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THE HECKLER'S VETO: A REEXAMINATION

RUTH McGAFFEY*

INTRODUCTION

In the late nineteenth century, members of the Salvation Army were arrested on the charge of disorderly conduct after a "Skeleton Army" had broken up their street parade.\(^1\) In 1938, labor organizers were denied a permit to speak in New Jersey because there was threatened disorder on the part of opposing groups.\(^2\) In 1946, the mayor of a small Iowa city set up roadblocks to prevent Jehovah's Witnesses from conducting a religious meeting in a city park because citizens had threatened to disrupt the meeting.\(^3\) In 1958, the city officials of Little Rock, Arkansas, asked permission to delay integration of the public schools because white sentiment was considered dangerous to public order.\(^4\) A decade later the Chicago police demanded that demonstrators disperse in order to prevent what they feared might become a riot when comedian Dick Gregory marched into the neighborhood of Mayor Richard Daley to protest racial segregation, even though the demonstrators themselves had been completely peaceful.\(^5\) And finally in 1972 a district court in Texas held that the flag desecration portion of the Texas Penal Code was a valid exercise of the police power of the state to prevent the violence which would naturally result from public indignities perpetrated on the national emblem.\(^6\)

In each of these instances the underlying question was the same. That question, perhaps one of the most difficult to be faced by our society, was: To what extent shall the actions of a hostile audience be allowed to interfere with the exercise of constitutional rights? The issue has usually arisen when an unpopular minority has insisted upon exercising its rights in spite of the probable opposition of the majority of the community. Those minority groups have been religious, such as the Salvation Army or the Jehovah's Witnesses, labor or socialist, occasionally racist, and in the last decades have been racial minorities or anti-war protesters. In each case the situation has involved an individual or group intent on

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exercising First Amendment Rights, an opposing group intent on expressing opposition, and law enforcement officials who must resolve the situation. That situation does not present a simple problem. Harry Kalven has expressed it in this manner:

The problem is a genuine puzzle either way it is decided. If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve. But the opposing view, that the police must go down with the speaker, has its obvious difficulties.7

The impression given by much of the literature in this area is that the courts have decided in favor of the speaker and have often reversed action taken by law enforcement officials against those speakers and demonstrators. To an extent that is true. However, as Professor Robert M. O'Neil has said:

The ultimate issue has never been decided in any court. That is, if the speaker is perfectly willing to risk injury or even death, as the price of going on, do the police have the power to protect him by cutting him off when they cannot insure his safety by controlling the crowd?8

Or, as Professor Franklyn Haiman has suggested, should they protect the speaker even if it means calling out the national guard or any other military force?9 This essay will discuss the importance of facing the issue directly, and the difficulties inherent in solving it. Both of these problems will be illustrated by discussing the historical development of the answer to the hostile audience problem.

The early background of the problem is made unusually confusing because, while the courts have often decided in favor of protecting individual speakers, both legislatures and courts have agreed that possible violent audience reaction is a justifiable rationale for certain laws, particularly those relating to protection of national symbols.10 Thus while in each of the cases used to intro-

duce this essay, the court upheld the rights of a speaker, a district court also justified upholding a law limiting symbolic expression on the grounds of possible reaction of a hostile audience.\textsuperscript{11}

The Hostile Audience and the Courts

In perhaps the earliest case on the subject, the law enforcement officials decided in favor of the hostile audience and against freedom of expression. In this English case, however, the court reversed the action of the local court.\textsuperscript{12} Using this case as support, Dicey’s Introduction to the Study of the Law of the Constitution, published in 1897, stated:

... no meeting which would not otherwise be illegal becomes unlawful because it will excite opposition which is itself unlawful, and thus will indirectly lead to a breach of the peace. The plain principle is that A’s right to do a lawful act, namely walk down the High Street, cannot be diminished by X’s threat to do an unlawful act, namely to knock A down.\textsuperscript{13}

In April of 1970, the United States Supreme Court upset the conviction of several anti-war protesters on the grounds that they may have been convicted because of the unfriendly reaction of onlookers. The Court stated, quoting Street v. New York, 394 U.S. 576, 592 (1969):

... "[I]t is firmly settled that under our Constitution the public expression of ideas are themselves offensive to some of their hearers," ... or simply because bystanders object to peaceful and orderly demonstrations.\textsuperscript{14}

These two examples give the impression that the courts, at least, have always been on the side of freedom of expression. That is not true. A description of the historical development of the attempts to answer the problem posed by the hostile audience will indicate that the position of the courts has not been consistent.

This judicial struggle with the problem illustrates the fact that the courts in this country are reflections of our society. Problems

\begin{itemize}
  \item 12. In Beatty v. Gilbanks, \textit{supra} note 1, at 314, the judge ruled: What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants \textit{[The Salvation Army]} and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, ...  
\end{itemize}
which divide our society tend also to divide the courts. There is a clear ambivalence in this nation between the desire for individual freedom and the wish for law and order. When those two interests come into conflict, our population becomes divided. The same division occurs within our judicial system.

A second factor which may affect the development of this area of law is the extreme difficulty of putting the guarantees of the Constitution into concrete language. The difficulty in getting several justices to agree on standards to be applied is great. However, when these standards must be made concrete enough to be understood and applied by local judges and local law enforcement officials, the problem is magnified. This same ambiguity of language could be expected to make the application of judicial precedent quite variable according to which way an individual judge chooses to interpret the language of a previous decision. Arriving at concrete, workable standards proves especially difficult when part of the law from which a concept is developed is the common law tradition of right of assembly, and the common law crime of breach of the peace, while a second part is statutory law, and a third part is constitutional interpretation.

Early Development

The right of assembly was assumed to exist as a common law right prior to the Constitution. According to judicial theory prior to 1925, the Constitution did not protect that right from infringement by the states. The states were assumed to have the obligation to maintain public order and tranquillity. In order to secure that tranquillity, they could either pass laws providing for means of punishing those who violated public order, or they could employ common law offenses such as unlawful assembly or breach of the peace. Even statutes used these common law definitions as a basis for convictions. The common law definition of breach of the peace included "a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace." This definition suggested that anything or anyone who deliberately or unintentionally aroused the hostility of someone else, was responsible for the second party's actions. It was a logical consequence then, to write laws forbidding certain behavior which might have that effect. The laws forbidding display of flags on advertising or display of red

flags were justified on that basis. This tendency to prohibit by statute any activity which it was thought would arouse unlawful activity in others was evident during World War I. Some of the Espionage Act prosecutions were decided on that basis. In Gilbert v. Minnesota, the United States Supreme Court ruled that Gilbert could be convicted because his audience was disorderly and hostile.

One of the earliest United States cases which did not consider that the State's interest in order could be used to prohibit activity which might arouse some kind of hostility was Dearborn Publishing Company v. Fitzgerald, decided by the United States District Court for Northern Ohio in 1921. The Dearborn Publishing Company published an anti-Jewish newspaper. The police department insisted that, while the paper could be sold in stores and on newsstands, it could not be peddled on the streets. The police department contended that sales on the streets would tend to cause disorder. The publishing company sought an injunction to prevent this restraint of their sales. The court granted the injunction.

A second case in which a judge took substantially the same position occurred thirteen years later in New Jersey. That state was not notably liberal in its policy toward public speakers. However, a decision in 1934 indicated that all judges were not in favor of the common New Jersey practice. The case in point was American

16. See authorities cited at note 10 supra.
17. 254 U.S. 325 (1920). Justice McKenna wrote:
Gilbert's remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence, and such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or danger of it is a proper exercise of the police power of the state.

18. 271 F. 479 (N.D. Ohio 1921). The court stated:
The affidavits conclusively show that no disorder or excitement was created on the streets by the sales in question. Nothing appears to indicate who were or might be excited by its sale to break the peace. It would be a libel, it seems to me, on the people of the Jewish race to assume that they are imbued with such a spirit of lawlessness. If it be assumed that the article might tend to excite others to breaches of peace against people of the Jewish race, the reply is plain. It is the duty of all officials charged with preserving the peace to suppress firmly and promptly all persons guilty of disturbing it, and not to forbid innocent persons to exercise their lawful and equal rights.

League of Friends of New Germany v. Eastmead. The American League had been denied a permit to hold a public meeting. In affirming their right to hold such a meeting, Judge Bigelow of the Court of Chancery of New Jersey said:

The defendants say, in effect, that if the meeting takes place speeches will be made extolling the present government of Germany and advocating measures to abridge the rights of Jews in the United States; that Jews will thereby be incited to riot; and that defendants forbade the meeting in order to avert disorder and possible bloodshed. The explanation does not, in a legal sense, excuse defendants. Our law does not prohibit the public expression of unpopular views. . . . If lawless elements in the community instead of ignoring such propaganda, or meeting it by sound argument, resort to riot, it is the duty of police to protect the lawful assemblage and to repress those who unlawfully attack it.

An apparently more typical case for New Jersey, however, was decided by the Supreme Court of that state in 1938. The case resulted from an attempt by Norman Thomas to compel the authorities of Jersey City to allow him to speak in that city. One of the judge's statements makes it clear why the attorneys in the case of Hague v. CIO decided to try the federal courts. His conclusion was:

Often a public speaker is subjected to rough handling even in this country. When opposition to a speaker's views run [sic] high, no reason exists for subjecting the speaker and innocent bystanders to dangers of assault.

It will be recalled that the officials of Jersey City consistently refused permission to speak if those officials could find any possible threat of disorder. They apparently had no difficulty finding

21. Id. at 489, 174 A. at 157.
23. That statement was:
The Director of Public Safety knows the temper of the people he serves. The record indicates that many citizens have strongly protested against the use of the public highways for a demonstration by the Socialist Party. Veteran organizations have filed petitions of protest. That the police could quell any disorder is no reason to grant a permit which might lead to disorder and a possible injury to innocent persons. The public are entitled to their tranquillity, and the discretion to issue the permit in question is vested in the chosen representatives of the city.
24. Id. at 490, 174 A. at 157.
such excuses to withhold permits from labor organizers. The Congress for Industrial Organization challenged this practice in the federal courts.

The case of *Hague v. CIO* was heard by three different courts. These courts handled the hostile audience issue differently. The most conservative method was used by the district court. The Judge indicated in his opinion that, if there were substantial evidence that a particular speaker had caused disorder in a similar situation, he might be required to submit his speech for prior censorship or be bound over to keep the peace.23

That method of handling the hostile audience problem aroused some comment. One writer noted:

> If fears, based on past experience, that the *audience* might indulge in breaches of the peace, are to be enough to warrant repressive action by the authorities, then all the plaintiff’s opponents would need to do to destroy its constitutional rights would be to hire some thugs to create a disturbance every time plaintiff held a public meeting. Plaintiff should be required to hold orderly meetings itself, but it should not be responsible for the actions of others present. That is the function of the police, and indeed it is their duty to afford protection against disturbances of this kind.26

Another author suggested that it was questionable whether possible reaction or disturbance should ever be a reason for prohibiting the right of public assembly.27

After the district court had handed down its decision in the *Hague* case, the Bill of Rights Committee of the American Bar Association entered the arena. The Committee in its brief discussed the problem of disorder and the hostile audience. In his preliminary discussion of the arguments to be used, Professor Chafee indicated that there were three alternative answers to the problem. The first was to charge local officials with the safety of the city and give them final power to judge whether or not there is sufficient danger to make public meetings undesirable. The second alternative was just the opposite. In that case a decision is made that a permit cannot be refused to law-abiding persons regardless of how well-founded the apprehension of disorder. The third alter-

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native allows public officials to prohibit a proposed meeting, but only if there is a clear and present danger of serious disorder. This third alternative had been the one selected by the district court. The Bill of Rights Committee felt that perhaps it was advisable for local officials to have some power to disallow meetings when there was a genuine fear of serious disorder. However, that selective power would have to be administered fairly and without discrimination against unpopular persons or groups.

The brief also included a long discussion of disorder caused by opponents of the speaker and concluded with the argument that, if such disorder were to prevent a speaker from speaking, freedom of speech could always be abridged by a few determined hostile people. The brief added:

"Surely a speaker ought not to be suppressed because his opponents propose to use violence. It is they who should suffer for their lawlessness, not he. Let the threateners be arrested for assault, or at least put under bonds to keep the peace."29

The circuit court and the Supreme Court held that the Jersey City ordinance was void on its face. Both decisions indicated that, not only could permits not be refused because of supposed threats of disorder, but also that police protection must be provided for speakers. The only objection to this point of view was raised by Justice McReynolds in his dissenting opinion:

... The District Court should have refused to interfere by injunction with the essential rights of the municipality to control its own parks and streets. Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided.30

The Hague decisions gave strong support to the premise that threats of disorder could not be used to excuse the prior restraint of a speaker. It did not, however, give any guidelines for the situation when a speaker had begun to speak and there was threatened or actual disorder from a hostile audience. The next ten years were to see this issue brought frequently before the courts. In addition it was to become clear that the permit issue had not been entirely settled by Hague v. CIO.

28. CHAFEE, supra note 10, at 422.
29. Quoted in CHAFEE, supra note 10, at 426.
After Hague v. CIO

One of the cases which presented an interesting precedent was Cantwell v. Connecticut. The seeming paradox of this case was that, while it struck down a discretionary permit ordinance, and established that strong language in defense of religious and political beliefs could not constitute breach of the peace, it also contained a definition which was used in succeeding cases to support a less libertarian position. Justice Roberts' definition of breach of the peace included the following sentences:

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquillity. It includes not only violent acts but acts and words likely to produce violence in others.

These sentences were to be used to support the proposition that anything likely to arouse hostility could be labelled a breach of the peace. This, together with the Court's statement in Chaplinsky v. New Hampshire that "fighting words" did not merit constitutional protection, gave some judges the impression that anything which might possibly arouse anger could be made illegal.

Much of the freedom of speech law in the 1940's was made in cases dealing with either the Jehovah's Witnesses or labor unions. Both groups had enough enemies to make a hostile audience a real possibility in almost any situation. One of these occasions arose in Iowa in 1946. The Witnesses were holding a summer campaign in the area of Lacona, Iowa. Several incidents had arisen where members of that group had been attacked by veterans' organizations and other local groups or individuals. In spite of what appeared to be a real effort by the mayor of the city to quiet down local animosity, incident after incident occurred. The Witnesses finally planned a large rally for a summer Sunday in a city park. The mayor decided that such a meeting would be very dangerous, and on that day blockaded all roads leading into the city. The meeting of the Jehovah's Witnesses was prevented. The Witnesses, however, have not been reluctant to fight their battles in the courts, and accordingly sought an injunction to prevent future action of this type. The resulting decision was a strong statement against the ability of a hostile audience to prevent the appearance of any speaker. The district court decided in favor of the town officials. After discuss-

31. 310 U.S. 296 (1940).
32. Id. at 308.
33. 315 U.S. 568 (1942).
ing the dangerous psychology of a mob, the Judge concluded that there was enough chance of a serious situation arising to justify refusing to allow the Witnesses to hold their meetings.

The Court of Appeals, however, came to a different conclusion, revealing, in fact, some surprise at the lower court's decision.\textsuperscript{35} The court quoted with apparent approval the \textit{amicus} brief of the American Bar Association in \textit{Hague v. CIO}:

"To 'secure' the rights of free speech and assembly against 'abridgment', it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be 'abridged' but could be destroyed by the action of a small minority of persons hostile to the speaker or to the views he would be likely to express."\textsuperscript{36}

In the judgment of the circuit court it was not necessary to decide whether the circumstances could ever be such that local officials would be justified in denying a group the exercise of their constitutional rights.\textsuperscript{37}

It is interesting to note that, in this case, the lower court, the one closest to the scene, ruled in favor of the local officials, while the court further removed from the area did not see the law and order problem as controlling the case. This kind of division seems somewhat characteristic of the development of the law in this area. The decision by the circuit court became a supporting case for those who would say that a hostile audience should never be granted veto power.

However, the complexity of the problem is in no way diminished. One commentator drew a comparison between this case and that of the violent public political meetings in Europe immediately prior to World War II.\textsuperscript{38} A case in which the situation might have

\textsuperscript{35} The Theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed is interesting but somewhat difficult to accept. Under such a doctrine, unpopular political, racial and religious groups might find themselves virtually inarticulate. Certainly 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.

\textsuperscript{36} Sellers v. Johnson, 163 F.2d 877, 881 (1947).

\textsuperscript{37} Id.

\textsuperscript{38} Id. at 881-82.

appeared to be that serious, at least to local officials, arose the next year in *Terminiello v. Chicago*. An unfrocked priest, advertised as "the Father Coughlin of the South", had been invited to speak under the auspices of Gerald L. K. Smith in the city of Chicago. Invitations and complimentary tickets were sent out to people thought to support the anti-Jewish ideas of Father Terminiello. At the time of the speech it was estimated that there were from 800 to 1000 people inside the auditorium, mostly friendly to the speaker and his views. There were apparently close to an equal number outside the building, mostly antagonistic to Father Terminiello and Gerald L. K. Smith. Those outside were trying to break down the doors. Windows were broken, a stench bomb was thrown, and several people were injured. During the midst of this, Father Terminiello gave a speech in which he referred to the people outside as "scum". Neither his language nor his ideas could be classified as moderate or rational. Eventually he was arrested and convicted for disturbing the peace. Two state appellate courts reviewed the decision of the trial court, and both agreed that the speaker's conviction should be affirmed.

Terminiello appealed the decision to the Supreme Court, which reversed the state court decision in a very interesting maneuver. Justice Douglas, delivering the opinion of the Court, said that, in the instructions to the jury, the trial judge had stated that the jury should find Father Terminiello guilty if there were evidence that his words were of the kind that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance. . . ." Douglas declared that the kind of speech described by those words was not the kind that could be used to convict a man of breach of the peace, and that therefore, since it was possible that Terminiello had been convicted on the basis of this charge, the entire conviction was void.

There were three dissents to the opinion, among which Justice Jackson's is probably the best known. Citing *Chaplinsky v. New Hampshire* and *Cantwell v. Connecticut*, he indicated regret that the wholesome principles of those cases had been abandoned. After a lengthy and eloquent exposition of his fears that local police forces were being disarmed, Jackson concluded that:

This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and

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40. *Id.* at 3.
41. *Id.* at 27.
that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.42

One author commented on the substance of the decision:

The opinion is the clearest Supreme Court utterance squarely on the right of speakers threatened by hostile persons. Whether the police can take the easy way out by jailing the speaker instead of disciplining a threatening crowd deserved a new Supreme Court consideration. The Terminiello case put the weight of the Constitution with the better cases of several jurisdictions.43

Those "better cases of several jurisdictions" included Sellers v. Johnson, Dearborn Publishing Company v. Fitzgerald, Near v. Minnesota, and the old English case of Beatty v. Gilbanks.44

Another commentator contrasted majority and dissent in Terminiello as follows:

[The] implications of the Terminiello case, emphasizing the delicacy of the problem involved, point up the fact that perhaps the safest way for a democratic people to solve this problem, is to have the law direct its punitive force against the potential rioters and not against the speaker. . . . It should be noted that the Jackson dissent in fact advocates conviction on a new theory, not clearly expressed, but certainly more broad than anything ever sanctioned by the Court heretofore; it is a theory that tends to condition the right to speak on the hostility demonstrated by the speaker's adversaries.45

That comment was an important one, although this writer would say it overstated the facts. It at least gave the impression that the prevailing theory was that a hostile audience could not silence a speaker. That this was not true became clear with the 1951 case of Feiner v. New York.46 The facts of the case are described in the Supreme Court opinion:

On the evening of March 8, 1949, petitioner Irving Feiner was

42. Id. at 37.
44. Id. at 28.
addressing an open-air meeting at the corner of South McBride and Harrison Streets in the City of Syracuse. At approximately 6:30 P.M., the police received a telephone complaint concerning the meeting, and two officers were detailed to investigate. One of these officers went to the scene immediately, the other arriving some twelve minutes later. They found a crowd of about seventy-five or eighty people, both Negro and white, filling the sidewalk and spreading out into the street. Petitioner, standing on a large wooden box on the sidewalk, was addressing the crowd through a loud-speaker system attached to an automobile. Although the purpose of his speech was to urge his listeners to attend a meeting to be held that night in the Syracuse Hotel, in its course he was making derogatory remarks concerning President Truman, the Mayor and other local political officials.\textsuperscript{47}

Apparently this language irritated some members of the crowd. Someone complained to the police, and at least one person threatened to remove the speaker if the policeman did not stop him from speaking. Feiner was arrested and convicted of disorderly conduct. The United States Supreme Court upheld the state court's decision.\textsuperscript{48} Chief Justice Vinson declared for the majority:

\begin{quote}
The language of \textit{Cantwell v. Connecticut} . . . is appropriate here. "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others."\textsuperscript{49}
\end{quote}

The Chief Justice made a slight qualification, however, as he added:

\begin{quote}
We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful meetings.\textsuperscript{50}
\end{quote}

\textsuperscript{47} \textit{Id.} at 317.

\textsuperscript{48} People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950). There the court stated: We recognize, however, that the State must protect and preserve its existence, and unfortunate as it may be, the hostility and intolerance of street audiences and the substantive evils which may flow therefrom, are practical facts of which the courts and the law enforcement officers of the State must take notice. Where, as here, we have a combination of an aroused audience divided into hostile camps, an actual interference with traffic and a speaker who is deliberately agitating and goading the crowd and the police officers to action, we think a proper case has been made out, under our State and Federal Constitution, for punishment.

\textsuperscript{49} 340 U.S. at 320.

\textsuperscript{50} \textit{Id.}
He concluded, however, that, in this case, the danger was more than the ordinary murmurings and objections of a hostile audience.

Justice Black, in dissent, eloquently objected to the Court's accepting the trial judge's description of the factual situation. That description, according to Justice Black, had been based entirely on the testimony of the prosecution. The Justice found no evidence of a clear and present danger, and thought that the conviction of Feiner had made a mockery of the First and Fourteenth Amendments. He concluded with an indictment of the policemen present at the scene:

. . . I reject the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they must first make all reasonable effort to protect him. Here the policeman did not even try to protect petitioner.51

There were some who thoroughly approved the decision as a confirmation of society's right to law and order.52 Professor Schwartz, in his book *The Supreme Court*,53 revealed the other side of the American character when he wrote:

The weakness of the *Feiner* decision, even if one agrees that the police can act against those who use speech to commit breaches

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51. *Id.* at 326.


The *Feiner* decision represents a long-awaited and much-needed trend away from the Court's over-solicitude in protecting the individual in the exercise of his First Amendment rights. The Supreme Court has been so zealous of late in defending the individual from the encroachments of government that it has left the mass of individuals—society—a helpless prey to the vagaries of a few. A reversal of *Feiner's* conviction, for example, would have tied the hands of municipal peace officers to cope effectively with the problem of possible disorder. As it is doubtful that even a trial judge can put himself in the place of the officer confronted with the possibility of imminent rioting, so it is true of the Supreme Court, there being substantial evidence in the record to support the officer's actions.

Perhaps the *Feiner* decision means that the Supreme Court will reconsider the extreme stand it has taken in other civil liberties decisions. It is submitted that the Supreme Court went too far in not deciding *Lovell v. Griffin, Douglas v. City of Jeannette, Saia v. New York* and *Cantwell v. Connecticut*, among others, entirely on their facts. The individual should be completely free in his own home as well as on the public streets from the annoyance of religious proselytizing or political haranguing. . . . If the *Feiner* decision is evidence that the Supreme Court is adopting a more reasonable attitude toward the problem of free speech, this writer welcomes the change.

of the peace, lies in the implication that, not the words or the intent of the speaker, but the effect on his audience can make him guilty of a breach of the peace. But this gives an audience, or any part of it, an easy means to suppress a speaker with whom it disagrees. Any group which wishes to silence a speaker can create a disturbance in the audience, and that will justify the police in stopping the speaker.54

It is difficult to reconcile the rulings in the *Terminiello* and *Feiner* cases. In the earlier case, the Court seemed to go out of its way to find a method for overruling the lower courts. In the *Feiner* case, it accepted without much question the interpretation given the situation by the lower courts. The *Terminiello* situation appears, from a reading of the facts, to have been more explosive than that involved in *Feiner*. The only obvious distinction is that the Chicago speech was given in a private hall, while Feiner spoke on the public streets. This factor may have entered into the decision.

The situation was further confused by another Supreme Court decision of the same period, *Kunz v. New York*.55 Kunz was a Baptist minister who had been refused a permit to speak on the streets of New York. The refusal had been based on his previous performances in which he had ridiculed members of other religious bodies, particularly the Jews. Kunz spoke without the permit and was convicted for his actions. The Supreme Court reversed his conviction on the ground that the ordinance, which granted discretionary power to an official, was invalid as a prior restraint on the exercise of First Amendment rights. Justice Jackson, in dissent, contended that the ordinance was not invalid in this instance because, in his view, the *Chaplinsky* doctrine of "fighting words" would exclude the kind of speech given by Kunz from constitutional protection. It is interesting to note here Professor O'Neil's comment that the *Chaplinsky* precedent has seldom been used in the nearly thirty years since it has been on the books.56

Justice Jackson also objected to the Court's striking down of permit ordinances by ruling that they did not contain standards for enforcement, and in doing so, struck what is most likely the essence of the problem. Jackson wrote:

Of course, standards for administrative action are always desirable, and the more exact the better. But I do not see how this

54. *Id.* at 246.
56. O'NEIL, supra note 8, at 42.
Court can condemn municipal ordinances for not setting forth comprehensive First Amendment standards. This Court has never announced what those standards must be, it does not now say what they are, and it is not clear that any majority can agree on them. In no field are there more numerous individual opinions among the Justices. The Court as an institution not infrequently disagrees with its former self or relies on distinctions that are not very substantial. . . . It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards. 57

The members of the Court do not usually agree on standards; academicians and the general population cannot agree on those standards, and even if some kind of theoretical agreement were possible, it is extremely difficult to make those standards concrete enough to be successfully applied to actual situations. The danger of the hostile audience appears more or less threatening in proportion to the distance from the scene. That fact makes the solution of the problem especially difficult.

One commentator synthesized the decisions in the Feiner and Kunz cases thus:

The Supreme Court of the United States in Kunz v. New York and Feiner v. New York, two recent decisions handed down on the same day, seemingly indicates that while a speaker's adversaries may not in advance cause the prevention of a meeting, they may force its arrestment once begun. 58

At this point, then, it seemed to be clear that cities could not refuse to give permits on the basis of possible disorder created by opponents of the sponsoring group. It was not as clear to what extent the court would uphold the rights of a speaker as opposed to the duties of law enforcement officials once the speech had begun. That part of the problem would receive ample attention from the courts in the next ten years.

Civil Rights and Anti-War Protesters

Beginning in the late 1950's, the courts and the nation were faced with a serious situation involving a hostile audience. This situation arose with the attempts of Negroes to assert their civil rights. Perhaps few audiences were so clearly hostile as those which

57. 340 U.S. at 308-09.
watched Southern Negroes try to integrate schools, parks, libraries, and restaurants. The televised views of white women viciously heckling black children, or police dogs jumping for the throats of black demonstrators amply demonstrated that hostility. The question was put in this manner by Harry Kalven:

Will the Constitution require that in the South the police go down with the Negro speakers? Or will the Court permit the South one gigantic hecklers' veto?\(^\text{59}\)

The Court answered this question in the case of Cooper v. Aaron.\(^\text{60}\) The school board of the Little Rock, Arkansas Public Schools had asked for a two and one-half year delay to integrate their schools. They claimed that the situation caused by Governor Faubus' calling in of state troops to prevent integration had so inflamed the population that law and order would be difficult to maintain. The Court replied:

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature. As this Court said some 41 years ago in an unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution," Buchanan v. Warely, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.\(^\text{61}\)

The state courts did not always see things in the same manner. In 1961, the Court of Appeals of Maryland affirmed the conviction of several individuals including one Negro who had tried to integrate a white amusement park. The decision is important chiefly because of the definition of disorderly conduct used. The Court, in upholding the conviction, defined disorderly conduct as "the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area."\(^\text{62}\) The court also accepted another definition of the crime as conduct "of such a nature as to affect the peace and quiet of persons who may

\(^{59}\) Kalven, supra note 7, at 141.
\(^{60}\) 358 U.S. 1 (1958).
\(^{61}\) Id. at 16.
witness the same and who may be disturbed or provoked to resentment thereby.\(^{63}\)

The Supreme Court came close to, but did not find it necessary to reach, the issue of whether the hostility generated by the response of a Southern crowd to an otherwise lawful Negro demonstration could make it possible to stop the demonstration.\(^4\) The decision was made that there was no evidence of disorderly conduct. That same year a District Court was presented with the problem of a group of freedom riders harassed by the Ku Klux Klan. The court decided that the situation was dangerous enough to necessitate an injunction against the Ku Klux Klan, and a restraining order against the Freedom Marchers.\(^6\)

In 1963, however, when the city of Memphis wanted a delay in the order to integrate their public parks, the Supreme Court ruled:

Constitutional rights may not be denied simply because of hostility to their assertion or exercise.\(^6\)

The same year the Court also ruled, in *Wright v. Georgia*,\(^6\) that several young blacks could not be evicted from a public park simply because there was a possibility of disorder. Chief Justice Warren declared that

> [t]he possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right to be present.\(^6\)

In a third case during that same year, the doctrine was finally applied directly to First Amendment rights, when the Supreme Court reversed the conviction of demonstrators in the case of *Edwards v. South Carolina*.\(^6\) The crowd surrounding the black marchers was apparently relatively peaceful, but Justice Stewart in the opinion for the Court noted:

> . . . they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

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63. *Id.* at 344.
68. *Id.* at 293.
The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views. Justice Clark dissented, arguing that *Feiner* was controlling since there was a large crowd and two hundred demonstrators. He reminded the Court of Justice Frankfurter's dictum in *Feiner* that there is no constitutional principle that says that, whatever the situation, the police must proceed against the crowd and not against the speaker.

In 1964, the Fifth Circuit Court of Appeals reversed a district court decision which had affirmed the conviction of several black department store picketers. In so doing, the court of appeals stated:

Peaceful picketing for the object of eliminating racial discrimination in department stores open to the general public is a right embraced in free speech under the First Amendment . . . . Of course, it should be added, that those claiming these rights are entitled to police protection throughout the course thereof.

The United States district court made the same ruling in 1965 in regard to the march from Selma to Montgomery, Alabama. Not only would the right to march not be infringed upon, but it would be protected by the police.

Justice Fortas in *Brown v. Louisiana* and Justice Goldberg in *Cox v. Louisiana* both refused to consider the threat of disorder an adequate reason for conviction if that threat arose from hostile spectators.

Two additional district court cases, both from Alabama, again indicated that the courts would not allow the South a gigantic
hecklers' veto. In *Houser v. Hill* and *Cottonreader v. Johnson* the courts ruled against the hostile audience. In *Cottonreader*, Judge Johnson cited all of the previously mentioned racial cases and concluded:

Thus, the threat of violence or public hostility to the views of those exercising First Amendment liberties does not of itself justify denial of the right, but rather is grounds for injunctive relief.

The opinion strongly emphasized that police officials cannot make suppression of free speech and assembly

... an easy substitute for the performance of their duty to maintain order by taking such steps as may be reasonably necessary and feasible to protect peaceable, orderly speakers, marchers or demonstrators in the exercise of their rights against violent or disorderly retaliation or attack at the hands of those who may disagree and object.

The same result was reached in the case of *NAACP v. Thompson*, when the Fifth Circuit Court overruled the decision of the district court and decided that city officials had used every possible excuse to interfere with the activities of the NAACP.

In these cases involving Negro protest and a hostile audience, the courts, especially the Supreme Court, have upheld the rights of the Negroes. While there has been a tendency for the state and sometimes the lower federal courts to side with local officials, these situations have usually been reversed by a higher appellate court or the Supreme Court. In the racial issue, the Supreme Court seems to have truly become the conscience of the nation. There has been a tendency to agree with the judge who said:

... the extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and "living" document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against.

Another group which has received substantial protection from the courts, as long as their protests have been conventional and

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78. *Id.* at 497.
79. *Id.*
80. 357 F.2d 831 (5th Cir. 1966).
have not involved the desecration of national symbols, has been the anti-war protesters. In *Hurwitt v. City of Oakland*, for example, the courts ruled in favor of war protesters and against the City of Oakland, which had consistently refused to issue permits for demonstrations. In this instance there was a history of harassment from Hell's Angels and other hostile groups. The district court said:

> It is also well established that peaceful, orderly expressions of views—through marches, demonstrations or otherwise—cannot be prohibited, or otherwise interfered with, merely because the views expressed may be so unpopular at the time as to stir the public to anger, invite dispute, and thus create, or appear to the public authorities or police to create, unrest or even disturbance.

Three years later the United States District Court for Eastern Pennsylvania ruled that peace officers could not arrest hippies who had taken to hanging out in a park adjacent to a wealthy residential area. The judge ruled that

> [t]he right of free speech and assembly may not be abridged, even if the speakers are so unpopular as to give rise to fears of possible violence. . . . And of course, the use of a public park may not be denied merely because the governing body disapproves of the views or objectives of those barred.

This issue of the hecklers' veto in relation to protesters was recently reached by the Supreme Court in *Bachellar v. Maryland*. In *Bachellar* the protesters had been convicted in the trial court on the general verdict of disorderly conduct. The state appellate court had used the *Drews* interpretation of disorderly conduct and had found the conviction reasonable, and that, since the behavior of the protesters was nonverbal, stricter controls could be used. It added: “We are unaware of any tenet of law which requires the State law enforcement facilities to stand impotently aside, while disruption and strife reign in the streets in the guise of protected activity. . . .”

The Supreme Court felt differently, however, and reversed the decision. In the instructions to the jury one sentence authorized the

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83. Id. at 1001.
jury to convict if they found that the defendants had engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." The Court ruled that, since it was possible that the protesters had been convicted because of the reaction from the hostile onlookers, their entire conviction must fall. In late 1971 the Supreme Court also held that a Cincinnati ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and "conduct themselves in a manner annoying to passersby" was unconstitutional. The opinion made it clear that a constitutional right could not be denied because the exercise of such a right may be annoying to some people. In April of 1972 a federal court of appeals ruled that the head of the Nazi party had a right to hold public rallies in Chicago parks, and the playing of "Dixie" was allowed by another court of appeals in St. Louis in January of this year in spite of hostile reactions of black students. However, during the same period a scheduled debate on race, heredity and intelligence was cancelled in Chicago after chanting hecklers began scuffling with the police. Thus it would appear that prior restraint is not usually allowed in cases where a hostile reaction is expected, but that at least in practice a speaker may be stopped if that hostile action does indeed occur. This is the problem that Professor O'Neil states has never really been faced by the Supreme Court, and it remains a difficult problem "morally and politically as well as legally."

**Conclusion**

It was suggested earlier that the courts reflect our society, and that problems which divide society also divide the judicial system. One of those problems is the struggle between liberty and order. It is submitted that the division between those who would support either one at the expense of the other has been illustrated in the courts' reaction to the problem of the hostile audience. Examples of this occurred in almost every case considered. American society is ambivalent on this issue. That ambivalence is reflected in the judicial process.

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89. *Collin v. Chicago Park District,* 460 F.2d 746 (7th Cir. 1972).
Another factor which was illustrated in this essay was the difficulty of putting the guarantees of the Constitution into workable form. Justice Jackson pointed out that it was unreasonable for the courts to strike down statutes for lack of standards when the Court itself had no standards. Not only is this a problem of disagreement as to what the standards should be, but of finding a way to word those standards so that they have concrete meaning when applied to a particular situation.

Professor Harry Kalven has written about the problem of the hostile audience with special reference to the Negro in the South. Kalven is largely responsible for the origination of the term "hecklers' veto". The fact that he has discussed the problem without proposing a specific solution was noted by Alfred Kamin in his article on residential picketing. That it is difficult to propose such a specific solution is obvious. One author divided speakers into those who want to communicate ideas and those who want to promote disorder, and audiences into those who are honestly enraged by the speech, and those who have a preconceived intent to create disturbance. The author then drew up a set of criteria which serves to illustrate why the practical handling of the hostile audience is difficult. If the speaker intends to create disorder, the speech should be prohibited. On the other hand, if the speaker desires to communicate his ideas, and the audience intends to create disorder, the speech should be permitted. If the speaker wants to communicate his ideas and the audience is genuinely aroused, the speech should be permitted if it is thought that such a speaker may not be held responsible for the intolerance of his audience. Such a speaker may be prohibited from speaking, however, at least where he knows of the danger of riot, if there is a tendency to feel that the preservation of order should prevail over the right to speak. Even the most well-intentioned law enforcement official would have considerable difficulty applying such criteria to an

Professor Kalven discusses, but proposed no solution for, what he calls the "heckler's veto" problem, which is really a crowd-handling problem. This phrase is intriguing and was relied upon by the Supreme Court in an opinion delivered while this article was being written. . . . But so apt a phrase as "heckler's veto" may quickly become a substitute for thought. There are circumstances when the requirements of community order may necessitate the arrest of the speakers or the marchers, rather than of the members of the crowd who would do them violence for otherwise protected and privileged activity.

actual problem. They involve so many value judgments that almost any result could be expected. A local police officer or local mayor and a Supreme Court Justice may disagree as to whether a given situation should be defined as an emergency. Professor Fellman of the University of Wisconsin summarized the situation:

There is no ready and easy solution to the problem of the hostile audience. The state has an incontestable duty to preserve order by controlling mobs; but it is unthinkable that the right to hold a public meeting should be determined by the least tolerant people in the community.95

After discussing the various kinds of speakers and audiences, Fellman concluded:

Since in concrete cases the outcome depends upon the facts, great weight must be given to the judgment of those who bear the initial responsibility for ascertaining the facts. But if police officers are not well selected and properly trained to understand the nature of the citizen's constitutional rights, these rights may be crushed under the weight of the presumption in favor of the regularity of official actions.96

Former Justice Fortas viewed the Constitution as attempting to accommodate two conflicting values: the need for freedom to speak and the necessity of maintaining law and order. He suggested that the precise facts in each situation should determine whether the particular protest or activity is within the shelter of the First Amendment.97 In light of the cases reviewed in this essay, it is submitted that this "suggestion" says little at all helpful to the solution of a problem which may be becoming our most important First Amendment issue.

This writer would argue that there are two types of heckling. One type has some value:

Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment. For many citizens such participation in public meetings, whether supportive or critical of the speaker, may constitute the only manner in which they can express their views to a large number of people; the Constitution does not require that the effective expression of ideas be restricted to rigid and prede-

95. Fellman, Constitutional Right of Association, 1961 Supreme Court Review 100-01.
96. Id. at 101.
HECKLER'S VETO

A cogent remark, even though rudely timed or phrased, may "contribute to the free interchange of ideas and the ascertainment of truth." The First Amendment contemplates a debate of important public issues; its protection can hardly be narrowed to the meeting at which the audience must passively listen to a single point of view. The First Amendment does not merely insure a marketplace of ideas in which there is but one seller.

The very possibility of adverse audience reaction may aid in the correction of evils which would otherwise escape opposition. Government officials might attempt to advance a partisan political cause by forcing the audience at a publicly financed event, such as a display of fireworks, to listen first to speakers of a particular persuasion. An astute and disputatious audience could deter such practices. Although a public official usually occupies a far better position than the ordinary citizen to publicize his views by the communications media, those who disagree with such an official may be able to proclaim disagreement by criticism to his face. Audience response, moreover, may force a speaker to discuss a difficult issue that he may wish to avoid, or to explain some past conduct that he hopes will be forgotten.

The public interest in an active and critical audience has long been recognized. The heckling and harassment of public officials and other speakers while making public speeches is as old as American and British politics; here, as in Great Britain, such protestant conduct has been thought to lie outside the realm of legal regulation except in the most egregious of cases.

When the activity of a heckler reaches that point, however, the second type of heckling exists and the speaker must be protected. Thomas I. Emerson wrote:

Up to a point heckling or other interruption of the speaker may be part of the dialogue. But conduct that obstructs or seriously impedes the utterance of another, even though verbal in form, cannot be classified as expression. Rather it is the equivalent of pure noise. It has the same effect, in preventing or disrupting communication, as acts of physical force. Consequently it must be deemed action and is not covered by the First Amendment. The speaker is entitled to protection from this form of interference as from any other physical obstruction.

In such situations the decision must be made in favor of the

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speaker. It solves nothing to give law enforcement officials a list of complicated criteria subject to individual interpretation; these cannot be applied consistently nor can their application be fairly evaluated by the courts. I would suggest that in all cases the speaker's right to speak be the paramount right and that law enforcement officials take all steps necessary to protect that right. If they do not, the burden of proof should be put on them to show that there was no other conceivable way to maintain order. The National Guard should be called out if necessary. This position is an extreme one perhaps. The alternatives, however, are unacceptable. Professor Franklyn Haiman made this position clear when he wrote:

How can such an extreme position be defended? Simply on the grounds that any other course of action is to issue an invitation to hostile audiences to veto the right of dissent whenever they desire to do so. Only by the firmest display of the government’s intention to use all the power at its disposal to protect the constitutional rights of dissenters will hecklers be discouraged from taking the law into their own hands. To be sure, the temporary costs may seem astronomical, but they may be nothing compared to the costs that could be suffered in the long run through any other course. This principle was clear to our national government when it posted an army on the campus at the University of Mississippi to insure that one man, James Meredith, was granted his rights to enter and to remain at that institution. Its reverse was equally clear when Governor Orval Faubus let it be known (either out of conviction or desire) that the state’s police power could not cope with those who wished to block the entry of Negro children to Central High School.100

The problem is complex; the solution may be oversimplified. However, the basic presumption on which this country must operate was stated in the opinion in Sellers v. Johnson:

Certainly 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.101

100. Haiman, supra note 9, at 108.
101. 163 F.2d 877, 881 (8th Cir. 1947).