

CIRCUMVENTING SANKIRTAN: PUBLIC SPACES, RELIGIOUS SOLICITATION, AND DECISIONS OF THE UNITED STATES SUPREME COURT

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In this paper, I examine American juridical positions on the use of public spaces for religious propagation and solicitation. While the Hare Krishna movement's ritual of sankirtan has been researched, legal reasoning on the right to solicit donations and preach in publicly accessible spaces that involve economic activities has been less studied. By analyzing these legal positions, this paper offers a glimpse of legal consciousness on the use of public spaces for a non-mainstream religious practice. It is argued that legal consciousness is inextricable in economic rationality, and that legal reasoning normalises disciplined choreographies of purposively rational action, to which regulatory concerns of public safety and orderliness are largely subservient. As public spaces are legally conceptualised within the normative expectations of market rationality, religious activities in public spaces are largely interpreted in material terms.

I. INTRODUCTION

Within the critical legal studies, the intersections of law and geography have led to a reappraisal of urban concerns within the city, and the circumstances of spatial regulation. In this study, I look at the critical legal geography of public religion in the United States. In many ways, the social and legal contexts of accessibility in public spaces offer glimpses of the regulatory tensions involving forms of public religion. By studying judicial cases involving the intersection of a non-mainstream religious ritual with spatial regulation, I examine the socio-legal circumstances that regulate accessibility to public spaces. I argue that the reasoning in judicial cases offers critical insights into how legal consciousness with respect to public spaces is conceptualised, and understood.

Legal jurisprudence on public spaces is a crucial indicator of legal positions on the right to access public spaces, the politics of visibility, and how these are often intertwined in deliberations on public safety. In this paper, I

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examine how legal consciousness on public spaces works, and is coterminous with deliberations of accessibility, safety and visibility. I argue that economic rationality informs the legal conceptualisation of a ‘public space’. By examining court decisions on the Hare Krishna followers’ right to propagation and solicitation, this paper throws light on the legal underpinnings of spatial regulation, and the use of public spaces for religious purposes. I further argue that relevant cases epitomise the practical implications of legal consciousness on using public spaces.

In Part II, I begin by examining the theoretical intersections of legal consciousness and public religion as seen in the case of a new religious movement in the United States. I follow this by tracing the Hare Krishna movement’s use of public spaces for solicitation and propagation in Part III, and in Part IV, I look at the ways in which public opinion and legal consciousness were intertwined in the case of the publicly occurring ritual of *sankirtan*. In Part V, I examine the judgments of the United States Supreme Court on the Hare Krishna followers’ right to access public spaces. Next, in Part VI, I offer my arguments on the ways in which an economic understanding of public spaces influenced the process of legal reasoning, as seen in the case of the Hare Krishna movement. I follow this in Part VII, with my concluding remarks.

II. LEGAL CONSCIOUSNESS AND PUBLIC RELIGION

In the law and society tradition, it is generally understood that legal consciousness evolves with the dominant cultural and institutional biases. Legal consciousness underpins popular attitudes and expectations on the law, the commonplace nature of the legal experience, and the agency of legal actors.¹ Ewick and Silbey further trace the evolution of legal consciousness to social conventions, and opportunities for thought and action – or ‘*schemas*’, and observe that the commonplace association of these schemas with meanings, motives, and conventions normalises legality.² In practical terms, legal consciousness is inherent in juridical positions that acknowledge the salience of context driven flexibility in legal outcomes. These stances reflect a legal understanding of public issues, and tensions within the juridical process. Diana Young argues that as legal reasoning precludes value judgments, and is

¹ MATHIEU DEFLEM, *SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION* 134-5 (2008); Naomi Mezey, *Out of the Ordinary: Law, Power, Culture, and the Commonplace*, 26(1) *LAW & SOCIAL INQUIRY* 151 (2001); PATRICIA EWICK AND SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 35-8 (1998).

² *Id.*, 38-40 (Referring to William Sewell’s definition, Ewick and Silbey describe the schemas as “cultural codes, vocabularies of motive, logics, hierarchies of value, and conventions, as well as the binary oppositions that make up what he calls a society’s ‘fundamental tools for thought?’” The examples of schemas include “the interactive rules of a criminal trial, the concepts of guilt or innocence, and the obligation born of a promise or a contract, in addition to commonplace proverbs and aphorisms”).

critiqued autonomously, it is a closed system.³ As she sees it, the practice of legality requires that non-legal deliberations on inclusiveness and neutrality are subjected to legal mechanisms. Despite a closed process of reasoning, the selection and ordering of tenable empirical information are subjected to rules. In assigning importance to facts and ascertaining their legal interpretability, these are often subjected to assumptions with non-legal antecedents.⁴ In other words, frames of legal reasoning in issues of public interest are informed by conflicting interests and claims that emanate from legal rules and rules that have non-legal antecedents. This is crucial to the legal conceptualisation of issues of general concern, such as public spaces. Because public spaces are an issue of general concern, legal reasoning on public spaces underpins legal consciousness on accessibility, safety concerns, and rights of passage.

In real terms, how does a normative legal consciousness on public spaces play out? Nicholas Blomley argues that at many North American urban sites, public property is contextualised within the exclusionary rights of private property.⁵ The commonplace association of *any* property with private property normalises the association of public space to ownership, entitlement and exchange.⁶ Space is coterminous with notions of property, and concomitant ideological, legal, political, and social relations that are based on the social power of property to exclude.⁷ As citizenship is subjected to power, exchange, and entrepreneurial acumen, property becomes a nonsocial but essential component of social relations.⁸ In the context of the English commons, Jonathan Mitchell observed that the demarcation of rural spaces inculcated newer social relations that went beyond rural property regimes.⁹ While a common area presupposes the exclusion of private property, land and property regimes are germane to the legal politics of accessibility.¹⁰ In public spaces, the statist emphasis on property, and by extension, of the values fostered by ownership, entitlement, and exchange – over the collectively held notions of equality, and shared rights – often leads to spatial boundaries, and the regulation of physical access in

³ Diana Young, *Claims for Recognition and the Generalized Other: The Reasonable Person and Judgement in Criminal Law*, 23(1) CAN. J. LAW SOC. 20-1 (2008).

⁴ *Id.*

⁵ NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 2-4 (2004).

⁶ *Id.*

⁷ Sarah Keenan, *Subversive Property: Reshaping Malleable Spaces of Belonging*, 19(4) SOCIAL & LEGAL STUDIES 429-30 (2010).

⁸ Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States* in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* 16 (N. Blomley, D. Delaney et al, 1st ed., 2001).

⁹ Jonathan Mitchell, *What Public Presence? Access, Commons and Property Rights*, 17(3) SOCIAL & LEGAL STUDIES 352, 354 (2008).

¹⁰ *Id.*

hitherto 'open' spaces (like the commons).¹¹ This is reflected in restrictions that discriminate against the homeless.¹²

More than physical presence, the politics of accessibility of public spaces encompass regimes of inclusiveness towards ideological and political claims on public visibility.¹³ Across urban sites in North America, discourses on public spaces are framed within property rights, and the tensions of inner-city gentrification inform many of the narratives on the urban commons. The political and social claims of inclusiveness and the empirical reality of subversion shape the legal and social debates on accessibility.¹⁴ Going further, Blomley remarks that the legal regimes (and spatial conflicts) on development, planning, and globalisation are acted upon by forces of demand and supply, and these are in turn, crucial determinants of socio-political relations.¹⁵ As property indicates material and corporeal implications on bodies of knowledge, disciplining technologies, and legal enforcement, the informal domains of civic space become structured by the formal requirements of property.¹⁶ Unlike private property, 'publicness' presupposes inclusiveness. In conceptualising municipal land as collective property, the expectations of private property get precedence. Not surprisingly, narratives on accessibility of public spaces become entwined in legal and social deliberations on private property.¹⁷ The production of public space is as much an act of facilitating common access, as of restricting non-commercial access, in which collective local agency and political interests are often inimical. These tensions are reflected in claims to public spaces, where regulated commercial access is given precedence over common access. This subverts the normative expectations of 'publicness'. Communicative activities in public spaces (including many religious or cultural practices) are primarily understood in commercial terms.

Across urban sites in North America, the non-commercial use of public spaces is often contiguous with the politics of identity. While public visibility brings forth notions of symbolic entitlement, regimes of exclusion constrain activities that are less welcome. Seen thus, the politics of visibility shapes the context of accessibility in the public domain. In liberal democratic societies, where notions of inclusiveness and tolerance are commonplace, the cultural significance of public events (like St. Patrick's Day) is often emphasised over the religious. The cultural emphasis of events that are rooted in religiosity is a strategic move that facilitates greater outreach and participation

¹¹ BLOMLEY, *supra* note 5, 5; Nicholas Blomley, *Landscapes of Property* in THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE 119-20 (N. Blomley, D. Delaney et al, 1st ed., 2001).

¹² Mitchell, *supra* note 8, 8-9.

¹³ Mitchell, *supra* note 9, 352-3.

¹⁴ Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, 17(3) SOCIAL & LEGAL STUDIES 320 (2008).

¹⁵ BLOMLEY, *supra* note 5, 30-32, 38.

¹⁶ *Id.*, 31; Mitchell, *supra* note 8, 16.

¹⁷ Blomley, *supra* note 14, 320.

from other ethnic groups and other religionists.¹⁸ However, when the cultural aspects of specific practices of public religion are misrepresented in the popular discourses and the mass media as deviant, and guided towards the pursuit of profit, power and privilege, the claims to inclusivity that publicness fosters become tenuous. These tensions are reflected in the use of public spaces by many non-mainstream religious movements.

In urban public culture, the primacy of specific forms of religious expression inculcates both symbolic entitlement and the politics of exclusion. Symbolic entitlement prioritises dominant religious narratives, which essentialise the enrichment of social life and adherence to norms and values. These are reflected in tensions over the use of public spaces by established religions and newer religious movements, in which cultural practices of the former are preferred. As multiculturalism situates religion to the realm of the private, religious expressions in the public domain are normatively expected to be cultural.¹⁹ Variations are considered irrational and dangerous, and discursively framed as threats to public safety.²⁰ Multiculturalism often requires minority religious groups to make symbolic adjustments for better collective representation in public spaces. For minority religionists, access to public spaces is often incumbent on accommodating the normative expectations of civil society. As Olsson argues, the use of blue and yellow by Swedish Muslims (by borrowing the two colours of the Swedish flag) in public spaces, coupled with universalistic discourses illustrates strategies of cultural integration.²¹ In a similar vein, Pastorelli observes that in Europe, tensions over new religious movements' accessibility to public spaces has led to collective governance, instead of statist intervention, that is largely restricted to disciplining and managing publicly occurring religious phenomena.²²

Legal consciousness revolves around people's expectations and associations with law. In many ways, the commonplace association of publicly

¹⁸ To give an example, St. Patrick's Day, which is annually celebrated on March 17, commemorates the day of the death of the commonly recognised patron saint of Ireland. In the United States, while this is not a legal holiday, the date is widely observed as a celebration of Irish and Irish American culture. Forms of celebrations include prominent displays of the colour green, eating and drinking, religious observances, and numerous parades. During the occasion, as this author has witnessed, many people without any Irish or even Christian antecedents, participate culturally, simply by wearing green coloured garments, by being in parades, and by consuming beer.

¹⁹ Davina Cooper, *Out of Place: Symbolic Domains, Religious Rights and the Cultural Contract* in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* 45 (N. Blomley, D. Delaney et al, 1st ed., 2001).

²⁰ *Id.*, 48.

²¹ Susanne Olsson, *Religion in the Public Space: 'Blue-and-Yellow Islam' in Sweden*, 37(3) *RELIGION, STATE & SOCIETY* 283-86 (2009) (Olsson refers to sociologist José Casanova's argument that in western democratic societies, the credibility of religion is maintained by mobilising universalistic discourses, such as perspectives on human rights, and civil society).

²² Sabrina Pastorelli, *The European Union and the New Religious Movements*, 37(1) *RELIGION, STATE & SOCIETY* 201 (2009).

occurring religious activities as non-commercial and cultural gives followers of established religions a sense of symbolic entitlement to the public domain. Conversely, religious expressions that are generally perceived as economic, or whose followers are seen as having an elastic view of municipal rules, are considered threatening and disruptive. As the commonplace expectations of religiosity are normative, it is hardly surprising that these get reflected in the legal consciousness on new religious movements' use of public spaces. If the religious practices are seen as making unwarranted claims on public attention and resources, their public presence is, from the municipal and legal perspectives, contentious and unnecessary. This is reflected in the accessibility and visibility of followers of the Hare Krishna movement in public spaces.

III. THE HARE KRISHNA MOVEMENT'S USE OF PUBLIC SPACES

In July 1966, at New York City, the Bengali Hindu religious leader A.C. Bhaktivedanta Swami Prabhupada established the Hare Krishna religious order, which is formally known as the International Society for Krishna Consciousness ('ISKCON').²³ This order was inspired by the revival of the *bhakti* (or devotional) tradition of the followers of Vishnu in 16th century Bengal.²⁴ The devotees' primary task is to spread awareness of Krishna, and for them, chanting the Hare Krishna mantra leads to spiritual bliss.²⁵ A unique practice is *sankirtan*, that originally meant a hortative expression of religious passion, involving dancing and singing praises of Krishna publicly. For Prabhupada's followers, *sankirtan* included chanting, preaching, distributing literature, recruiting members, and soliciting donations in public spaces.²⁶

The trajectory of any non-mainstream religious movement is shaped by the cultural, political, and legal environments in which it operates. In multicultural societies, religious movements that require conversions are often suspect. In Britain and the United States, as immigrant religious groups have had better legal standing as compared to those of white converts, local ISKCON branches claimed Indian support to avoid being stereotyped as a conversion dependent religious group.²⁷ As new religious practices involve strategies aimed at facilitating greater outreach, these often bring forth public scrutiny.

²³ CHARLES R. BROOKS, *THE HARE KRISHNAS IN INDIA* 78 (1989).

²⁴ E. BURKE ROCHFORD, *HARE KRISHNAS IN AMERICA* 11 (1985); Steven J. Rosen, *Who is Sri Chaitanya Mahapabhu?* in *THE HARE KRISHNA MOVEMENT: THE POSTCHARISMATIC FATE OF A RELIGIOUS TRANSPLANT* 63, 71 (E. Bryant & M. Ekstrand, 1st ed., 2004).

²⁵ ROCHFORD, *Id.*; E. BRUKE ROCHFORD, *HARE KRISHNA TRANSFORMED* 3 (2007).

²⁶ ROCHFORD, *supra* note 24, 11; E. Burke Rochford, *Airports, Conflict, and Change* in *THE HARE KRISHNA MOVEMENT: THE POSTCHARISMATIC FATE OF A RELIGIOUS TRANSPLANT* 274 (E. Bryant & M. Ekstrand, 1st ed., 2004).

²⁷ MALORY NYE, *MULTICULTURALISM AND MINORITY RELIGIONS IN BRITAIN: KRISHNA CONSCIOUSNESS, RELIGIOUS FREEDOM, AND THE POLITICS OF LOCATION* 7 (2001); E. BURKE ROCHFORD, *HARE KRISHNAS IN AMERICA* 270-1 (1985).

Public evaluation and response critically determine resource mobilisation, recruitment strategies, and the movement's overall prospects. Since the 1970s, ISKCON's resource mobilisation strategies were influenced by public attitudes towards its followers.²⁸ While *sankirtan* efforts initially sustained their communities, after 1972, followers augmented resources by selling candles, record albums, candy, and cookies.²⁹ Public spaces were instrumental for ISKCON's evolution. Apart from ensuring resources, many public contacts crystallised into memberships.³⁰ Following Prabhupada's instructions, *sankirtan* practices were extended to shopping malls and parking lots.³¹ The constitutional protection of the First Amendment facilitated *sankirtan* in public spaces like airport lounges, national parks, and state fairs.³²

By the mid-1970s, ISKCON's activities were widely considered pecuniary, and this often led to public backlash.³³ During solicitation, many followers concealed their identities as Krishna devotees.³⁴ The decline of the 1970s counterculture made public spaces less conducive to recruitment and solicitation.³⁵ As counterculture oriented youth communities left Haight-Ashbury district in San Francisco and Bowery on the Lower East Side of New York City, places that were traditionally frequented by Krishna followers, solicitation and recruitment efforts dwindled.³⁶ To counter this, and approach inaccessible groups, ISKCON leaders stressed on *sankirtan* activities within or near airports. In the Los Angeles International Airport in 1980, Rochford found that devotees usually approached males under thirty, as they were easier to recruit.³⁷

IV. PUBLIC OPINION, SANKIRTAN, AND LEGAL CONSCIOUSNESS

Public opinion is often crucial in shaping a non-mainstream religious group's goals, ideology, and practices. In the early 1970s, the recruitment and outreach strategies of many of these religious groups were adversely scrutinised in the media, and opposed by anti-cultist groups. The mainstream media portrayed the followers as dangerous and delinquent, and their leaders as pursuers of power and profit, who misused religious freedoms to avoid taxes, criminal charges, and possible deportation. These religious groups faced the ire of the media, churches and civic organisations, chambers of commerce,

²⁸ Rochford, *supra* note 26, 282-3.

²⁹ *Id.*, 274; ROCHFORD, *supra* note 24, 182-3.

³⁰ *Id.*, 173.

³¹ Rochford, *supra* note 26, 275.

³² ROCHFORD, *supra* note 24, 174.

³³ Rochford, *supra* note 26, 276.

³⁴ *Id.*, 278; ROCHFORD, *supra* note 24, 179.

³⁵ *Id.*, 177.

³⁶ Rochford, *supra* note 26, 277.

³⁷ *Id.*

lobbies and lawmakers, all of which diminished public support.³⁸ In the case of ISKCON, anti-cultists overemphasised the commercial aspect of *sankirtan*, and portrayed its followers as deviant, coercive, and dangerous. The association of a religious group with material interests made a strong case of misuse of the First Amendment. By the mid-1970s, ISKCON followers were avoided, and even targeted by commoners in public spaces like airports, state fairs, and bus terminuses. Local authorities used restrictions on accessibility to curtail *sankirtan*. These provisions restricted the number of practitioners at a given time, for distribution and solicitation. In state fairs, legal rulings restricted *sankirtan* to booths and stalls, thereby denying the Krishna followers potential patrons.³⁹ State courts also forbade solicitation in airport facilities, public zoos and country fairs.⁴⁰ Following these rulings, ISKCON authorities restricted their outreach activities.⁴¹

It is argued that legal consciousness is inextricable in the evolution of public attitudes. This, in turn, shapes the ways in which frames of legal reasoning develop, and are passed on. By examining cases, this study brings forth the frames of legal reasoning employed in the adjudication of a non-mainstream religious group's right to use public spaces. Legal cases involving ISKCON's outreach efforts suggest that the conceptualisation and use of public spaces were guided by an economic understanding. That a religious ritual was suspected of being a cover to pecuniary motives suggests radical divergences in conceptualising public spaces. This was also a time when public attitudes on new religious movements degenerated into rabid anti-cultism. This transformation is reflected in the court judgments on *sankirtan* in public spaces during the last two decades of the previous century. To understand this, the legal reasoning in the U.S. Supreme Court judgments on *sankirtan* in public spaces during that period is examined. These spaces were primarily created for specific economic functions. As the legal understanding of public space is germane, the reasoning for using similar types of public spaces for nonreligious activities is also examined here.

V. U.S. SUPREME COURT JUDGMENTS ON ACCESSIBILITY TO PUBLIC SPACES

One of the first cases to rule on the right of religious minorities to access public spaces was *Michael Heffron v. International Society for Krishna Consciousness, Inc.*⁴² According to Rule 6.05 of the Minnesota State Fair

³⁸ *Id.*, 282-3.

³⁹ See *Michael Heffron v. International Society for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981) (U.S. Minn.).

⁴⁰ See *International Society for Krishna Consciousness, Inc. v. Walter Lee*, 112 S. Ct. 2703 (1992) (U.S. N.Y.).

⁴¹ Rochford, *supra* note 26, 284-5.

⁴² 101 S Ct 2559 (1981) (US Minn.).

Rules, any sale, exhibition, or distribution of merchandise, including printed or written material, by individuals, groups, or firms, could occur only at a licensed location, to which any deviation constituted misdemeanour. This rule prevented a group's representatives from simply walking in and communicating with visitors or soliciting from possible patrons.⁴³ ISKCON representatives challenged this rule in a Minnesota court and argued that it violated their First Amendment rights by enabling the suppression of expressive *sankirtan* rituals. By confining *sankirtan* to a fixed location, Rule 6.05 restricted the devotees' mobility, and severely curtailed their ability to disseminate and preach. On behalf of the defendant Minnesota State Agricultural Society Board (the state's public corporation that operated the annual fair), Michael Heffron argued that within the fairground, peripatetic distribution of religious literature and solicitation for donations did not violate First Amendment rights.⁴⁴ He asserted that the State's interest in maintaining order at the state fair was sufficient to justify the application of the rule. Further, within the fairground, space was rented in a non-discriminatory first-come, first-served basis irrespective of purpose – nonprofit, charitable, or commercial. As the District Court of Ramsey County ruled in favour of the governing body of the state fair, ISKCON appealed to the Minnesota Supreme Court for striking down Rule 6.05.

The Minnesota Supreme Court, ruling 5:4 in favour of the defendants, illustrated divergences in interpreting Rule 6.05, and the context of free expression within the scope of the First Amendment. Justice White, in the majority opinion, stated that Rule 6.05 did not violate the rights of the members of a sect to propagate within the free exercise clause of the First Amendment. The Court recognised that the state authority had a legitimate interest in facilitating the orderly movement of a large crowd, given the constricted area of the fair.⁴⁵ The Court also held that the First Amendment did not guarantee anyone or any group the right to propagate their religion without any restrictions, by disregarding existing rules on safety and security. Freedom of religious expression did not preclude the need to maintain order and decorum.⁴⁶ While the judges were not unanimous, they upheld Rule 6.05, stating that it did not violate the First Amendment, and that the “ritual of Sankirtan [had] no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds”.⁴⁷ Since peripatetic solicitation was not part of the ritualistic repertoire of most established religions, it was reasoned that the Krishna devotees' ritualised public solicitation did not merit

⁴³ *Id.*

⁴⁴ The First Amendment to the United States Constitution forbids the making of any law that impedes the free establishment and exercise of religion, by impinging upon the freedom of speech, the freedom of press, and the right to peacefully assemble or prohibit the petitioning for a governmental redress of grievances.

⁴⁵ Michael Heffron v. International Society for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981) (U.S. Minn.), 2565.

⁴⁶ *Id.*, 2568.

⁴⁷ *Id.*, 2566.

any special consideration. However, by recognising ISKCON's need for new patrons, the judgment restricted *sankirtan* to a location, as applicable to any other group.⁴⁸ The reasoning demarcated the scope of freedom of religious expression under the First Amendment. By restricting religious activities outside of the fairground and by limiting the devotees' mobility to a specified area inside, the judgment curtailed *sankirtan* activities at the fair.

The primacy of economic exchange and reasonable transfer of goods and services was the crucial criterion for accessing the fairground's 125 acres. By upholding Rule 6.05, the judgment equated the devotees to members of any other group that did not merit an exemption in having access to the fairground. Doing so would have set a precedent, following which the denial of exemptions to other groups would have proved difficult.⁴⁹ The Court recognised the state's interest in facilitating a smooth flow of crowds. As the fair was defined as an economic enterprise, the underlying rationale was that ISKCON's activities were adverse to fairgoers and participating businesses. As disciplined crowd movement facilitates economic exchange, economic rationality was essential to the reasoning process. To generate business, the state administration used revenue from participating businesses and patrons, and the sale of entry tickets. The Court reasoned that the peripatetic nature of *sankirtan* led to ISKCON profiting from access to multiple fair spaces and prevented a proportionate contribution in revenues.⁵⁰

ISKCON was not the only organisation to face legal restrictions on using public spaces for solicitation and distribution. In February 1990, the federal government charged two volunteers of the National Democratic Policy Committee, Marsha B. Kokinda and Kevin E. Pearl, for soliciting contributions, selling books and subscriptions on a table, in a post office entrance's sidewalk, in Bowie, Maryland.⁵¹ Federal magistrate Justice O'Connor held that soliciting contributions in a post office's front sidewalk violated postal service regulations. According to the judgment, a postal sidewalk was not a 'traditional' public forum, and the postal service rules did not allow for any expressive activity on its adjoining sidewalks.⁵² Any activity in the adjoining sidewalks could potentially disturb the smooth continuity of the postal services. As postal regulations prohibited any kind of solicitation or distribution on postal premises or on sidewalks near a post office entrance, the regulations did not violate the free speech protections of the First Amendment.⁵³ Irrespective of whether the postal services allowed for a form of speech that was not necessarily disruptive,

⁴⁸ *Id.*, 2567.

⁴⁹ *Id.*

⁵⁰ *Id.*, 2566.

⁵¹ *United States v. Marsha B. Kokinda*, 110 S. Ct. 3115 (U.S. Md.) (1990), 3120-2, 3128.

⁵² *Id.*

⁵³ *Id.*

prohibiting solicitation on the post office's sidewalk was considered reasonable as that disrupted the normal business of the postal establishment.⁵⁴

How then, is public space legally defined? The aforesaid judgment maintained that the post office sidewalk was not a 'traditional' public forum. Rather, it was considered a 'limited-purpose' forum as its existence was solely the prerogative of the government, which exercised the power to withhold general access, except for the specific business of using the postal service.⁵⁵ In another Supreme Court case, television programmers and cable television viewers petitioned for a judicial review of provisions in a federal act that allowed cable operators to control programming which they believed to be indecent or obscene, and restrict 'patently offensive' programming to a single channel.⁵⁶ In the judgment, a public forum was defined in two ways: as a 'traditional' public forum, which by custom, allows for public assembly and discourse, like streets, sidewalks, and parks, and as a 'designated' public forum or property where the state allows expressive activity by the members of the public.⁵⁷ By defining public space exclusively in terms of property and entitled rights, this judgment situated it as subject to common knowledge and shared discursive practices that posit the primacy of economic and material interests. Legal awareness on public space is ensconced in the carapace of economic-rational understanding.

The tensions in using public spaces for religious solicitation are further reflected in the use of airport terminals for solicitation related activities. The Port Authority of New York and New Jersey operates three major airports around New York City (John F. Kennedy International Airport, La Guardia Airport, and Newark International Airport) and controls their terminal areas.⁵⁸ In the early 1990s, the Port Authority forbade solicitation inside terminals, despite the fact that it was allowed on the sidewalks outside these terminals.⁵⁹

In March 1992, ISKCON and Brian Rumbaugh petitioned against the port authority challenging its restrictions on distribution and solicitation in airport terminals.⁶⁰ Walter Lee, the then police superintendent, whose task was to enforce the restriction, represented the port authority. In the suit, it was alleged that the regulation deprived devotees of their First Amendment rights.

⁵⁴ *Id.*, 3123.

⁵⁵ *Id.*, 3132.

⁵⁶ *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 116 S. Ct. 2374 (1996) (U.S. Dist. Col.), 2409.

⁵⁷ *Id.*

⁵⁸ Collectively, these airports form one of the world's busiest metropolitan airport complexes, and serve roughly 8% of America's domestic air traffic and over 50% of the trans-Atlantic market. They handle over 110 million passengers annually.

⁵⁹ *International Society for Krishna Consciousness, Inc. v. Walter Lee*, 112 S. Ct 2701 (1992) (U.S. N.Y.), 2703-4.

⁶⁰ *Id.*

The District Court for the Southern District of New York passed a judgment supporting ISKCON's right to practice in the terminals. However, on June 26, 1992, the Court of Appeals partly reversed that decision on the ground that airport terminals were unlike other public fora. Given the need to maintain order and safety precautions, the ban on solicitation was reasonable. The United States Supreme Court held that the airport terminal was a non-public forum for First Amendment purposes and that the existing prohibition on solicitation and distribution was justified.⁶¹ While Justices O'Connor, Kennedy, Blackmun, and Stevens concurred partly with that decision, Justice Souter filed a dissenting opinion, which was later supported by Justices Blackmun and Stevens.⁶² The Court of Appeals observed that traditionally, solicitation took place in transportation venues, like rail and bus stations, and wharves, many of which were privately owned. Equating airports with traditional transportation centers was erroneous as that missed the extent to which expressive activity could be accommodated. In their judgment, they reasoned that:

“The Port Authority, other airport builders and managers, and the Federal Government all share the view that terminals are dedicated to the facilitation of efficient air travel, not the solicitation of contributions...The Port Authority's ban on solicitation is reasonable. Solicitation may have a disruptive effect on business by slowing the path of both those who must decide whether to contribute and those who must alter their paths to avoid the solicitation. In addition, a solicitor may cause duress by targeting the most vulnerable persons or commit fraud by concealing his affiliation or shortchanging purchasers. The fact that the targets are likely to be on a tight schedule, and thus are unlikely to stop and complain to authorities, compounds the problem. The Port Authority has determined that it can best achieve its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly by limiting solicitation to the sidewalk areas outside the terminals. That area is frequented by an overwhelming percentage of airport users, making ISKCON's access to the general public quite complete... While the inconvenience caused by ISKCON may seem small, the Port Authority could reasonably worry that the incremental effects of having one group and then another seek such access could prove quite disruptive.”⁶³

The judgment underscored the convenience and practical needs of the passengers, and of the necessity for arranging an incident-free transition

⁶¹ *Id.*, 2706.

⁶² *Id.*

⁶³ *Id.*, 2703.

within the terminals. It also stressed upon the need to set an example by prohibiting potential solicitation efforts, irrespective of intent.⁶⁴ The reasoning emphasised the primacy of disciplined and controlled economic activity for facilitating the material and rational interests for all concerned parties. It underscored the need for maintaining decorum within the terminal, so that passengers and passersby were not distracted from their normatively tight schedule, due to mendicant solicitation. However, by restricting solicitation to the sidewalks outside the terminals, the judgment also recognised ISKCON's need to contact members of the general public.

Through the preceding discussion, the centrality of economic rational considerations is brought forth. Since the sole rationale for public presence in an air terminal is safe and secure travel, it is unlike any other public forum. Concerns related to safety and convenience, and the need to maintain efficiency are the primary considerations, to which any potential for disruption by soliciting itinerants was deemed avoidable. Like the other interested parties, ISKCON's legal position was evaluated on purely economic and rational terms. While the 'limited-purpose' terminal was seen as a resource to facilitate smooth travel, the spaces within were understood in their economic possibilities, as sources of revenue from the fixed-location commercial establishments, or even by the sale of entry tickets. To this, any potential source of disruption was unwelcome. Given the circumscribed scope of action for those not associated with primary purpose of travel, it is thus not really surprising that *sankirtan* inside a busy terminal was seen as being commensurate with material needs, and less guided by the other worldly constraints of spirituality. With material considerations emphasised over the spiritual, judicial positions became coterminous with normative economic-rational interests, and hardly by the transcendent, disinterested, and formal expectations of legality.

These cases offer a glimpse of judicial stances on public spaces. Although these cases uncover the legality of expressive religious solicitations, the legal position on using public spaces is applicable to other interest groups as well. In January 2000, the constitutionality of a Colorado statute that forbade approaching anyone without consent, within eight feet of that person's presence near a healthcare facility, was challenged.⁶⁵ The petitioners argued that they were within their legal rights to oppose abortion publicly, and that the Colorado statute violated the First Amendment. They sought an injunction against the statute and appealed against it in the Supreme Court.⁶⁶ In their concurring judgment, Justices Stevens, Souter, O'Connor, Ginsburg, and Breyer observed that the eight feet rule occurred only within 100 feet of a healthcare facility, or at the place where the restriction was crucial. The restriction interfered less with

⁶⁴ International Society for Krishna Consciousness, Inc. v. Walter Lee, 112 S. Ct. 2701 (1992) (U.S. N.Y.), 2704.

⁶⁵ Leila Jeanne Hill & Ors. v. Colorado, 120 S. Ct. 2480 (2000) (U.S. Col.), 2482.

⁶⁶ *Id.*

a speaker's ability to communicate, as compared to the total ban on picketing on the sidewalk, outside a residence.⁶⁷ The reasoning emphasised that private citizens had the power to decide what to read, heed or ignore. The statute empowered private citizens entering a healthcare facility, in the sense that within eight feet, they could avoid unnecessary contact and communication. As per the reasoning, the statute upheld, and did not curtail the First Amendment freedoms. While the distribution of handbills was considered more serious, the statute did not prevent a leaflet distributor from simply standing near the path of the pedestrians and solicit, to which pedestrians were at a liberty to avoid.⁶⁸

VI. ACCESSIBILITY, ECONOMISM AND SUBVERSION

In a liberal democratic regime, the legal and cultural politics of restriction are coterminous with regulatory regimes on accessibility and visibility. It is useful to remember Michael Walzer's classification of two kinds of public spaces: single-minded, and open-minded. While the former presupposes economic rational action, the latter's scope is unknown and unforeseen.⁶⁹ As single-minded spaces are premised on purposeful activity, they foster anonymity, privacy and discipline. By this definition, the airport terminal and the sidewalks of a public establishment are single-minded in facilitating purposive economic rational activity. Unlike single-minded spaces, open-minded spaces allow for the unpredictable and oftentimes irrational. However, these encompass a much broader canvas of social relationships, which foster normative expectations of civility, respect, and solidarity.⁷⁰

In the Minnesota Supreme Court's decision, the state authority's interest in arranging the orderly movement of a large crowd was considered germane, given the constricted area of the fair. While the fairground was, going by the scope of Walzer's definition, an open-minded space for visitors and patrons, the legal reasoning upheld that the 125 acres of fairgrounds were single-minded for facilitating commercial interests. As the fair's purpose was solely to generate business and patrons, any competing presence could be seen as distractive to the generation of profit. The presence of competing wandering mendicants was, seen in this light, distractive and unnecessary. By legally construing the fairgrounds as a closed space, the reasoning underlined the salience of disciplined flow of fairgoers for purposively rational activity. In other words, the fairground was understood as single-minded in the sense that it existed primarily to facilitate economic and rational exchange. Because it was reasoned that fairgrounds were a single-minded space, the material and commercial

⁶⁷ *Id.*, 2485.

⁶⁸ *Id.*

⁶⁹ Michael Walzer, *Pleasures and Costs of Urbanity*, 33(4) *DISSENT* 470-1 (1986).

⁷⁰ *Id.*, 472.

aspects of *sankirtan* were given precedence, following which restricting the Krishna devotees to a particular location was appropriate. While the logic of the single-minded space can be extended to the airport terminal, the post office sidewalk, and the demarcated space around a healthcare facility, there are other spaces predicated on single-minded purposes, where these distinctions may not necessarily hold. Following Walzer, it could be argued that the capacious waiting rooms of many nineteenth century railway terminuses (most of which are by the way, huge) are open-minded, and reflect the spirit of that age.⁷¹

In the legal understanding of public spaces, the idea of a public forum is situational. In the three types of public fora discussed here – ‘traditional’, ‘designated’, and ‘limited-purpose’, *sankirtan* was possible only in the first two. The airport terminal was understood as a ‘limited-purpose’ forum to facilitate safe and incident-free travel for travelers on a normatively tight schedule, with economic considerations restricted to fixed locations. As no one could be approached freely, asking for solicitations or donations applied to anyone or any group, including practitioners of *sankirtan*. Also, while facilitating public assembly and discourse are part of the normative expectation of a ‘traditional’ public forum like a fairground, the primacy of economic interests influence the reasoning on accessibility and visibility of expressive activities like *sankirtan*. This assumes criticality in the sense that the empirical reality of access to public spaces is determined not as much by the transcendent expectations of legality, but by economic and rational considerations, that subvert the criterion of access to a narrow range of possibilities.

Activities that have the ability to challenge normative liberal expectations are perceived as unwelcome threats to imagined social boundaries. Nicholas Blomley argues that economism is part of the liberal imagination of public space, and to that end, activities like begging are considered disruptive and unwelcome.⁷² While the liberal imagination situates space as a crucial resource for facilitating inclusive citizenship, and for embracing the multicultural expectations of difference, legal regimes (like the Street Safety Acts in North America) diminish the scope of access for the homeless.⁷³ By restricting the agency of actors availing the public space to purposeful and disciplined economic activity, and by restricting the public articulation of suffering, these multiple urban regulatory regimes (like the prohibitions on begging) essentialise normative expectations and expressions of citizenship to purposively rational economic activity.⁷⁴

⁷¹ *Id.*

⁷² Nicholas Blomley, *The Right to Pass Freely: Circulation, Begging, and the Bounded Self*, 19(3) SOCIAL & LEGAL STUDIES 332 (2010).

⁷³ *Id.*

⁷⁴ *Id.*; Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 (4) HARVARD L. REV. 899 (1991).

Just as the act of begging makes a public demand on the conscience of the addressee, and acts as a touchstone for self-introspection, a similar argument could be made for *sankirtan*. The reasoning on *sankirtan* underscored the primacy of economistic interpretations over the religious. Not surprisingly, the ritual of *sankirtan* was in many ways, equated with begging. Within the demarcated public fora, activities of the Krishna devotees were construed as manifestations of undisciplined economic rational behaviour that threatened disciplined economic activity. As the economistic liberal imagination presupposes disciplined bodies as a prerequisite for disciplined action, the normative expectation of choreographies of mobility in public spaces are to be predictable, and rule-bound. Considering that the liberal legal consciousness locates space as territorialised, deviations to these normative imaginaries are treated as unwarranted intrusions on territorialised notions of civility. As public spaces are contextualised as extensions of the bounded self, encounters with alternative forms of expression are legally conceptualised as threats to civic expectations. The restrictions and rulings that curtail the scope of *sankirtan*, by the use of economistic arguments throw light on regulatory regimes on public spaces for religious purposes.

VII. CONCLUSION

I have argued that legal positions on a new religious movement's use of public spaces are a useful indicator of legal consciousness regarding public religion. By underlining the salience of purposeful and productive activity in public spaces earmarked for specific types of behaviour, these legal positions crystallised the primacy of the economic and the rational. Considering that the choreographies of mobility in a public forum are predicated on normative expectations, to which deviations are unwelcome, *sankirtan* was understood as a disruptive activity that posed a significant threat to social norms. Any group whose activities in the public domain suggested an elastic adherence of existing regulations on public safety was suspect, and to that end, a religious ritual could not be exempt. Public attitudes on social issues are toolkits for understanding the ways in which ideas of legality are normalised within the process of legal reasoning. The legal reasoning underscored the monetary and material necessities of the Krishna devotees over the religious and spiritual. While the desire to regulate accessibility to the single-minded public spaces was guided by safety concerns to which any potential hindrance caused by the unpredictable presence of wandering mendicants was considered avoidable, the need to discipline crowd behaviour underscored the primacy of disciplined and stationary economic interests. In legal terms, the process of economistic reasoning is reflected in the framing of public spaces primarily from the prism of property rights, ownership, entitlements and other symbols of exchange value, and not so much as commonplace entities that are normatively accessible to residents of a formally civil society. In other words, legal practice helps in rationalising and normalising the expectations of single-minded public spaces. The primacy of

economic determinism suggests that it would be simplistic to assume that legal consciousness works autonomously, that legal reasoning is closed to extraneous variables, or that legality exists in a transcendent state of Parnassian detachment. Rather, it stands that the institutions and instruments of culture and law are in a constant dialogue, and mutually influence and reinforce each other, and in so doing, negotiate legal outcomes. This shapes how legal consciousness works, is understood, and passed on. To that end, this study offers a useful understanding on how legal consciousness works, with specific emphasis on the use of public spaces for religious solicitation, by a non-mainstream religious movement in the United States.