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Constitutional Law--Civil Right Demonstrations--Trespass Statutes

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What effect *Carter* will have in the future is questionable. Having been decided by a federal district court, the case will not be a precedent which binds other federal courts. Although the *Carter* view is still in the minority, the fairness of the result and the acclamation of the *Wilkins* opinion by the American Law Institute[53] may well influence other courts to adopt this ruling. Because the judicial conflict over this issue has been waged without apparent resolution for nearly thirty years, perhaps the most expedient settlement of the question would lie in congressional action.

JEFFREY P. WHITE

CONSTITUTIONAL LAW — CIVIL RIGHTS DEMONSTRATIONS — TRESPASS STATUTES

Adderley v. Florida, 385 U.S. 38 (1966).

With the advent in the 1960's of marches, demonstrations, and pickets by nonviolent civil rights advocates, various states have generally been frustrated by the Supreme Court and other federal courts in their attempted use of the police power to control the protesters.[1] The basic issues involved in these decisions focus upon the conflict between the states' interest in preserving an orderly social structure and the first amendment rights[2] of the demonstrators. Some states have tried to regulate peaceful demonstrations on public property[3] by charging those involved with breach of the peace, as defined by either common law[4] or statute,[5] and by invoking ordinances controlling the obstruction of traffic[6] or statutes prohibiting courthouse picketing by those intending to impede "the administration of justice" or influence a "judge [or] juror . . . in the discharge of his duty."[7] The United States Supreme Court, through the decisions of a fluctuating majority, has consistently reversed such convictions due either to the vagueness[8] or discriminatory application[9] of the statute authorizing the arrest or the attempt by the police to disregard prior interpretations of a precisely drawn statute's meaning.[10] Despite the results of these prior decisions, the Supreme Court may have given the states a solution to their problem by its recent decision in *Adderley v. Florida*.[11]

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[53] ALI JURISDICTION STUDY § 1312(d), comment at 79-80 (Tent. Draft No. 4, 1966).

In 1963, the picketing of segregated Tallahassee theaters resulted in the arrest of a number of Negro college students and a

[1] This comment is concerned with those decisions of the Supreme Court which involve civil rights demonstrations on public property as opposed to cases involving protests against private businesses, *i.e*, the sit-in cases, which involve a different set of problems. *E.g.*, Bouie v. City of Columbia, 378 U.S. 347 (1964); Bell v. Maryland, 378 U.S. 226 (1964); Gober v. City of Birmingham, 373 U.S. 374 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963); Garner v. Louisiana, 368 U.S. 157 (1961).

[2] The proposition that the rights of free assembly, free speech, and freedom to petition the government for redress of grievances are protected from state interference by the fourteenth amendment is well understood, thus obviating the necessity of discussing the development of the law in this area. Cantwell v. Connecticut, 310 U.S. 296 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[3] The term "public land," as usually defined by statute, is not meant to include lands reserved for special governmental or public purposes. 73 C.J.S. *Public Lands* § 1 (1951); 26 FLA. JUR. *Public Lands* § 2 (1959). *Cf.* FLA. STAT. § 821.20 (1961). However, in this comment the phrases "public land" and "public property" will be used to encompass property which, for example, if controlled by a city would be considered public property in the broadest sense of the word. 63 C.J.S. *Municipal Corporations* § 950 (1950). Such property would include sidewalks and land surrounding governmental buildings, whether controlled by the city, county, or state.

[4] Edwards v. South Carolina, 372 U.S. 229 (1963). Demonstrators assembled at the state capitol to express their grievances concerning the general treatment of Negroes in South Carolina. After being told by the police that they had the right to enter the grounds, the demonstrators were confronted by a group of three hundred white persons. Despite a lack of any outward expression of the crowd's feelings, the demonstrators were ordered to leave within fifteen minutes. A refusal to obey this order resulted in their arrest for the common law offense of breach of the peace — an offense which the state court admitted was "not susceptible of exact definition." *Id.* at 234. The Court overruled the convictions because of this vagueness and the fact that the demonstrators were arrested simply because they drew a crowd and not because actual public disorder existed. *Id.* at 237-38.

[5] Cox v. Louisiana, 379 U.S. 536 (1965).

[6] *Id.* at 542.

[7] Cox v. Louisiana, 379 U.S. 559 (1965).

[8] Cox v. Louisiana, 379 U.S. 536 (1965). This case involved the same facts as Cox v. Louisiana, *supra* note 7, but was reported separately. The appellant led two thousand demonstrators on a march near the state courthouse where a number of picketers from a previous demonstration were being held. Following police orders they walked on the sidewalk until Cox told them to leave and "sit-in" at a local lunch counter. This remark so aroused the gathering crowd of white citizens that the police ordered the marchers to disperse and then used tear gas when their demand was refused. Cox was subsequently arrested and charged, in part, with breaching the peace as defined by the following statute:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street . . . or upon a public sidewalk . . . and who fails or refuses to disperse and move on . . . when ordered to do so by any law enforcement officer . . . or by any other authorized person . . . shall be guilty of disturbing the peace. LA. REV. STAT. § 14:103.1 (Supp. 1966).

The Supreme Court decided that the circumstances did not constitute a breach of the peace and that the statute was unconstitutional "in that it sweeps within its broad

march by two hundred others to the Leon County jail grounds in protest of both the arrests and state and local policies of segregation. Upon their arrival at the jail entrance, the marchers, in obedience to a deputy sheriff's order, moved to the driveway and various grassy areas upon the grounds until commanded by the later-arriving sheriff to leave the area entirely because they were trespassing upon county property. A refusal by Harriet Adderley and thirty-one others to obey this order resulted in their arrest and conviction for the statutory offense of trespassing upon the property of another with a "malicious and mischievous intent."[12]

In a five-to-four opinion upholding the convictions, the Court supported its decision by first determining that the cases of *Edwards v. South Carolina*[13] and *Cox v. Louisiana*[14] were not controlling. *Edwards*, which involved demonstrators on state capitol grounds who were unconstitutionally arrested for allegedly breaching the peace, as defined by common law,[15] was distinguished because: (1) jail grounds are usually not open to the general public, whereas the capitol grounds are traditionally made available to all;[16] (2) the demonstrators in *Edwards* entered the capitol grounds through a public driveway after receiving permission from a state officer, while in *Adderley* the marchers entered the jail grounds without permission through a driveway normally used only for jail purposes;[17] and

scope activities that are constitutionally protected free speech and assembly." Cox v. Louisiana, *supra*, at 552. The majority felt that the first part of the statute dealing with a refusal to obey an order to disperse was constitutional but that the statute, as a whole, could result in an arrest of those who simply expressed unpopular views. *Id.* at 551-52.

[9] Brown v. Louisiana, 383 U.S. 131 (1966). Sit-in demonstrators at a public library, after having been waited on, were ordered to leave. Their refusal to do so resulted in their arrest for breaching the peace under the same statute involved in Cox v. Louisiana, *supra* note 8. In reversing the convictions the majority stated that even if the petitioners' action were within the scope of the statute, they would be required to assess the constitutional impact of its application, and "since the statute was deliberately . . . applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility," the Court stated that "interference with this right so exercised, by state action is intolerable under our Constitution." *Id.* at 142. It should be noted that the majority was influenced by the fact that the only people in the library at the time of the "disturbance" were library employees. *Ibid.*

[10] Cox v. Louisiana, 379 U.S. 559 (1965).

[11] 385 U.S. 39 (1966) (Douglas, Brennan, and Fortas, J.J. and Warren, C.J., dissenting).

[12] FLA. STAT. § 821.18 (1965).

[13] 372 U.S. 229 (1963).

[14] 379 U.S. 536 (1965).

[15] For a discussion of the case, see note 4 *supra.*

[16] 385 U.S. at 41.

[17] *Ibid.*

(3) the Florida trespass statute did not suffer for vagueness as evidenced by the specific conduct it proscribed, the adequate notice it gave, and the term "malicious and mischievous intent" which narrowed its scope and clarified its meaning.[18] *Cox v. Louisiana* was distinguished solely on the ground that it also dealt with an unconstitutionally vague statute.[19]

Once these decisions had been distinguished, the majority had little difficulty in determining that all the necessary elements of trespass had been proven by the state.[20] Justification for holding that the petitioners' constitutional rights to freedom of speech, assembly, and petition had not been violated focused on the lack of access to the jail grounds by the general public,[21] the fact that the sheriff's sole objection to the demonstration was its occurrence on county jail property,[22] and the fact that the right to picket, not being an absolute right, may be controlled by a state through its authority to "control the use of its own property for its own lawful nondiscriminatory purpose."[23]

The dissenting opinion written by Mr. Justice Douglas criticized the majority's treatment of this situation as an ordinary trespass or picketing problem rather than one concerned with the first amendment right of petitioning the government for the redress of grievances.[24] Arguing that such petitioning, logically held outside a jail which housed prisoners believed to have been unjustly arrested, "should not be condemned as tactics of obstruction and harassment as long as the assembly and petition" were peaceable,[25] Justice Douglas pointed out that the jail routine was in no way disrupted, that traffic on the driveway was not blocked,[26] and that the demon-

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[18] *Id.* at 42-43.

[19] *Id.* at 42.

[20] *Id.* at 46. This included evidence that the petitioners were told they were trespassing, refused to leave within ten minutes after the order, and only those on the jail grounds after the ten-minute period were arrested. *Ibid.*

[21] *Id.* at 47. In objecting to this construction of the facts, the minority argued that the state made no claim that the public had generally been excluded from the jail grounds. *Id.* at 52 (dissenting opinion).

[22] *Id.* at 47. On this point, the minority argued that this lack of concern over the ideas expressed by the demonstrators is stated by most police in these cases just before jailing the demonstrators. *Id.* at 56 (dissenting opinion).

[23] *Id.* at 48.

[24] *Id.* at 52.

[25] *Id.* at 51. The minority felt the majority discounted the fact that most picket lines are directed against private interests and that there was a complete absence of "No Trespassing" signs on the jail premises. *Id.* at 52.

[26] *Ibid.* The dissent pointed out that only the sheriff and deputy sheriff made any attempt to use the driveway, and they experienced absolutely no difficulty in parking.

strators exhibited a complete willingness to relocate themselves on other parts of the jail grounds when requested to do so.[27] While agreeing that places such as courthouses or legislative galleries might be improper areas for the voicing of grievances, the minority expressed the view that this did not support the conclusion that "all public places are off limits to people with grievances" or that a "custodian" of public property may, at his discretion, determine when a public place may be used by those who wish to communicate their ideas.[28]

Since *Adderley* presents the first Supreme Court decision upholding the conviction of civil rights demonstrators on public property, a brief evaluation must be made of the various positions expressed by different members of the Court in order to place *Adderley* in its proper perspective. Generally, the members of the Court agree that participants in any form of group demonstration upon highways, streets, or other public facilities would enjoy more restricted first amendment freedoms than would individuals under the same circumstances.[29] There also seems to be a consensus that peaceful demonstrators may not be arrested for the vague common law offense of breaching the peace, since the police officer's discretionary power to define activity coming within the terms of the offense may easily result in the arrest of those who simply express unpopular views.[30]

With respect to statutory offenses, however, a chasm develops within the Court over what constitutes a statute specific enough constitutionally to support the arrest of nonviolent demonstrators and over what type of conduct, if any, is outside the purview of even a narrowly drawn, nondiscriminatorily applied statute. While prior to *Adderley* a majority of the Court had consistently reversed state convictions of civil rights demonstrators, there persisted a lack of unanimity as to the rationale for these decisions. All of the Justices seem to agree that some type of "precise and narrowly drawn regu-

Also, the majority's view that the demonstrators blocked a vendor's truck, thereby forcing him to stay at the jail until they were dispersed, was countered by the argument that it could as easily be assumed that the vendor was staying in the building so as not to miss the excitement. *Id.* at 51-52.

[27] *Id.* at 52.

[28] *Id.* at 54.

[29] See Cox v. Louisiana, 379 U.S. 559 (1965).

[30] Edwards v. South Carolina, 372 U.S. 229 (1963). Mr. Justice Clark dissented on the ground that the state's duty to protect society would support any action it took against those whose peaceful demonstrating had so aroused a crowd of on-lookers that a strong possibility of danger existed. *Id.* at 238-39. The contrary argument would be that the policemen's duty is to protect the demonstrators and not vice-versa.

latory statute evincing a legislative judgment that certain specific conduct be limited or proscribed" would be constitutional if applied to peaceful marchers on public property.[31] Only Mr. Justice Clark has supported the constitutionality of an arrest on a public sidewalk, the arrest being based upon a statute making it a misdemeanor to refuse to disperse upon orders of any person in authority when such an individual feels that circumstances exist which could lead to a breach of the peace or that a group intends to provoke such a breach.[32] However, in a later case, four dissenting Justices, led by Mr. Justice Black, strongly argued that such a statute, while too broad to be applied to demonstrators near a courthouse, was specific enough to support a conviction of sit-in demonstrators in a public library, since the library was designed to serve a clearly defined function which the demonstrators disrupted through their conduct. Thus, these four Justices would hold the same statute to be both constitutional and unconstitutional, depending upon the circumstances in which it was applied.[33]

On the other hand, even where there was complete agreement as to the constitutional specificity of a statute, a five-to-four decision resulted when the state's method of enforcement was evaluated. *Cox v. Louisiana*[34] concerned a statute making it a misdemeanor to

[31] *Id.* at 236. The concept that some form of statutory control, if properly defined, could be used against the demonstrators caused some very basic problems for the majority of the Court prior to *Adderley*. The Court had inferred in dictum that it would accept a narrowly drawn statute such as one controlling access to parking lots on state capitol grounds during business hours. *Ibid.* However, when confronted with a situation in which the actions of a large mass of demonstrators were clearly prohibited by a narrow regulatory statute — one approved by the American Bar Association — the majority reversed the convictions of the marchers because after the police told them that the statute would allow demonstrations within a certain distance of a courthouse, this decision was revoked. The Court, in rationalizing its decision, stated that the opinion was not to be interpreted "as sanctioning riotous conduct in any form or demonstrations however peaceful which conflict with properly drawn statutes . . . designed to preserve law and order." Cox v. Louisiana, 379 U.S. 559, 574 (1965). Therefore, if the majority in *Cox* actually believed that a specific statute could be used by the state to control civil rights demonstrators, they had the perfect opportunity to so hold in that case, since the police were in a position to honestly decide that the march would have to be disbanded due to the attitude of the crowd.

[32] Cox v. Louisiana, 379 U.S. 536, 589-91 (1965) (dissenting opinion). Mr. Justice Clark would also allow the states to arrest demonstrators whenever clear evidence of danger exists even though the protest is completely peaceful. See Edwards. v. South Carolina, 372 U.S. 229, 244 (1963) (dissenting opinion).

[33] Brown v. Louisiana, 383 U.S. 131, 151 (1966) (Black, Clark, Harlan, and Stewart, J.J., dissenting). Mr. Justice Black argued that the statute only reached specific conduct, that is, the refusal to obey an authorized person. This was distinguished from the situation in Edwards v. South Carolina, 372 U.S. 229 (1963), where the statute was so broad that it could cover any act which aroused the onlookers in the vicinity of the demonstration. 383 U.S. at 159.

[34] 379 U.S. 559 (1965). (Black, Clark, Harlan, and White, J.J., dissenting).

parade "near" a courthouse with intent to interfere with the administration of justice. Although all members of the Court agreed that the marchers desired to hinder a judicial proceeding, the majority vacated the conviction upon discovery that the arrests had been made *after* the demonstrators were told by a police officer that they were far enough away from the courthouse so as not to come under the terms of the statute.[35]

These cases reveal the fundamental conflict within the Court between the approach advocated by Mr. Justice Black, who would allow *all* picketing to be disallowed by the state as long as the governing statute would be applicable to all groups,[36] and the opposing view that the enforcement of statutory prohibitions against civil rights demonstrators must be of such primary importance to the state that without such prohibitions an immediate threat of danger would exist. Underlying the latter position, as expressed by Mr. Justice Fortas in *Brown v. Louisiana*,[37] is the belief that actions by demonstrators which are clearly within the scope of a regulatory statute would not support an arrest *if* the sole purpose for enforcing the statute were to limit protest against segregationist practices by a state or one of its agents.[38] Mr. Justice Black's approach seems to overlook the possible anti-Negro feelings of the police which may cause an arrest and instead place emphasis upon a state's right to control the *conduct* of all demonstrators and to define nondiscriminatory controls over state property.[39]

The result of this conflict was the *Adderley v. Florida* decision in which Mr. Justice Black's "conduct approach" finally became the majority opinion. However, this does not mean that a sudden rush by the various states to adopt broad statutes outlawing all forms of demonstration will be supported by the Court. *Adderley*, if applied strictly to its facts, will support only the arrests of demonstrators who express their opinions in places controlled by the state or its

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35 *Id.* at 570-71. In the dissent Mr. Justice Black argued that the policeman had no legal right to give permission to commit an unlawful act and that, in any event, he later revoked the permission. *Id.* at 582-83.

36 See, *e.g.*, Brown v. Louisiana, 383 U.S. 131, 151 (1966) (dissenting opinion); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

37 383 U.S. 139 (1966).

38 *Id.* at 142.

39 See *id* at 166 (dissenting opinion). Mr. Justice Black has always advocated the absolute first amendment rights of the individual when confronted by the state, but his view that the conduct of picketers does not come within the first amendment guarantees has also been rather consistent. See, *e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

agents in which the public has been notified that the area is open only to those with official business. Nevertheless, serious problems can still be created even with a strict interpretation of *Adderley* — and they certainly will be if a broader approach is attempted — if the states attempt to limit areas of demonstration solely through a general trespass statute.

It is the type of statute involved in *Adderley* that presents the most unfortunate aspect of the decision. Little if any evidence exists to support the conclusion that the various states, including Florida, have considered utilizing an omnibus trespass statute to safeguard public property.[40] Furthermore, the term "property of another" connotes private as opposed to state or public property as evidenced by its use in trespass statutes involving only private property. These factors, plus the complete lack of any definition in the statute as to the particular types of property involved, would seem to leave in the hands of law enforcement officials the same discretion in determining the limitations of the demonstrators' first amendment rights that the Court has disallowed in prior decisions. Without statutory direction as to the type of public property covered by the statute, a policeman's determination of a statutory violation may foreseeably be as subjective as were the misdemeanor charges in the "breach-of-peace" cases.

In all fairness to the majority in *Adderley*, there would seem to be no valid or logical way to interpret the decision so that the statute in question, or even one more narrowly drawn, could cover property as public as the sidewalks leading to the state capitol.[41] However, as emphasized in the dissent, a very serious problem can arise when a building with surrounding grounds that traditionally are open to the general public, such as the state capitol, is located next to a jail

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[40] Those Florida trespass statutes which deal specifically with state property do not mention the term "property of another"; rather, they deal with various specific uses of the land such as the removal of trees or the establishment of a homestead. FLA. STAT. §§ 821.19-.21 (1961). Furthermore, in 32 FLA. JUR. *Trespass* § 16, at 206 n.17 (1960), the only authority cited which refers to the omnibus trespass statute is an Opinion of the Attorney General stating that the statute applies to an individual parking in a posted *private* lot. See also Ervin, *Freedom of Assembly and Racial Demonstrations*, 10 CLEV.-MAR. L. REV. 88 (1961). The author was the Attorney General of Florida at the time he wrote the article. It is interesting to note that in part IV of the article, entitled "When do Racial Demonstrations Become Unlawful Assemblies?," the author never mentions the use of a general trespass statute as a means for stopping the demonstrations.

[41] This would seem evident from the majority's emphasis on the alleged fact that the public had not been allowed to use the jail grounds before for their own personal use or enjoyment. 385 U.S. at 47.

or other traditionally inaccessible place.[42] The majority did not attempt to resolve this problem and, by not doing so, has placed the states in the precarious position of having a Supreme Court decision in their favor without receiving any indication of its scope.

It is submitted that if the states begin to enforce their general trespass ordinances toward lands where the public has traveled, the Court will have little difficulty returning to the view that conduct within the scope of a statute may not be condemned if it can be shown that an arrest was made solely to hinder a demonstrator from expressing his viewpoint against segregation,[43] especially if there is a lack of warning that the statute is being used to punish previously constitutionally premissible behavior.[44] Thus, if the states desire to use trespass ordinances, or statutes involving breach of the peace or the like, they would be well advised to enact laws dealing with somewhat specific lands and buildings, for they cannot expect factual situations as favorable as *Adderley* to arise in every instance.

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42 *Id.* at 53.

43 Brown v. Louisiana, 383 U.S. 131, 142 (1966).

44 Wright v. Georgia, 373 U.S. 284, 291-92 (1963).