Libraries, Bare Feet, and the First Amendment

Introduction

The purpose of this paper is to examine the constitutional validity of library rules that require patrons to wear shoes. This analysis will be based mainly on *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242 (3rd Cir.1992), and the Supreme Court cases that it references.

Using the constitutional principals presented and summarized in *Kreimer*, it is concluded that a library rule that requires patrons to wear footwear violates the First Amendment.

History

Richard Kreimer is a homeless man who resided in Morristown, NJ. He regularly entered the Joint Free Public Library of Morristown and Morris Township and engaged in disruptive conduct, including staring at and following other patrons. In addition, because of his homeless state, Mr. Kreimer exuded an offensive odor that prevented other patrons from using the library near him, and prevented library staff from performing some of their duties.

In response, the Library instituted rules to deal with Mr. Kreimer's behavior. When their rules were applied to him, he sued the Library in the U. S. District Court of New Jersey. This court ruled (*Kreimer v. Bureau of Police for the Town of Morristown*, 765 F.Supp 181 (D.N.J.1991)) that Mr. Kreimer's constitutional rights were violated. On appeal to the United States Court of Appeals, Third Circuit, the District Court decision was overturned.

However, while Mr. Kreimer ultimately lost his case, the principals of First Amendment law explained in *Kreimer* illuminate the constitutional principals that apply to libraries.

The Right to *Receive* Speech

The first principal summarized in *Kreimer* is that the First Amendment guarantees not only the right to make speech, but also the right to receive speech. Both sorts of expressive conduct are protected by the First Amendment. Supreme Court decisions referenced in support of this include *Martin v. City of Struthers*, 319 U.S.141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965); *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); and *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

Libraries exist for the purpose of allowing their patrons to receive information (a form of speech). Library patrons, while using the library facilities, are involved in expressive activity protected by the First Amendment. The whole panoply of First Amendment jurisprudence applies to those patrons (*Kreimer*, 958 F.2d at 1255).

Public Forums

In order to apply First Amendment principals, the type of forum must first be identified. In regards to the application of the First Amendment, there is the "traditional public forum," the "designated (or limited) public forum", and the "non-public forum".

The traditional public forum encompasses "places which by long tradition or by government fiat have been devoted to assembly and debate" (*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, L.Ed.2d 794 (1983)), such as streets and parks. The government is allowed to regulate traditional public forums, but just barely. Content-neutral time, place, and manner restrictions are permissible if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (*Id*. at 45, 103 S.Ct. at 955).

A designated public forum is "public property which the state has opened for use by the public as a place for expressive activity." (*Id*. at 45, 103 S.Ct. at 955). An example of this is a municipal theater. Here, regulations unrelated to speech must be "reasonable", but regulations relating to the expressive activity designated for the forum follow the same rules as for a traditional public forum (content-neutral, narrowly tailored, significant government interest). For instance, theater-goers do not have the First Amendment right to stand up and give a political speech during the municipal theater's production of "Auntie Mame." However, the theater manager who otherwise books all sorts of plays cannot refuse to schedule a play because of its message.

A non-public forum is a government location not reserved for expressive activity. A pentagon office might be an example.

The analysis in *Kreimer* decided that a public library is a designated public forum (*Kreimer*, 958 F.2d at 1259). The designated expressive conduct is the communicative use of library materials (reading). When a patron is using a library for its intended purpose, restrictions must be in the form of a narrowly tailored rule that serves a significant government interest. Other rules must be "reasonable."

Application of Kreimer to Bare Feet

The Morristown Library instituted two sorts of rules that the courts addressed. Their "Rule 5" is an example of the first sort of rule:

> Patrons shall respect the rights of other patrons and shall not harass or annoy others through noisy or boisterous activities . . .

For this class of rule, the "reasonableness" test applies. Patrons who are annoying others, for instance, are not exercising their First Amendment library rights to receive information. The Court of Appeals ruled that this was a perfectly reasonable thing to require in a library.

The second sort of rule applied to patrons actually engaged in the expressive conduct of using the library for its intended purpose. Their "Rule 9" is an example of the second sort of rule:

> Patrons shall not be permitted to enter the building without a shirt or other covering of their

> upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building.

For this class of rule, the stricter constitutional test applies: restrictions must be in the form of a narrowly tailored rule that serves a significant government interest. As the Court of Appeals put it:

> Because this rule would require the expulsion of a patron who might otherwise be peacefully engaged in permissible First Amendment Activities within the purposes for which the Library was opened, such as reading, writing or quiet contemplation, we must determine whether the rule is narrowly tailored to serve a significant government interest and whether it leaves ample alternative channels of communication.

Id. at 1264.

The court then found that

> The Library's goal is served by its requirement that its patrons have non-offensive bodily hygiene, as this rule prohibits one patron from unreasonably interfering with other patrons' use and enjoyment of the Library . . .

Note that only the second part of this rule (offensive odor) was before the court, so only the constitutionality of **that** part was decided. No decision was reached regarding the constitutionally of requiring footwear.

It is clear that this higher standard of review also applies to barefooted patrons, as long as they are using a library for its intended purpose. The question then becomes, does requiring footwear serve an important government interest? The answer to this must be, "No." Bare feet do not cause any sanitary problem. Libraries are places that contain no particular hazard to barefooted patrons (while dropping a book on a bare foot might be a hazard, it is a hazard equally shared by patrons wearing sandals, which are generally not prohibited in libraries). The presence of barefooted patrons will not disrupt the library, nor cause offense to other patrons. The Court of Appeals even recognized this, for in a footnote it said

> . . . it can hardly be imagined that a person simply by being barefoot would disrupt the library.

Id. at 1263, footnote 25.

Sloppiness in the Decision

A cursory reading of *Kreimer* might lead one the believe that footwear rules were upheld. In fact, since the District Court did not rule on that issue, the Court of Appeals did not address the issue, except in a comment in a footnote. It is clear from the context of the footnote that the Court of Appeals did **not** apply the First Amendment principals just laid out to the subject of footwear.

In a footnote discussing implications of the first class of rule (patron not engaged in expressive conduct; "reasonableness" test applies), the Court of Appeals says

> Finally, we reiterate that the Library is a limited designated public forum. The Library need only permit use of its facilities which is consistent with the intent of the government when opening this forum to the public. Even within the scope of these consistent uses, it seems obvious that the Library may regulate conduct protected under the First Amendment which does not actually disrupt the Library. For example, we do not doubt that a Library may limit the number of books which a patron may borrow from it at any time, even though no request has been made by another patron for the book which the patron at his or her borrowing limit desires to withdraw. Similarly we do not doubt that the Library may limit the length of time during which a book may be borrowed. Indeed, the district court itself implicitly acknowledged this point when it modified its order so that it did not invalidate the rule requiring the wearing of shoes, since it can hardly be imagined that a person simply by being barefoot would disrupt the Library.

Id. at 1263, footnote 25.

This flies in the face of the court's application of the law to "Rule 9". They clearly say there that, for patrons otherwise peacefully engaged in permissible First Amendment activities within the purposes for which the Library was opened, a rule must be narrowly tailored to serve a significant government interest and must leave ample alternative channels of communication. In this *obiter dictum*, the court suggested the wrong standard of review. In fact, even their example about limiting the number of books or the length of borrowing should also fall under the stricter standard of review. Of course a library can limit the number of books or length of borrowing because that is the purpose of the expressive conduct for which the library was formed. It serves the significant government interest of circulating the books and making them available for all users of the library.

It must be kept in mind that this is mentioned in the footnote only because the District Court, in trying to rescue its original ruling by mentioning footwear (see *Id*. at 1250, footnote 8), modified that ruling so as not to invalidate the footwear part of "Rule 9". No First Amendment analysis was done.

Finally, note that footnote 25 continues and ends with

> We further reject the district court's intimation that the rules would prohibit the wearing of an armband for political purposes. It is clear to us that, so long as the patron is engaged in the peaceful and non-disruptive use of the Library, the adornment of an armband is irrelevant.

Precisely. And the adornment (or lack thereof) of feet is also irrelevant so long as a patron is engaged in the peaceful and non-disruptive use of a library. In this last paragraph of the footnote, the Court of Appeals returns to the stricter standard of review.

Conclusion

Rules in libraries about wearing footwear fall within First Amendment jurisprudence, since libraries are designated public forums dedicated to the receipt of information. Such rules do **not** meet the strict standard that they be narrowly tailored to serve a significant government interest, and are thus unconstitutional.