

PODIUM

CIVIL LIBERTIES *By Harvey A. Silverglate*

Another Bloody Skirmish in the Free-Speech War

NOTWITHSTANDING how frequently municipal officials have been ordered by courts to refrain from punishing civil servants' off-duty expressive activities, this free-speech battle never seems to end.

The latest skirmish is being fought in New York, where officials suspended two firefighters and a police officer for wearing blackface while riding on a racist Labor Day parade float.

Mayor Rudolph W. Giuliani, as reported in *The New York Times*, said dismissal was being pursued because these officers' actions, including an apparently mocking re-creation of the dragging death of James Byrd, a black man, in Texas this past June, "demonstrated a total lack of understanding" of their oath.

A spokesman for the Fire Department claimed that the men had discredited their uniform by violating a regulation that bans any activity "that may be instrumental in arousing religious, racial or other hatred."

The Police Department followed suit, relying as well on a regulation prohibi-

ting conduct "prejudicial to the good order and efficiency" of the department.

Reliably, the New York Civil Liberties Union jumped into the fray. NYCLU Executive Director Norman Siegel reminded the mayor "that the First Amendment protects the obnoxious, repugnant, outrageous and controversial—including racist statements." The NYCLU brought suit on behalf of the police officer.

But it is surprising that, this far into our constitutional history, a nationally reputed political leader of perhaps the most sophisticated city in the country did not (or pretended not to) understand that offensive speech is core First Amendment-protected activity.

This phenomenon is hardly unique to the Big Apple. Just a few weeks earlier, the administration of Boston Mayor Thomas Menino had to be ordered by a state court judge, for the second year, to permit a pro-marijuana political demonstration on Boston Common.

Probable Victory

There is little doubt that Mr. Siegel and Marvyn M. Kornberg, who represents one of the firefighters, will win their lawsuit. The policeman and firemen who participated in the ugly "Black to the Future" float were off duty and not in uniform; hence, it could not be said that they wore using (or, more accurately, abusing) their official status to pro-

mote their views, nor that they were conveying an erroneous (nor indeed, any) version of official city policy.

They were using a privately owned pickup truck, according to Mr. Siegel, not city equipment. Their performance of their official duties, while on duty, was without blemish.

The U.S. Supreme Court in 1983 reminded us that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." The extent of protection is based on an examination of "the content, form, and context of a given statement."

The standard was elucidated by the 4th U.S. Circuit Court of Appeals in a 1985 case remarkably like the New York controversy. The Baltimore Police Department terminated an officer for his off-duty Al Jolson impersonations in local nightclubs. Officer Robert M. Berger offended some members of the community by donning blackface and a black wig during the act but, noting that Mr. Berger bore no police insignia while performing, the court ruled that his performances "constituted speech upon a matter of obvious public interest to those considerable segments of the community who willingly attended and sometimes paid to see and hear them."

This free-speech interest could be counterbalanced only if the performance

were found to "jeopardize the [department's] capability to perform its duties effectively and efficiently," but the court did not buy this claim made by the city.

On the other hand, a respectable argument could be made that a police officer is always on duty and that, in any event, a citizen is entitled to believe that police officers, like judges and prosecutors, will enforce the law equally. Might not an officer's wearing blackface, even "off duty," reasonably affect a citizen's perceptions in this respect?

The New York controversy is further subject to the Supreme Court's 1995 unanimous ruling that a parade is a constitutionally protected expressive event and that its private sponsors may pick and choose their messages regardless of how offensive.

The court protected the sponsor's decision to deny participation to a group seeking to march under a gay rights banner and invalidated Boston's permit denial.

Yet, notwithstanding the precedents, municipal leaders, whether out of constitutional ignorance or cynical defiance, are again forcing courts to intervene.

City officials in New York, Boston and elsewhere seem not to remember their own oath of office—to defend the Constitution, including the amendments. The judiciary is not the only branch pledged to protect liberty. ☐

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