NORTH CAROLINA LAW REVIEW

Volume 46 | Number 1 Article 6

12-1-1967

Free Speech for Mustangs and Mavericks

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FREE SPEECH FOR MUSTANGS AND MAVERICKS

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> Struggles to coerce uniformity of sentiment of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. (Mr. Justice Robert Jackson in *West Virginia State Board of Education v. Barnette*,[1] striking down a compulsory flag-salute law.)

Introduction

Patience, good temper, and respect for the rights of others are among the growing casualties of the Viet Nam conflict. Although the courts have held fast to democratic traditions, and in some instances have extended first amendment freedoms to new fields, the pressures of uncertainty and confusion have pushed other public agencies, and private citizens, to extreme action. A martial spirit moved a large gang of Boston high-school toughs to beat to the ground eleven young pacifists protesting on the courthouse steps our presence in Viet Nam.[2] In Atlanta, the Georgia Legislature twice denied an elected seat to Julian Bond because of his anti-war expressions.[3] In Ann Arbor, University of Michigan students

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[1] 319 U.S. 624, 640 (1943).

[2] Boston's Mayor John F. Collins promptly held a televised press conference where he emphasized the obligation to protect the rights of all persons: "Precisely because any protest against United States foreign policy in Vietnam is unpopular among some citizens of Boston," he said, "it is even more urgent to protect this right. A law-abiding city cannot tolerate violence on its streets against those who embrace unpopular causes without undermining our very society." CIVIL LIBERTIES, May, 1966, at 3 (publication of the A.C.L.U.).

[3] The Supreme Court ordered his reinstatement because "Bond's disqualification because of his statements violated the free speech provisions of the First Amendment as applied to the States through the Fourteenth Amendment." Bond v. Floyd, 385 U.S. 116, 131-32 (1966). The Court explained that "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office. . . ." *Id.* at 136.

protested the war by a sit-in demonstration at the draft-board office, and promptly were denied their draft-deferred status as students.[4] High school students in Cleveland and Pittsburgh were suspended for wearing black armbands in mourning for the Viet Nam dead.[5] In San Francisco, the headquarters of the left-wing W. E. B. DuBois Club was bombed and gutted by unknown arsonists.[6] In Washington, D.C., the Daughters of the American Revolution denied the use of its Constitution Hall to folk-singer and pacifist, Joan Baez.[7]

When members of a small band of Catholic pacifists sought to dramatize their protest against the war by publicly burning their draft cards, Congress responded by making such protest a federal offense, punishable by a fine of 10,000 dollars or imprisonment for five years.[8] Subsequently, when a handful of peace demonstrators set fire to the flag at a rally in New York's Central Park, the first federal law in history making it illegal to "cast contempt upon any flag of the United States"[9] swept through the House of Representatives, with but sixteen nay votes.

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[4] The federal court held that the reclassification was unlawful because its effect "was immediately to curtail the exercise of First Amendment rights, for there can be no doubt that the threat of receiving a 1-A classification upon voicing dissent from our national policy has immediate impact upon the behavior of registrants and others similarly situated." Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

[5] Schlesinger, *McCarthyism Is Threatening Us Again*, SATURDAY EVENING POST, August 13, 1966.

[6] N.Y. Times, Sept. 30, 1966, at 22, col. 3.

[7] The Department of Interior promptly made the Washington Monument grounds available for the cancelled concert, just as thirty years earlier it had made the Lincoln Memorial available to Negro soprano, Marian Anderson, when the DAR had cancelled her scheduled concert at Constitution Hall for racial reasons.

[8] The federal appellate court in New York assumed that draft-card burning was a form of "symbolic speech" but held that the efficient functioning of the Selective Service System justified the limited infringement of free protest imposed by the 1965 amendment to the draft law. United States v. Miller, 367 F.2d 72 (2d Cir. 1966).

The federal appellate court in Boston disagreed, holding that the draft-card burning amendment "strikes at the very core of what the First Amendment protects." The court, however, sustained the Congressional requirement that "possession of the draft card be maintained at all times," and remanded the case to the trial court for resentencing without the "aggravating circumstances" of the public burning. O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), *cert. granted*, 36 U.S.L.W. 3125 (U.S. Oct. 10, 1967) (No. 232).

[9] Ironically, although commonly referred to throughout the debate as the "flag burning" law, H.R. 1048 as passed by the House makes it unlawful to cast contempt upon the flag or any replica thereof by "publicly mutilating, defacing, defiling or trampling upon it." An amendment to add the word

Close on its heals came the "Anti-Riot" legislation, punishing those who cross a state line with the intent to incite a riot. Proponents argued that its enactment "would cramp the style and make subject to criminal prosecution the Stokely Carmichaels, the Martin Luther Kings, the Floyd McKissicks, and others of their kind who preach anarchy or disobedience to the [draft] law."[10] A proposed amendment to protect "orderly and peaceful dissent" was voted down with but little support.[11]

The right to protest majority will, peacefully but with force and vigor, is a near victim of the civil-rights tensions in our major metropolitan centers. Kentucky clergymen in Louisville were pelted by white hecklers with mud and ball bearings as they marched in support of an open housing ordinance.[12] When the hecklers grew in number and ferocity, a local court enjoined the civil rights forces from marching after sunset.[13]

Earlier, in Chicago, Martin Luther King was stoned to the ground while four thousand whites threw rocks, burned cars, and jeered Negro marchers protesting segregated housing.[14] As white hostility intensified against the continued marches, Mayor Daley ob-

"burning" to the list was expressly rejected. 113 CONG. REC. 7544 (daily ed. June 20, 1967).

Three primary constitutional arguments were advanced during the debate by proponents of the bill who recognized that "symbolic speech" in other circumstances would receive constitutional protection.

First, the public act of desecration of our flag is so outrageous and shocking that it is beyond the pale. Reference was made to Lady Godiva, who rode horseback down the streets of Coventry clad only in a smile to protest by deed, rather than words, her disagreement with governmental policy. Reference was also made in this connection to the Puerto Rican terrorists who some years earlier had indiscriminately shot at members on the legislative floor.

Second, the public act of desecration of our flag is apt to produce a civil disturbance, in which not only the dissenter but also the person and property of others are exposed to an unreasonable risk of harm.

Third, the public act of desecration of our flag tends to undermine the morale of American troops. Many members could attest to this from their correspondence with servicemen expressing shock and disgust at such conduct. *See, e.g.*, the statement of Congressman Wiggins at 113 CONG. REC. 7505-06 (daily ed. June 20, 1967).

[10] 113 CONG. REC. 9001 (daily ed. July 19, 1967).

[11] 113 CONG. REC. 9000 (daily ed. July 19, 1967).

[12] N.Y. Times, May 16, 1967, at 91, col. 3.

[13] N.Y. Times, April 15, 1967, at 27, col. 1. The injunction limited marches to daylight hours, excluding morning and afternoon rush periods, restricted the number of marchers to 150 or less, and required that the police be notified at least 12 hours before any march.

[14] N.Y. Times, August 6, 1966, at 1, col. 3 (city ed.).

tained a court injunction against the size, frequency, and location of the civil-rights parades.[15] When Dr. King announced a Sunday march in the all-white suburb of Cicero, officials there sought to block the demonstration with a court injunction to stave off "obvious disaster."[16] The march went on only after Governor Kerner sent 2,000 Guardsmen to lead the marchers through a gauntlet of rock-throwing whites waving the Nazi swastika and confederate flags.[17]

In Wisconsin, the situation was equally grave when the Milwaukee NAACP youth group began nightly prayer vigils at the suburban home of Circuit Judge Robert Cannon to protest his membership in an "all white" Eagles Club.[18] At first there was little notice, but soon the white counter-protest reached the dimension where protection was needed. Governor Knowles sent in Guardsmen who—shoulder to shoulder with fixed bayonets—held back the mobs while teenagers cried, "Kill, kill, kill the jungle bunnies."[19] The civil-rights demonstrations ended when the state Attorney General announced plans to seek a court injunction.[20]

Similar situations are found the country over. But it is not only pacifists and civil-rights enthusiasts who bear the brunt of community reaction, by mobs and by the officials. Hard times for the dissenter know no boundaries; geographical, political, or temporal.

The Ku Klux Klan

The Ku Klux Klan and related groups have been denied the right to assemble, to speak, and to petition for redress of their grievances. In Cicero, during the civil-rights protest, town officials warned that they would arrest any Klansman on sight for disorderly conduct.[21] In Baltimore, a Maryland court enjoined a public rally by the National States Rights Party because of the tense racial situation.[22] In Indiana, a state court enjoined a Klan rally on a private farm near Dillsboro.[23] In New Jersey, Attorney General Arthur Sills obtained a court order against a similar Klan meeting after reading

[15] N.Y. Times, August 20, 1966, at 1, col. 3.
[16] N.Y. Times, August 24, 1966, at 34, col. 5.
[17] N.Y. Times, Sept. 4, 1966, at 54, col. 2.
[18] N.Y. Times, August 30, 1966, at 31, col. 3.
[19] N.Y. Times, August 29, 1966, at 1, col. 1.
[20] N.Y. Times, August 31, 1966, at 32, col. 7.
[21] N.Y. Times, Sept. 4, 1966, at 54, col. 3.
[22] N.Y. Times, August 12, 1966, at 17, col. 6.
[23] N.Y. Times, May 20, 1966, at 41, col. 2.

newspaper accounts that three busloads of Black Muslims from Philadelphia intended to crash the private rally.[24] Two reasons were given for the injunction: first, that its "white only" character violated the state's anti-discrimination laws; and second, that the contemplated cross-burning ceremony would violate the state forest fire regulations.[25]

A similar incident in North Carolina ended on a different note. The problems were identical; only the protagonists differed.

In a few of the southeastern counties of North Carolina along the Lumbee River lives a unique band. Known variously as Lumbee Indians, Croatoans, or the Cherokee Indians of Robeson County, their origin is obscure. Some believe they are descended from the survivors of Sir Walter Raleigh's "Lost Colony," befriended and adopted by the nearby Croatoan Indian tribe. Others think their origin goes back to Moors or Turks who came to fight with the colonists during the Revolution.

The law has contributed to the mystery, and to the isolation, of these people. From 1885 until a recent federal court decision, these southeastern North Carolina counties required a tri-racial school system; for whites, for Negroes, for Indians, with the quality of educational offering descending in this order. Robeson County even had a fourth school system: for "Smilings" whom the Indians disowned, and who refused to attend school with the Negroes.[26] Miscegenation laws isolated these people still further by prohibiting marriage between "Cherokee Indians of Robeson County" and their neighbors.[27]

Poorly educated and hard pressed to make a living, the Lumbee Indians remain clannish, inbred, independent, proud, quick-to-anger, and since 1958, bitter enemies of the Ku Klux Klan.

In that year the Klan burned two crosses in Robeson County,

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[24] N.Y. Times, May 19, 1966, at 34, col. 4.

[25] N.Y. Times, May 22, 1966, at 60, col. 5.

[26] NORTH CAROLINA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, REPORT 120-24 (1962). Northampton County lists a school as "Portuguese"; and Warren County, a school for "Haliwa." In most other counties and cities of the State, the Indians are assigned to "white" schools.

[27] N.C. GEN. STAT. § 51-3 (1965) provides that "All marriages between a white person and Negro . . . or between a Cherokee Indian of Robeson County and a Negro . . . shall be void." Until a 1961 amendment, this prohibition also applied to a marriage between white persons and Indians and persons of Indian descent.

On June 12, 1967, the Supreme Court held that state miscegenation laws were unconstitutional. Loving v. Virginia, 388 U.S. 1 (1967).

one in front of the house of an Indian woman to warn against an affair with a white man, and the other at the home recently occupied by an Indian family in a white neighborhood. The Klan leader, the Reverend James "Catfish" Cole, publicized an upcoming rally and orated on maintaining school segregation in inflammatory terms: "If the (official) Pearsall Plan doesn't work the (unofficial) Smith and Wesson Plan will."[28]

When the Klan held an announced meeting on a private farm near the rural community of Maxton, the Indians turned out with vengeance, and with their own "Smith and Wesson Plan." Dressed in feathers and paint, they broke up the meeting with war-whoops and a fusillade of 200 shots. Two people, a news reporter and a soldier-bystander, were slightly injured by the gunfire. The state chuckled, Grand Wizard Cole was convicted of inciting a riot and no legal action was taken against the Indians.[29]

Early in March of 1966, the Klan announced a meeting at the scene of its earlier humiliating rout. Immediately there were police reports and newspaper rumors that the Indians were stockpiling high-powered rifles, shotguns, dynamite, and even hand grenades. Superior Court Judge W. A. Johnson promptly issued a temporary injunction prohibiting any Klan meeting within 20 miles of Robeson County.[30]

Most of the state approved; only the North Carolina Civil Liberties Union denounced this state action as a ban on free speech. ACLU attorney Anthony Brannon of Durham asked leave to file a friend-of-the-court brief in support of the Klan motion to dismiss the temporary court order prohibiting its rally. The Klan apparently wanted no such friendship. The state also opposed and the Judge denied the ACLU motion to intervene as coming too late. The Civil Liberties Union, however, took comfort when it became apparent that its brief, circulated earlier, had supplied the grist of oral argument.

Malcolm Seawell, a former North Carolina Attorney General, led off for the state with over 170 affidavits warning of violence. One such affidavit, from the State Bureau of Investigation, told that Grand Dragon Robert Jones always carried a .38 caliber pistol, and that over 16 M-1 carbines and 50 tear gas tins were counted

[28] State v. Cole, 249 N.C. 733, 107 S.E.2d 732 (1959).
[29] *Id.*
[30] Durham Morning Herald, March 31, 1966, at 3, col. 1.

at a recent Klan rally. Seawell told the court that if the Klan met in the area, "there will be bloodshed, there will be loss of life, and there will be damage to property."[31]

Klan attorney Lester Chalmers made no attempt to counter the allegations of violence, but instead centered his arguments on the constitutional rights of free speech and assembly. He told the court that the Klan planned no violence, that any trouble would be initiated by the Indians, and that the "State has time to provide police protection." The Klan attorney recalled that Governor Hodges a few years earlier had sent the National Guard to strike-torn Henderson and added: "If the state can provide protection to a mill owner, I believe it can provide equal protection to the KKK for an exercise in freedom of speech."[32]

On April 18, Judge Johnson held for the Klan. The Judge admitted that his decision "was not an easy one," but he ruled that the objecting Indians "have no right to protest by taking up arms;" and that "freedom of speech and freedom of assembly are so vital, I cannot see how this court can deny an organization the right to meet."[33]

Robeson County Sheriff Malcolm McLeod commented after the decision that he still thought violence would erupt if the KKK came into Robeson. Grand Dragon Jones, however, was jubilant: "If I break the law, I expect to be locked up. If anyone else breaks the law, I expect them to be locked up." He admitted, however, that plans for a Klan rally in Robeson were indefinitely postponed.[34]

Despite the humorous overtones, this episode illustrates serious and recurrent questions going to the heart of the right to dissent: the right of rejected minorities to assemble and sponsor ideas which are odious to the majority in the community. The decision here in favor of speech is of significance to everyone, not merely to Klan members. If the threat of Indian mob violence justifies a state injunction prohibiting a KKK meeting, no minority organization is safe. Vigilante groups would find an easy route to silence unpopular views. By threatening lawless violence, hoodlums could intimidate state and local officials into cancelling meetings of labor

[31] Durham Morning Herald, April 1, 1966, at 12, col. 2.
[32] Greensboro Daily News, April 19, 1966, at 1, col. 7.
[33] *Id.* at col. 4.
[34] *Id.* at col. 8.

unions, peace groups, World Federalists, civil rights organizations, dissident religions—the list is endless.

Fortunately for free speech and assembly, the Klan decision in North Carolina signifies that the law does not permit the suppression of unpopular views, presented in a peaceful and orderly fashion, merely because others resent these views and resort to lawless action. Decisions arising out of earlier efforts to silence other unpopular minorities clearly support the constitutional right of Klansmen to assemble on a private farm and there don hooded robes, burn a cross, sing a hymn, and build up their collective ego by condemning Jews, Catholics, Negroes and even Lumbee Indians as inferior creatures.

Labor Unions

Labor unions have gradually, and grudgingly, won the rights to assemble, to distribute leaflets, to picket, and otherwise to carry on their organizational activities. For many years trade unionists were considered illegal conspirators and outside the law. Such was the situation during the mid-1930s in Jersey City. When the CIO first sent organizers there, Mayor Hague destroyed their leaflets, arrested the organizers, and dumped them on ferryboats destined for New York. He justified this suppression on the theory that the CIO was a "Communist organization," and that CIO organizers inevitably would create "riots, disturbances or disorderly assemblage." The Supreme Court admitted that the total prohibition of speech would prevent riots, but this would be throwing out the baby with the bath. It held that suppression of free expression "cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."[35]

A few years later the Supreme Court again upheld the right of labor unions to disseminate their views in an unfriendly environment. Here, Alabama sought to preserve peace and order in the community by outlawing all picketing in an inflammatory situation. A local union leader named Thornhill was arrested for "unlawful intimidation" when he violated a state law making it illegal to picket "at or near the scene" of a labor dispute. Alabama argued that "violence and breaches of the peace" are inevitably and invariably "the concomitants of picketing" and that consequently the latter can be prohibited to prevent the former. But the Supreme Court disagreed.

[35] Hague v. Committee for Indus. Organization, 307 U.S. 496 (1939).

It told Alabama that it could preserve the peace by arresting lawbreakers if and when violence erupted, but that it had a *primary* obligation to protect picketers and "freedom of discussion on matters of public concern."[36]

The harassment of trade union organizers continues to this day in certain areas of the country. One device widely used in the southeast is the municipal licensing ordinance. These ordinances make it a crime for a union or union organizer to solicit anyone to join a union without first securing a license. Usually an exorbitant license fee is fixed, and sometimes there is a daily fee or a fee for each person joining. On occasion, the application for the license must be verified by a local citizen of "good repute." Although these ordinances seem clearly unconstitutional,[37] they continue to proliferate.[38]

The harassment of trade union organizers and their sympathizers is sometimes more direct. In July of 1967, five ministers from California were arrested in Texas as they gathered at the local jail to protest the arrest of striking agricultural workers by reciting the Lord's Prayer. The charge—disturbing the public peace.[39]

Minority Religious Groups

Not only labor unions, but also the dissident and minority religious groups have trouble when their views are antagonistic to the more orthodox community beliefs. But the courts, on many occasions, have upheld the right to preach these views, even in the face of local disorder and tumult.

One such case involved Carl Kunz, an ordained Baptist minister whose conviction and duty was to "go out on the highways and byways and preach the word of God." In 1948, he preached around Columbus Circle in New York City where he ridiculed and denounced other religious beliefs. "The Catholic Church," he said, "makes merchandise out of souls;" and the Jews are "Christ-killers" who "should have been burnt in the incinerators." These utterances, as one might expect, stirred strife and violence. Kunz testified that he had become acquainted with one of the complaining witnesses,

[36] Thornhill v. Alabama, 310 U.S. 98 (1940).

[37] Staub v. City of Baxley, 355 U.S. 313 (1958); Denton v. City of Carrollton, 235 F.2d 481 (5th Cir. 1956).

[38] Brief for AFL-CIO as Amicus Curiae at 12-15, Walker v. City of Birmingham, 385 U.S. 809 (1966).

[39] 113 CONG. REC. 8998 (daily ed. July 19, 1967) (statement of Rep. Frank Thompson, Jr., Chairman of the Special Subcommittee on Labor).

whom he thought to be a Jew, "when he happened to sock one of my Christian boys in the puss." He also testified, "I have trouble" when the police are absent, but "with an officer, no trouble."

Kunz's street-preaching license was revoked because of the fist fights, and he was convicted and fined ten dollars for his subsequent preaching without one. The Supreme Court, in an opinion by Chief Justice Vinson, reversed, because the denial of the license unlawfully suppressed free speech. The Court added that apart from denying a preaching license to a known troublemaker like Kunz, there are more "appropriate public remedies to protect the peace and order of the community."[40]

One appropriate remedy would be to arrest Kunz if he spurred his own followers into lawless conduct. Such an arrest for disorderly conduct was sustained by the Supreme Court when violence erupted after a street orator in Syracuse, New York, urged the Negroes in his mixed audience to rise up in arms.[41]

Another remedy to preserve the peace, when the speaker is lawful, is to have police available in case of lawless conduct by the listeners. This was the approach used by a United States Court of Appeals when Jehovah's Witnesses were set upon and beaten shortly after World War II by the "G. I. boys" in Lacona, Iowa.

The Jehovah's Witnesses take literally the biblical admonition against paying homage to "graven idols," and refuse to salute or otherwise honor the American Flag. In past years, this refusal has raised the ire of many, just as today the "flag burning" at peace rallies draws public condemnation. This was the situation in 1946 when the Witnesses attempted to hold a series of four Sunday meetings in the town park of Lacona.

At the first of such meetings, while the speaker was preaching on "Religion as a Peacemaker," he was heckled and jeered. When the Jehovah's Witnesses returned for the second meeting, a crowd of 700 or more filled the park, and there were "numerous fist fights, with the usual results—bloody faces, black eyes, broken glasses and teeth, and torn clothing." During the third week, the Sheriff deputized over 100 local citizens to prevent a breach of the peace, and the deputies used their power to block the Jehovah's Witnesses' entrance to the town.

[40] Kunz v. New York, 340 U.S. 290 (1951).
[41] Feiner v. New York, 340 U.S. 315 (1951).

The federal court told the town officials to turn their power the other way and to protect the Witnesses, by arresting the "G. I. boys" if necessary. "Certainly," held Judge Sanborn, "the fundamental rights to assemble, to speak and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised."[42]

Elsewhere, Jehovah's Witnesses ran into trouble while they were holding a district convention at the high school in Duncan, Oklahoma. Local citizens drove a sound truck through the Sunday streets exhorting "red blooded Americans" of Duncan to come to the high school and "fight for the flag." They did, armed with "sticks, rocks, guns and other instruments of violence." They broke up the assembly and beat up the Witnesses until the city firemen quenched the violence with a water hose. Subsequently, the Witnesses sued the chief of police and other city officials for failure to provide protection, and won. The federal court of appeals held that the city officials had an obligation "to make the Jehovah's Witnesses secure in their right to peaceably assemble," and that "one charged with the duty of keeping the peace cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded. He must stand on the side of law and order or be counted among the mob."[43]

Right Wing Groups

An even stormier session took place in Chicago when Father Terminiello, a suspended Catholic priest, gave a speech under the auspices of the Christian Veterans of America. Gerald L. K. Smith and other well known right wingers had sponsored and publicized the meeting, and it opened behind a protesting picket line of over 1,500 persons. Once inside, Terminiello gave an inflammatory speech. He said that "Queen Eleanor [Mrs. Roosevelt] is now one of the world's communists," that "Franco was the saviour of what was left of Europe," and, about "Communistic Zionistic Jews," that "we want them to go back where they came from." He described his reception outside the hall: "The street was black with people on both sides for at least a block either way; bottles, stink bombs and brickbats were thrown. About 28 windows were broken."

[42] Sellers v. Johnson, 163 F.2d 877, 881 (8th Cir. 1947).
[43] Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951).

The crowd constituted "a surging, howling mob hurling epithets at those who would enter and tried to tear their clothes off."

No one in the mob was arrested, but Terminiello was tried for disorderly conduct and found guilty under a law making it illegal to give a speech which "stirs the public to anger, or creates a disturbance." The Supreme Court reversed. Mr. Justice Douglas held that this was the very function of constitutionally protected free speech: that "it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." He noted that "speech is often provocative and challenging . . . and may have profound unsettling effects as it presses for an acceptance of an idea." But such speech must be protected, said the Justice, for "the alternative would lead to standardization of ideas either by legislatures, courts or dominant political or community groups."[44]

Right wing speakers also have had trouble in New York City, at least initially. George Lincoln Rockwell, self-styled Nazi, asked permission to give a Fourth of July speech in Union Square, a small place in the heart of New York's crowded business area. Park Commissioner Morris denied the permit, because a Nazi meeting at that location and on that patriotic day could not be held "without resultant disorder, riot and violence endangering city property and the safety and welfare of the residents." On appeal, the New York court ordered the permit. Mr. Justice Breitel said: "Only if Rockwell speaks criminally can his right to speak be cut off. If he does not speak criminally, then, of course, his right to speak may not be cut off, no matter how offensive his speech may be to others. Instead, his right, and that of those who wish to listen to him, must be protected, no matter how unpleasant the assignment."[45]

A more respectable conservative ran into similar licensing difficulties. William Buckley, publisher of the *National Review* and later Conservative Party candidate for mayor, had a lease to use a hall at Hunter College for a series of talks. At one of them, Jacques Soustelle, a leader of the French right wing movement, spoke on the necessity of keeping Algeria French. This meeting aroused great controversy and was picketed. Thereupon, Hunter

[44] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[45] Rockwell v. Morris, 12 App. Div. 2d 272, 211 N.Y.S.2d 25, *aff'd mem.* 10 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 268, *cert. denied*, 368 U.S. 913 (1961).

College, a municipal institution, cancelled the lease for further meetings because the point of view presented was "opposed by substantial parts of the public." Buckley promptly brought suit against President Meng of Hunter College, and the New York court ordered that the lease be reinstated. This was on the "simple principle" that the state cannot do indirectly what it may not do directly. "Since there is no power in the state to stifle minority opinion directly by forbidding its expression," remarked Justice Markowitz, "it may not accomplish this same purpose by allowing its facilities to be used by proponents of majority opinion while denying them to dissenters."[46]

Civil Rights Demonstrators

It is the Civil Rights Movement, however, which has done most to establish the legal principle that "Constitutional rights may not be denied simply because of hostility to their exercise." These were the words of Mr. Justice Goldberg when the Supreme Court told the City of Memphis that it could not delay integration of city parks to avoid "interracial disturbances, violence, riots, and community confusion and turmoil."[47] This was the sentiment of Mr. Chief Justice Warren when the Supreme Court told the Little Rock School board that it could not postpone integration in its Central High School because of "extreme public hostility" on the outside, or because of "chaos, bedlam and turmoil" within.[48] It was for this reason that the Supreme Court sustained the right of Negro students in South Carolina[49] and Louisiana[50] to march in large numbers protesting Jim Crow policies, even though "a dangerous situation was really building up" among the white onlookers.[51]

The lower federal courts have protected the rights of Negro and White protesters throughout the South: in Albany, Georgia, where Judge Bell directed the city police to protect the Negro marchers from the three to four thousand aroused spectators;[52] in St. Augus-

[46] Buckley v. Meng, 230 N.Y.S.2d 924, 35 Misc. 2d 467 (Sup. Ct. 1962).
[47] Watson v. City of Memphis, 373 U.S. 526 (1963).
[48] Cooper v. Aaron, 358 U.S. 1 (1958).
[49] Henry v. City of Rock Hill, 376 U.S. 776 (1964); Fields v. South Carolina, 375 U.S. 44 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963).
[50] Cox v. Louisiana, 379 U.S. 559 (1965).
[51] Edwards v. South Carolina, 372 U.S. 229 (1963).
[52] Kelly v. Page, 335 F.2d 114 (5th Cir. 1964).

tine, Florida, where Judge Simpson told the police chief to protect the nightly marches to the Slave Market from the "armed toughs and hoodlums, Klan types, armed with sticks, metal rods, chains, knives, etc.;"[53] in McComb, Mississippi, where Judge Tuttle held for the Freedom Riders that "the discontent and unrest of the local populace resulting from the unpopularity of racial integration in the bus terminal, are no grounds to prohibit what otherwise would be a constitutionally guaranteed right and freedom."[54]

When the Freedom Riders left Anniston, Alabama, their bus was dynamited; and when they reached Montgomery, they were assaulted while the police stood by without "lifting a finger." Judge Johnson promptly ordered the Klan leaders responsible to cease all violence or face contempt of court, and he ordered the police chief to cease "failing or refusing to provide protection for all persons traveling in interstate commerce in and through the City of Montgomery."[55]

The most vivid illustration that "Constitutional rights may not be denied simply because of hostility to their exercise" is found in the Selma march for voting rights. After weeks of fruitless effort to register while Sheriff Jim Clark said "never," the Reverend Martin Luther King announced plans to publicize the local vote denial with a march on the state capitol in Montgomery. Governor Wallace issued an official proclamation "absolutely banning the march" and said "it would not be tolerated." When the Negro demonstrators began their long trek, state troopers drove them back across the Selma bridge with tear gas and billy clubs while local deputies on horseback rode them down. King and the other civil rights leaders turned to the federal court for protection, and Judge Johnson came to their aid.

The federal judge saw the potential of danger on the five day walk for freedom but held that "hostility to this march will not justify its denial. Nor will the threat of violence constitute an excuse for its denial." The court ordered "police protection in the exercise of this constitutional right to march along U.S. Highway 80 from Selma to Montgomery," despite the "considerable burden imposed upon the law enforcement agencies of the State of Ala-

[53] Young v. Davis, 9 Race Rel. L. Rep. 590 (1964).
[54] Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th Cir. 1963).
[55] United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961).

bama."[56] Ultimately, the United States underwrote the police protection costs by federalizing the state national guard.

Conclusion

It is understandable why local authority desires to curb a march protesting local conditions and customs of long tradition. It is easy to sympathize with the desire of elected officials to arrest an out-of-state Freedom Rider, whose mere presence creates an incendiary situation. It is natural to side with the Lumbee Indians, and chuckle that the Klan is getting its due when a state judge bans a cross-burning ceremony. It is understandable why a Park Commissioner would deny a self-styled Nazi a permit to harangue in the heart of New York's garment district on the Fourth of July. Why, then, does the Constitution give protection?

The short of the matter is that once the state gives rein to vigilante power, against the unworthy and for beneficient purposes, we are all the loser. No one can tell who will be next. Mr. Justice Frankfurter explained why the privacy of even a wartime black-marketeer must be protected against a governmental search and seizure:

> It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.[57]

Much earlier, Mr. Justice Brandeis explained the rationale for curbing police wire-taps, even when used in the aid of law enforcement against bootleggers:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.[58]

Protection of the "unworthy" is especially essential in the area of free speech and assembly, where the response to a bad idea may

[56] Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

[57] Davis v. United States, 328 U.S. 582, 597 (1946). This was a dissenting opinion, but there was no disagreement with this sentiment.

[58] Olmstead v. United States, 277 U.S. 438, 479 (1928) (dissenting opinion).

in turn spark new concepts and insights. The maverick who departs the herd might well blaze short-cuts to Armageddon, or at least to new and accessible way stops. Society needs the plow horse with blinders; it also needs the sometimes unique contribution of the mustang who kicks over the traces. The country is big enough for all. Mr. Justice Holmes put forth the "theory of our Constitution" in these famous words when he sought to protect free speech for the Communists at the close of World War I:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[59]

There is nothing new or novel about this concept. It was advanced almost 2,000 years ago by a Pharisee named Gamaliel at the trial of Peter and John.[60] After the Crucifixion, the Apostles gathered in Jerusalem to teach the people. Peter and John worked miracles before an ever-increasing throng; they even healed a lame beggar at the temple gate. For this they were arrested and brought before the "rulers, elders and scribes." Annas, the high priest, "commanded them not to speak at all nor teach in the name of Jesus." Peter and John disregarded this mandate, and were again brought before the council because of their continued preaching. The High Priest asked: "Did we not straightly command you that ye should not teach in his name?" The Apostles answered: "We ought to obey God rather than men." The elders, "when they heard that, they were cut to the heart, and took counsel to slay them." Then, "stood there up one in the council, a Pharisee, named Gamaliel, a doctor of the law." Gamaliel reviewed the history of earlier Prophets—Theudas, Judas of Galilee, and others—who momentarily had gained large followings, and then concluded:

> And now I say unto you, Refrain from these men, and let them alone: for if this counsel or this work be of men, it will come to nought; but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God.

[59] Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).
[60] The Acts, Chapter 5.

As the chapter concludes, "to him they agreed," and when they had called the apostles, and beaten them, they let them go.

It is not necessary to equate Peter and John with today's dissenters to ask whether the United States should be less receptive to radical concepts than the theocratic state of ancient Israel.