

*Constitutionally Protected Expressive Activity on Private  
Property:  
Who You Gonna Call?*

*By Robert C. Phillips*

The situation is not at all uncommon: An individual business owner, security official for a large shopping mall, or store manager representing a major retail chain store such as Costco, Wal-Mart or Target, complains to law enforcement that demonstrators, signature collectors, pamphlet distributors, or some other politically or socially motivated group of individuals, has set up a table on their property near an entrance to their store. Such persons, while on the mall or the store's "private property," and commonly in violation of some local rules established to control such activity, are generally attempting to communicate to store patrons some political, social or otherwise controversial viewpoint.

The mall or store representative calls for law enforcement's assistance in evicting the demonstrators, demanding that the responding police officer tell them to leave or, in the alternative, arrest them for trespassing. Should the officer balk at doing so, the complainant can be expected to wave around a ream of important looking documents purporting to be case law saying that what the demonstrators are doing is "illegal."<sup>1</sup>

The store representative might also insist that he or she is going to make a citizen's arrest and, pursuant to Penal Code § 142, the officer is required by law to accept the arrestee even if the officer does not agree with the wisdom of doing so.

*So what should the police officer do?*

The answer is actually quite simple: Except when necessary to preserve the peace, and with other limited exceptions, *the officer should do nothing.*

Getting involved in such disputes, either by making an arrest or accepting the target of a citizen's arrest, is likely to be little more than an exercise in futility. What is *not* likely to happen is that the "trespassing" demonstrator will ever get charged criminally in a court of law. This is because what the demonstrators are doing is generally not in violation of any of California's criminal trespass statutes. And even if it is, the demonstrators might have a constitutional right be on the complainant's property espousing their political or social beliefs. For an officer to attempt to interject a criminal prosecution into the mix is more likely to result in civil liability for both the officer and his or her police department than get the "trespasser" into the criminal justice system.

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<sup>1</sup> E.g., *Lloyd Corp. v. Tanner* (1972) 407 US. 551 [33 L.Ed.2<sup>nd</sup> 131]; *Diamond v. Bland* (1974) 11 Cal.3<sup>rd</sup> 331; and *Costco Companies, Inc. v. Gallant* (2002) 96 Cal.App.4<sup>th</sup> 740

It cannot be disputed that every person in this country has a constitutional right to the private ownership and use of property without undue interference from other persons or the government.<sup>2</sup> This is no less true for the owners of a business or a shopping mall. By the same token, we all have a First Amendment right to exercise free speech and to petition the government for redress of grievances.<sup>3</sup> When called to the scene of a dispute between a shopping mall or business owner and a demonstrator, signature collector, or pamphlet distributor, the police officer finds himself in the middle of these two constitutionally protected groups, each doing no more than attempting to exercise their sometimes conflicting rights. This, for the officer, is a lose-lose situation.

The United States Supreme Court has considered this type of situation and has attempted to find a fair balance between one's property rights and another's free speech rights. As a result, it has been held that a private property owner, including commercial enterprises such as large department stores and shopping malls, may, under most circumstances, prohibit others from using their property for purposes of exercising their First Amendment free speech and petitioning rights, at least so long as there are other effective alternative channels of communication. Such "alternative channels" would include the availability of public sidewalks, parks and streets adjacent to the store or shopping complex from which the demonstrators can make their viewpoints known.<sup>4</sup>

However, the California Supreme Court has evaluated the problem differently. The California Constitution contains its own version of the right to free speech<sup>5</sup> and to petition the government for redress of grievances.<sup>6</sup> Interpreting these local provisions, it has been ruled that at least in California, the free speech and petitioning rights are to be given a broader application than as provided for under the similar U.S. constitutional First Amendment protections, tipping the scale, in most cases, in favor of the demonstrator.<sup>7</sup>

In so ruling, and while affirming a shopping center's right to establish reasonable "time, place and manner" restrictions on the activities of demonstrators, signature collectors, pamphlet distributors, and other individuals or organizations, the California Supreme Court has held that large department stores and shopping centers *cannot* prevent others from having access to their private property for the purpose of exercising free speech and petitioning rights.<sup>8</sup>

The Court's reasoning on this issue is based upon the concession that such businesses have, in effect, replaced the traditional town center where people used to meet to discuss the issues of the day. Today, shopping malls and large businesses, by opening their private property to public access, have established a modern-day public forum for

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<sup>2</sup> Fourteenth Amendment, U.S. Constitution

<sup>3</sup> First Amendment, U.S. Constitution

<sup>4</sup> *Lloyd Corp. v. Tanner*, *supra*.

<sup>5</sup> Calif. Const. Art I, § 2, subd. (a)

<sup>6</sup> Calif. Const. Art I, § 3

<sup>7</sup> *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3<sup>rd</sup> 899;

*Fashion Valley Mall, LLC v. National Labor Relations Board* (2007) 42 Cal.4<sup>th</sup> 850

<sup>8</sup> *Ibid.*; see also *Westside Sane/Freeze v. Hahn, Inc.* (1990) 224 Cal.App.3<sup>rd</sup> 546.

the communication of ideas and varied viewpoints.<sup>9</sup> This is true even if the demonstrator’s message involves issues that are unpopular, controversial, or which to some—as in the case of some anti-abortion demonstrations where large, intentionally shocking photographs of aborted fetuses are used—are personally offensive.<sup>10</sup>

The United States Supreme Court, recognizing that the individual states may interpret their own constitutions as they choose so long as not to diminish a person’s rights as guaranteed by the U.S. Constitution’s Bill of Rights, has given California its blessing on this concept.<sup>11</sup>

Exceptions to this California rule have been found, however, when the location of the proposed activity is what can best be described as something other than the functional equivalent of a public forum. Whether or not a particular business or other location qualifies as an exception depends upon a careful evaluation of a number of factors. The nature of the facility is certainly one such factor. But more importantly, the Court must weigh the competing interests of the public and the property owner:<sup>12</sup> I.e.; because the store owner has a right to enjoy “freedom from disruption of normal business operations and freedom from interference with customer convenience,”<sup>13</sup> whether or not, and to what degree, the demonstrator’s activities interfere with the store’s activities are an issue.<sup>14</sup>

Where an exception is found, the business or shopping complex has the legal right to prohibit constitutional expressive activity on its property altogether. Such exceptions are slowly but surely being established by case law. So far, the courts have told us that the following businesses or activities fall within this list of exceptions:

- A stand-alone retail outlet which has its own parking area not shared with other businesses is not required to allow demonstrators to set up a table in front of its store.<sup>15</sup> This would likely also include the large, box-style membership stores such as a Costco, at least when not part of a shopping center complex.<sup>16</sup>
- A single stand-alone supermarket’s decision to permit the placement of a few newsracks on its property, in front of its store, did not create a public forum requiring it to allow other newspapers to place their racks there as well.<sup>17</sup>
- Any areas adjacent to a commercial store where the areas in dispute lack any “public forum attributes,” as shown by the evidence as presented to a civil court.<sup>18</sup>

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<sup>9</sup> *Robins v. Pruneyard Shopping Center, supra.*

<sup>10</sup> See *Reeves v. Rocklin United School District* (2003) 109 Cal.App.4<sup>th</sup> 652

<sup>11</sup> *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [64 L.Ed.2<sup>nd</sup> 741]

<sup>12</sup> *Costco Companies, Inc. v. Gallant* (2002) 96 Cal.App.4<sup>th</sup> 740

<sup>13</sup> *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3<sup>rd</sup> 1193

<sup>14</sup> See *In re Hoffman* (1967) 67 Cal.2<sup>nd</sup> 845

<sup>15</sup> *Trader Joe’s Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4<sup>th</sup> 425;

*Lushbaugh v. Home Depot U.S.A., Inc.* (2001) 93 Cal.App.4<sup>th</sup> 1159

<sup>16</sup> See *Costco Companies, Inc. v. Gallant, supra.*

<sup>17</sup> *Judlo, Inc. v. Von’s Companies* (1989) 211 Cal.App.3<sup>rd</sup> 1020, 1029

- A grocery store that, even though sharing a parking lot with several other businesses, does not “encourage people to congregate in or to otherwise remain at the center for longer time periods” than necessary to complete their shopping, and which “does business as a convenience store with a goal of getting customers in and out of the store very quickly,” is not the equivalent of a public forum, or even a “quasi-public forum.”<sup>19</sup>
- A high school campus may not be entered by demonstrators without the permission of the school’s principal. In such a case, Penal Code sections 627.2 and 627.7 may be enforced. But if the demonstrators set up their activities on the sidewalk in front of the school, so long as the sidewalk or streets are not being blocked,<sup>20</sup> the Constitution protects their right to do what they are doing no matter how offensive or shocking their message might be to some people.<sup>21</sup> Note, however, that the same protections are not necessarily accorded to a college campus where free speech receives greater protection; a college campus having “long been recognized as a ‘center for free intellectual debate.’ (Citation)”<sup>22</sup>
- A secured apartment complex, as “a place where the public is generally excluded, where an individual can escape the public forum by retreating into his or her apartment and closing the door,” is not required to allow leafleting to its tenants.<sup>23</sup>
- An auditorium located within a public university’s laboratory complex used for large technical group meetings “clearly do(es) not qualify it as a traditional public forum, nor even as a ‘semi-public forum.’”<sup>24</sup>
- A medical clinic, where persons are picketing or distributing leaflets on privately owned property, such as a 40-space parking lot of a small clinic that provides family planning services, including abortions, is not a public forum. In such a case, at least where the property is posted as being for the exclusive use of patients and staff, and after the demonstrators refuse to leave when requested to do so, the protestors may be arrested for trespassing, per P.C. § 602(o).<sup>25</sup>

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<sup>18</sup> *Van v. Home Depot* (2007) \_\_ Cal.App.4<sup>th</sup> \_\_ [2007 DJDAR 15483]

<sup>19</sup> *Albertson’s, Inc. v. Young* (2003) 107 Cal.App.4<sup>th</sup> 106

<sup>20</sup> See P.C. § 647c

<sup>21</sup> *Reeves v. Rocklin United School District*, *supra*.

<sup>22</sup> *O’Toole v. Superior Court* (2006) 140 Cal.App.4<sup>th</sup> 488, and at p. 503

<sup>23</sup> *Cox Cable San Diego, Inc. v. Bookspan* (1987) 195 Cal.App.3<sup>rd</sup> 22, 29

<sup>24</sup> *U.C. Nuclear Weapons Labs Conversion Project v. Laurence Livermore Laboratory* (1984) 154 Cal.App.3<sup>rd</sup> 1157, 1170

<sup>25</sup> 73 Ops.Cal.Atty.Gen. 213 (1990);

see also *Feminist Women’s Health Center v. Blythe* (1995) 32 Cal.App.4<sup>th</sup> 1641;

*Allred v. Harris* (1993) 14 Cal.App.4<sup>th</sup> 1386, 1392-1293;

*Planned Parenthood v. Wilson* (1991) 234 Cal.App.3<sup>rd</sup> 1662, 1672; and

*Allred v. Shawley* (1991) 232 Cal.App.3<sup>rd</sup> 1489, 1504-1505.

- The advertising within a transit bus, not being the equivalent of a public forum, may be restricted as to its content.<sup>26</sup>

It can get even more complicated in that there may be exceptions to the exceptions. For instance: “(W)here the property owner itself is the subject of a public dispute or controversy—as for instance a labor dispute—its property may as a practical matter be the only available forum to effectively express views on the controversy and it may be required to give its opponents access to its property.”<sup>27</sup> In a labor dispute, therefore, it would likely be held that it is improper for a police officer to attempt to assist the business owner in evicting the demonstrators.

Also, for those instances when the expressive activity is legally taking place on private property, trying to determine what “*time, place and manner*” rules the store should be allowed to enforce is going to be problematic. Whether or not a store’s rules are appropriate requires a court’s evaluation of the rules themselves, taking into account all the surrounding circumstances. For instance, it has been held that if a store is allowed to exercise discretion without reference to some objective standards, “the regulation runs the risk of governing speech on the basis of its content” making discriminatory practices possible. Such a rule will not likely be upheld by a court if challenged.<sup>28</sup>

Even assuming the above issues could be resolved in the field, and if it were to be determined that the property owner had a legal right to either exclude the protestors or put restrictions their activities, the question then becomes: “*Now what? What do we charge them with?*”

The answer to this question is not as simple as one might expect. To the contrary, with certain exceptions, it will be found that California’s trespass statutes are woefully inadequate in these situations.

Penal Code § 647c, which prohibits the obstruction of a street, sidewalk or other place open to the public, requires more than merely being an annoyance. There must be shown to be an interference with vehicular or pedestrian traffic that is done “willfully and maliciously.” This requires more than just being stopped by, or having to walk around, the demonstrator. The offender must be found to have actually and significantly blocked an entrance, exit, passageway, sidewalk or street.<sup>29</sup>

A trespass under either Penal Code sections 602(k)<sup>30</sup> or 602.1 similarly fail to properly address the constitutional expressive activity situation. Both sections require proof of a “specific intent” to injure property or property rights, or to interfere with the

<sup>26</sup> *Women’s Internat. League etc. Freedom v. City of Fresno* (1986) 186 Cal.App.3<sup>rd</sup> 30, 41

<sup>27</sup> *Costco Companies, Inc., v. Gallant, supra*, at p. 755, fn. 1; citing *In re Lane* (1969) 71 Cal.App.2<sup>nd</sup> 872, 876; *Sears, Robuck & Co. v. San Diego County Distr. Council of Carpenters* (1979) 25 Cal.3<sup>rd</sup> 317, 326-327

<sup>28</sup> *Costco Companies, Inc., v. Gallant, supra*, at p. 754

<sup>29</sup> See *Jennings v. City and County of San Francisco Superior Court* (1980) 104 Cal.App.4<sup>th</sup> 50, 55-57

<sup>30</sup> Formerly P.C. § 602(j)

business or occupation carried on by the owner. No such specific intent is present when the demonstrator is doing no more than trying to collect signatures or express an idea or opinion, even though the business's patrons are inconvenienced in the process.<sup>31</sup>

Unless there is a complete blocking of an entrance to a store,<sup>32</sup> or it can be proved that the demonstrator has the specific intent to interfere with, or somehow damage the store's business itself, there is just no chargeable trespass section that covers the situation when someone sets up a table in a shopping mall or near the entrance to a Wal-Mart, Costco or Target store, attempting to get the attention of patrons as they come and go. An unsupported claim that by merely being there and soliciting patrons somehow interferes with a business, or even that specific patrons are being annoyed by the demonstrators' activities, does not support the elements of any available trespass sections under California law.

Also, for those who might have been concerned that Penal Code §142 mandates that an officer accept a person arrested by a private citizen when the arresting citizen insists, it should be noted that the Legislature amended section 142 a few years back, specifically making its mandatory provisions inapplicable to the citizen's arrest situation.<sup>33</sup>

Exceptions to the problem of not being able to find an applicable trespass section include the situation where demonstrators have gone onto a school campus—grades kindergarten through high school—without the permission of the school administrators. In such a case, Penal Code sections 627.2 and 627.7, failing to register with the school's principal, may be charged.<sup>34</sup> Also, where property is posted as being private property not open to the general public, and a demonstrator ignores a request by the property owner, or a law enforcement officer at the request of the owner, to leave, then a trespass per Penal Code section 602(o)<sup>35</sup> may be charged.<sup>36</sup>

In the vast majority of situations, however, a police officer is left without any tools with which to enforce an order to pack up one's card table and leaflets, and leave. But even in the rare instance where a specific trespass section might apply, using the power of arrest to resolve the issue is perhaps not the wisest of ways to handle the situation. Given the complexity of the issues as discussed above—i.e., whether or not the site, under the circumstances, is the equivalent of a "public forum," and if it is, whether the store's time, place and manner restrictions are reasonable—the whole issue is one perhaps best left for a civil court to resolve.

The myriad of factors that must be considered, weighed, and resolved, are all issues best determined after an evidentiary hearing in the controlled atmosphere of a civil

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<sup>31</sup> See *In re Wallace* (1970) 3 Cal.3<sup>rd</sup> 289; and *Hamburg v. Wal-Mart Stores* (2004) 116 Cal.App.4<sup>th</sup> 497

<sup>32</sup> See *In re Ball* (1972) 23 Cal.App.3<sup>rd</sup> 380

<sup>33</sup> Subd. (c), of P.C. § 142

<sup>34</sup> *Reeves v. Rocklin United School District*, *supra*.

<sup>35</sup> Formerly P.C. § 602(n)

<sup>36</sup> See 73 Ops.Cal.Atty.Gen. 213 (1990)

court where all parties have been heard, and at which the court can properly determine the rights and duties of everyone involved.<sup>37</sup> These are *not* issues an individual police officer can properly determine, or should be expected to determine, while standing between two emotionally charged individuals, each trying his hardest to impose his viewpoint over that of his opponent, at the scene of the complaint.

Every situation is a little different, either in the type of location the person is “trespassing” upon, the degree of interference alleged by the business owner, or the nature of the expressive activity (e.g., signature collecting, leaflet distribution, oral protests, picketing, etc.) involved. A civil court is properly equipped to balance the equities and establish the ground rules that are appropriate to the specific situation. A police officer at the scene is not. A law enforcement officer, therefore, should not even attempt to get involved in resolving these issues.

Should it be determined that no arrests are to be made, and where it is the business or shopping mall owner who is complaining, that person should be told to consult his or her own private legal counsel and seek a *civil restraining order* or *injunctive relief*. In the case of a complaining signature collector or demonstrator, perhaps arguing to the officer that a store’s rules, or “*time, place and manner*” restrictions, are unreasonable, they should similarly be advised to seek a preliminary injunction restraining the store owners from attempting to prevent their proposed activities on the store’s property.<sup>38</sup>

In either case, the parties first need to get their issues before a civil court. After an evidentiary hearing, the judge can then properly balance the rights and interests of the parties involved and issue an order with specific guidelines as to who can do what, when, where and how. When appropriate, the court can also impose “*reasonable time, place and manner*” restrictions on the parties. When the rules as to the particular circumstance in issue are clearly set out in writing by the court, a police officer may then—*and only then*—enforce these rules as a misdemeanor violation of a court order, pursuant to Penal Code § 166(a)(4).

The bottom line is this: There is a reason why nearly all the case law on this topic are civil cases. *It is a civil issue* that first needs to be evaluated by a civil court before any criminal action is taken. Police officers called to the scene of an incident involving the exercise of constitutionally protected expressive activity rights would be well-advised to avoid trying to use the criminal law to resolve what experience has told us is better handled in a civil court of law.

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<sup>37</sup> E.g., see *Van v. Home Depot, supra*.

<sup>38</sup> See *Needletrades, etc. Employees v. Superior Court* (1997) 56 Cal.App.4<sup>th</sup> 996