in part on other grounds by Burks v. U.S.*, 437 U.S. 1 (1978); *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002).

[79] *Brandenburg*, 395 U.S. at 447 (emphasis added); *Jones v. Parmley*, 465 F.3d 46, 56-60 (2d Cir. 2006) ("Neither energetic, even raucous, protesters who annoy or anger audiences, nor demonstrations that slow traffic or inconvenience pedestrians, justify police stopping or interrupting a public protest.").

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