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Counter-Demonstration as Protected Speech: Finding the Right to Confrontation in Existing First Amendment Law

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Counter-Demonstration as Protected Speech: Finding the Right to Confrontation in Existing First Amendment Law

By KEVIN FRANCIS O'NEILL* and RAYMOND VASVARI**

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I. Introduction

Seven decades of constitutional jurisprudence have firmly established the right to speak in public places as among the most basic of our political liberties.¹ Since the early half of this century, that right has been both enshrined and delimited by a body of case law balancing the tension between free expression and public order.² Established precedent now sanctions a complex web of permissible time,

1. *De Jonge v. Oregon*, 299 U.S. 353 (1937) (invoking First Amendment to reverse criminal syndicalism conviction of a defendant who had merely assisted in the conduct of a public meeting held under the auspices of the Communist Party); *Stromberg v. California*, 283 U.S. 359, 361 (1931) (overturning the conviction of a Youth Communist League member by striking down a California statute that outlawed the display of any “red flag, banner, or badge . . . [employed] as a sign, symbol or emblem of opposition to organized government”). In the 1920s, the seeds were sown for these landmark precedents by the eloquent, often dissenting, opinions of Justices Louis D. Brandeis and Oliver Wendell Holmes. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (upholding criminal anarchy conviction based in part on defendant’s publication and distribution of *The Left Wing Manifesto*) (“It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”).

2. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning Ku Klux Klansman’s conviction by invoking the First and Fourteenth Amendments to strike down Ohio’s criminal syndicalism statute); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (reversing “breach of the peace” conviction of Christian Veterans of America member who made racially inflammatory speech) (“[A] function of free speech under our system of government is to invite dispute. 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.”); *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (striking down Jersey City, N.J. ordinances requiring permits to hold public meetings and prohibiting public distribution of printed materials) (“The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.”).

place, and manner restrictions on public speech.³ And yet, despite the large and often subtle body of law limiting governmental power to restrict public speech, few courts have directly addressed the seemingly basic question of what restrictions may be placed on peaceful counter-demonstration.⁴

The place of counter-demonstration among the pantheon of First Amendment liberties is more than a matter of academic concern. At the end of this century, despite predictions of an increasingly insular and atomized American society, disputatious public controversies continue to spill into the streets. In certain contexts, like the abortion rights controversy, public protest has evolved into week-long and city-wide campaigns of carefully orchestrated protests and counter-demonstrations, often with both sides seeking simultaneous access to a uniquely symbolic forum.⁵

As these protests move (like much of our commercial intercourse) from raucous downtowns to sedate suburbs,⁶ protesters are

3. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

4. Only two cases directly address First Amendment protection for counter-demonstration. *City of Seven Hills v. Aryan Nations*, No. 258726, C.P. Ct., Cuyahoga County, Ohio (Dec. 15, 1993) (enjoining the simultaneous presence on John Demjanjuk's street of groups of protesters—including Holocaust survivors and the Ku Klux Klan—with opposing viewpoints on the return of "Ivan the Terrible" to the United States), *aff'd*, No. 66754, 1995 Ohio App. LEXIS 575 (Ohio Ct. App. Feb. 16, 1995); *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986) (holding that advocates and opponents of gay rights seeking access to the same unique forum—the sidewalk in front of St. Patrick's Cathedral—to raise their voices in response to New York City's annual Gay Pride Parade were entitled to recognition of their First Amendment rights and equal time for their demonstrations), *cert. denied*, 480 U.S. 917 (1987). These cases are discussed *infra* at notes 60-102 and accompanying text.

5. *State by State: Both Sides Mark Roe's 21st*, American Political Network, Jan. 24, 1994, available in LEXIS, Nexis Library; Jacqueline Frank, *Groups Clash in Vocal Battle Over Abortion Pill*, Reuters, June 18, 1993, available in LEXIS, Nexis Library, REUNA File; Christine Spolar, *Abortion-Rights Rally Draws Half a Million Marchers*, WASH. POST, Apr. 6, 1992, at A1; *Rhode Island: Operation Rescue and Pro-Choicers Clash*, American Political Network, Nov. 4, 1991, available in LEXIS, Nexis Library; Michael J. Ybarra & Molly Sinclair, *Abortion Protest Scurries Through City; 311 More Arrested at Clinics; Each Side Sees Victories*, WASH. POST, Nov. 18, 1990, at B1; *Pro-Choice Advocates, Anti-Abortionists Clash*, Wires, Nov. 12, 1989, available in LEXIS, Nexis Library, Wires File; *Both Sides Demonstrate Peacefully Over Abortion*, Wires, Oct. 23, 1989, available in LEXIS, Nexis Library, Wires File; *Anti-Abortionists and Opponents Stage Moving Protests*, Wires, Aug. 12, 1989, available in LEXIS, Nexis Library, Wires File; *Abortion Foes, Backers Clash*, L.A. TIMES, Sept. 19, 1988, § 1, at 2.

6. See *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221 (1994) (holding that injunction prohibiting speech activities in privately owned shopping malls was not an unconstitutional restraint on speech under the Ohio State Constitution); *id.* at 231 (Wright, J., dissenting) (observing that shopping malls constitute the "new downtowns" and, by functioning as "public-gathering centers," feature many of the qualities of our traditional public

confronted with a growing intolerance of their presence. Some communities have enacted regulations that severely restrict the right to protest, especially in residential areas,⁷ while judges find themselves confronted with the task of maintaining public order, a task often achieved by injunctions keeping demonstrators and counter-demonstrators apart.⁸

This Article argues that such restrictions are valid only as a necessary expedient to prevent imminent lawless conduct, and that counter-demonstrators otherwise have a right under established First Amendment doctrine to deliver their message in the same forum, and at the same time, as those whose message they oppose. This Article proceeds by defining counter-demonstration; examining its history, nature, and significance; analyzing the few cases that have touched upon it; and demonstrating, finally, that the right to counter-demonstration is grounded not only in existing precedent, but in the philosophical justifications for the First Amendment.

II. The History, Nature, and Meaning of Counter-Demonstration

A. An Academic Definition of Counter-Demonstration

At its most basic, counter-demonstration can be defined as any organized and affirmative act of speech, conducted in opposition to another act of speech, that is performed in the same forum, and at the same time, as the speech it seeks to oppose.

Counter-demonstration is something different from the right to heckle, which is a right directly upheld already by the courts.⁹ While

fora) (citing Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168 (1980)).

7. See, e.g., Marcy Oster, *Seven Hills Ban on Picketing Challenged in Court by ACLU*, CLEVELAND JEWISH NEWS, Oct. 22, 1993, at 10-11 (in anticipation of John Demjanjuk's return there, the City of Seven Hills, Ohio, enacted a ban on all residential picketing) [hereinafter Oster, *Seven Hills Ban*].

8. See *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (examining a variety of injunctive restrictions on protests at a Florida abortion clinic, including a 36-foot "buffer zone" surrounding the clinic in which pro-life, but not pro-choice, demonstrators were forbidden to set foot); *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio. See Marcy Oster, *Protests Still Restricted at Demjanjuk's Home*, CLEVELAND JEWISH NEWS, Nov. 5, 1993, at 16 [hereinafter Oster, *Protests Still Restricted*]; *Judge Upholds Limits on Protests at Demjanjuk Home*, LEGAL INTELLIGENCER, Nov. 1, 1993, at 6, available in LEXIS, Nexis Library, LGLINT File [hereinafter *Judge Upholds Limits*].

9. *In re Kay*, 464 P.2d 142 (Cal. 1970) (overturning criminal convictions of boycotting farmworkers who were charged with disturbing a lawful meeting after they engaged in rhythmical clapping and shouting for five to ten minutes during a California congressman's speech in a city park). In *Kay*, the California Supreme Court observed:

both heckling and counter-demonstration involve simultaneous counter-speech directed at the speech or expressive activity of another, with the intent to rebut, refute, or call into question the targeted speaker's views, counter-demonstration is *organized* in a way that spontaneous disruptions of another speaker are not. Moreover, counter-demonstration involves an element of *independence* that heckling, by its very nature as responsive speech, does not achieve. Unlike the counter-demonstrator, the heckler is dependent upon the targeted speaker if heckling is to exist at all. While the heckler's message may be contempt for the targeted speaker or his or her point of view, the chosen mode of expression, heckling, would be impossible if the targeted speaker had stayed home. In this sense, counter-demonstration is *affirmative*—it has an identity and integrity separate from, yet dependent upon, the speech it seeks to counter.

For purposes of this Article, counter-demonstration is defined to include not only actual or literal speech, but all of the expressive activity that comes under the broader rubric of First Amendment protection. This includes the sort of expressive activity known as "symbolic

Under most circumstances, of course, ordinary good taste and decorum would dictate that a person addressing a meeting not be interrupted or otherwise disturbed. The Constitution does not require that any person, however lofty his motives, be permitted to obstruct the convention or continuation of a meeting without regard to the implicit customs and usage or explicit rules governing its conduct. The constitutional guarantees of the free exercise of religious opinion, and of the rights of the people peaceably to assemble and petition for a redress of grievances, would be worth little if outsiders could disrupt and prevent such a meeting in disregard of the customs and rules applicable to it. *This inhibition does not mean, however, that the state can grant to the police a "roving commission" to enforce Robert's Rules of Order, since other First Amendment interests are likewise at stake.*

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. . . . An unfavorable reception, such as that given Congressman Tunney in the instant case, represents one important method by which an officeholder's constituents can register disapproval of his conduct and seek redress of grievances. 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.

464 P.2d at 147 (citations omitted) (emphasis added). *Accord* City of Spokane v. McDonough, 485 P.2d 449 (Wash. 1971) (holding that a disorderly conduct ordinance could not be enforced to punish an attendee at an outdoor rally who shouted "warmonger" and flashed the peace sign at Vice President Spiro Agnew). *But see* State v. Hardin, 498 N.W.2d 677 (Iowa 1993) (upholding disorderly conduct conviction of heckler who intentionally disrupted a speech by President George Bush during a Republican fundraising rally). *See generally* Eve H. Lewin Wagner, Note, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215 (1986).

speech,"¹⁰ provided the symbolic speech in question otherwise falls within the parameters of counter-demonstration. For example, a group willing to stand in silent vigil, or display placards, or wear armbands as a form of expressing opposition to the views of another group would, for purposes of this Article, be engaged in counter-demonstration, provided the group engaged in its expressive conduct in the same forum, and at the same time, as the group it sought to oppose.

The simultaneous presence of two opposing groups is a *sine qua non* of counter-demonstration, and the dynamic produced by such a meeting is something which will be given considerable attention.¹¹ The principal focus, however, will be on efforts by the state—usually in the form of a municipality—to limit or prohibit such encounters in the name of peace and public safety. Such restrictions can take several forms, all of which present similar problems from a First Amendment standpoint. Legislation or the administrative regulation of protesters—through such devices as parade permits¹²—are common tools of prohibition. In other cases, cities and even states have sought equitable relief in the courts, in efforts to enjoin those with opposing viewpoints from meeting face-to-face.¹³ In either case, the restrictions pose the same constitutional question: To what extent, if any, and when, may the state place constitutionally-sound limits on the act of counter-demonstration? That query is the central question which this Article endeavors to answer.¹⁴

10. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning to protest policies of the Reagan Administration); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armbands to protest U.S. involvement in Vietnam War).

11. See *infra* notes 15-59 and accompanying text.

12. See, e.g., *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991) (upholding city ordinance requiring fees for parade permit, but reversing city's denial of parade permit to gay rights organization), *cert. denied*, 502 U.S. 880 (1991).

13. E.g., *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio. See Oster, *Protests Still Restricted*, *supra* note 8; *Judge Upholds Limits*, *supra* note 8.

14. A word of limitation is appropriate. This Article seeks to explore the fundamental tension between peace and public order on the one hand, and a certain limited form of free expression on the other. To better focus on that tension, we will limit the scope of this essay to cases involving counter-demonstration in the public fora. A delicate balance of interests is implicated by demonstrations outside the public fora, the proper treatment of which is neither necessary to the analysis nor within the scope of this essay. Likewise, demonstrations that occur in the context of labor disputes give rise to a number of considerations all their own, and are also beyond the scope of this Article. These include questions of labor law, and are far afield from the focus of this effort. See, e.g., *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957), *reh'g denied*, 354 U.S. 945 (1957).

B. Counter-Demonstration in Historical Perspective

Counter-demonstration is a comparatively recent phenomenon. One finds no reference to it in American history prior to the 1960s.¹⁵ But in the past decade, initially and most visibly in the debate on abortion,¹⁶ counter-demonstration has become an increasingly pervasive phenomenon. Its use has spread to a broad range of volatile issues, including race,¹⁷ rap music,¹⁸ gay rights,¹⁹ assisted suicide,²⁰ the death penalty,²¹ and the Holocaust.²² Indeed, counter-demonstration

15. The earliest instances of counter-demonstration occurred in the context of pro-war and anti-war rallies during the Vietnam War. On February 20, 1965, three simultaneous demonstrations, involving both pro-war and anti-war groups, took place in Washington, D.C. on the White House sidewalk. A Quaker Action Group v. Morton, 362 F. Supp. 1161, 1168 (D.D.C. 1973). Although approximately 420 people took part, the secret service reported no incidents. *Id.* On April 28, 1967, the White House sidewalk was again the scene of simultaneous demonstrations by pro-war and anti-war groups. *Id.* An estimated 200 persons took part. *Id.* Once again, the Secret Service reported no incidents. *Id.* Arab and Israeli groups used the White House sidewalk and adjacent Lafayette Park to stage simultaneous demonstrations on June 8, 1967. *Id.* An estimated 30,000 Jews rallied in the park while an estimated 200 Arabs demonstrated on the White House sidewalk. *Id.* Police reported "hostility and tension," but no arrests. *Id.* at 1168-69. In November 1972, the Interior Department published regulations expressly permitting "simultaneous demonstrations" on the White House sidewalk and in Lafayette Park. *Id.* at 1167.

16. See *supra* note 5.

17. Chris Black, *City Puts \$350,000 Price Tag on Parade Protection, Services*, BOSTON GLOBE, May 11, 1994, at 27; NAACP to Demonstrate Against KKK, Wires, Feb. 27, 1994, available in LEXIS, Nexis Library, Wires File; Gregory Tejada, *Ryan Says KKK Can Rally on West Side of Statehouse Because East Side Taken*, Wires, Nov. 19, 1993, available in LEXIS, Nexis Library, Wires File; *Neo-Nazi Group Wins Bid for Rally*, LEGAL INTELLIGENCER, Nov. 4, 1993, at 7, available in LEXIS, News Library, LGLINT File; *Protesters Chant "Go Home Nazis" at White Power Rally*, Reuters, Apr. 24, 1993, available in LEXIS, Nexis Library, REUNA File; Patricia Bond, *Anti-Skinhead Rally Planned to Counter Vigil*, Wires, Dec. 8, 1988, available in LEXIS, Nexis Library, Wires File [hereinafter Bond, *Anti-Skinhead Rally*].

18. Playthell Benjamin, *Rap on the Knuckles*, SUNDAY TIMES (NEW YORK), June 13, 1993 (rappers counter-demonstrate against the Reverend Calvin Butts, who was protesting "negative" rap music).

19. *Domestic News: Georgia*, UPI, Aug. 14, 1993, available in LEXIS, Nexis Library, UPI File; Rene Sanchez & Linda Wheeler, *Gays Demand Rights in Six-Hour March; A Call for Equality, Tolerance*, WASH. POST, Apr. 26, 1993, at A1; *Thousands March in U.S. Gay Rights Parades*, Reuters, June 25, 1989, available in LEXIS, Nexis Library, REUNA File; Estelle Lander, *Parade Highlights Gay Pride, Protest*, NEWSDAY (NEW YORK), June 27, 1988, at 21.

20. Carol J. Castaneda, *Aided-Suicide Ban Faces Challenge; ACLU Says the Decision to Die an Individual Right*, USA TODAY, Mar. 1, 1993, at 6A.

21. Paul W. Valentine, *Thanos Waits To Die as a Maryland Storm Rises; Battle Over Death Penalty Centers on Convicted Killer*, WASH. POST, Oct. 31, 1993, at B1; Catherine Chriss, *Anti-Death Penalty Movement Snowballs to Support Graham*, HOUSTON CHRON., July 25, 1993, at A13; Brian Rooney, *Death Watch Ends Outside San Quentin*, UPI, Apr. 2, 1990, available in LEXIS, Nexis Library, Wires File; Andrew Fegelman, *Indiana Gives Vandiver His Death Wish*, CHI. TRIB., Oct. 16, 1985, at 2.

has entered the realm of mainstream politics; it was employed in the last presidential election,²³ and has surfaced in debates on gun control,²⁴ health care,²⁵ taxes,²⁶ education²⁷—even the merits of Rush Limbaugh as a suitable representative of the citrus industry.²⁸ Those who employ it are cognizant of its dialectic function: to confront and refute an opposing viewpoint.

Ironically, in some of the most polarized debates, the presence of counter-demonstrators is supported, even welcomed, by their opponents.²⁹ This attitude, expressed most often in the context of abortion,³⁰ appears grounded upon two related notions: first, that the debate is a contest between two starkly different viewpoints;³¹ and second, that the presence of “the other side” helps to make each side’s message more vivid and dramatic.³² Thus, an Operation Rescue leader acknowledged that “[our demonstrations] are more effective

22. See Oster, *Protests Still Restricted*, *supra* note 8; Judge Upholds Limits, *supra* note 8; Oster, *Seven Hills Ban*, *supra* note 7.

23. Glenn, *DeWine Supporters Get Ugly*, UPI, Nov. 1, 1992, available in LEXIS, Nexis Library, Wires File; B. Drummond Ayres, Jr., *The 1992 Campaign: Campaign Trail; Quiet Hecklers Receive Thanks from President*, N.Y. TIMES, Oct. 3, 1992, § 1, at 10.

24. *Simon's Rock Students, Faculty Lobby for Gun Control*, UPI, Apr. 8, 1993, available in LEXIS, Nexis Library, Wires File.

25. *Republicans' Anger at "Dirty Tricks,"* MARKETLETTER, Dec. 13, 1993, available in LEXIS, Nexis Library, NWSLTR File; Robin Toner, *Partisan Jostling Frays Health Care Cooperation*, N.Y. TIMES, Dec. 3, 1993, at A24.

26. *Few Tax Supporters, Protesters Turn Out for Rally in Stafford*, HARTFORD COURANT, Oct. 11, 1992, at B4.

27. Ronald Smothers, *U.S. Moves To Oust Principal in Furor on Interracial Dating*, N.Y. TIMES, May 18, 1994, at A20; Keith Ervin, *Pasco Schools Chief Wins Tense Standoff*, SEATTLE TIMES, May 1, 1993, at A1.

28. Jerry Jackson, *Feminists Demonstrate Against Florida Orange Juice in Five Cities; The Citrus Commission Says Most Callers to Its Office Support Its Alignment with Rush Limbaugh*, ORLANDO SENTINEL, March 11, 1994, at B1.

29. *Minnesota: Terry Attracts Counter-Demonstrators*, American Political Network, May 5, 1992, available in LEXIS, Nexis Library (remarks of Randall Terry, founder of Operation Rescue) [hereinafter *Terry Attracts Counter-Demonstrators*]; *New York: Showdown Starts Today, Not Without Counter Effort*, American Political Network, Apr. 21, 1992, available in LEXIS, Nexis Library (remarks of Keith Tucci, Operation Rescue official) [hereinafter *Showdown Starts*]; Ethan Rarick, *Abortion Opponents, Gay Rights Activists in Shoving Match*, UPI, Mar. 6, 1990, available in LEXIS, Nexis Library, Wires File (remarks of T.J. Bailey, Political Director of the Oregon Citizens Alliance, a conservative, pro-life group) [hereinafter *Rarick, Shoving Match*].

30. See *supra* note 29.

31. *Terry Attracts Counter-Demonstrators*, *supra* note 29 (Randall Terry, founder of Operation Rescue, said of the pro-choice counter-demonstrators: “I’m pleased that we can generate antagonism because I know we are doing our job. . . . There are only two camps, [the Christians] and the pagans. That’s it.”).

32. *Showdown Starts*, *supra* note 29.

when there are pro-aborts around.”³³ And another pro-life leader, welcoming the presence of counter-demonstrators, concluded simply, “We couldn’t have a dog without the tail.”³⁴ Thus, even in the most hotly contested debates, isolating one side from the other may actually muffle the message of each.³⁵

C. The Virtues of Counter-Demonstration

The utility of counter-demonstration—its appeal to the would-be protester, and its capacity to advance public discourse on a given subject—stems from a variety of factors. First and foremost, from the standpoint of public discourse, is its tendency to juxtapose competing viewpoints. From the protester’s perspective, it affords the most direct means of confronting and refuting a rival message. Moreover, the need for confronting an opponent *in person* may be especially compelling if a forum that is uniquely pertinent to the dispute has been chosen: an abortion clinic, for example, or the site of a nuclear facility. Indeed, being there in person may be part and parcel of one’s message—like the Holocaust survivors who picket the home of John Demjanjuk and seek to convey, by their very presence, eternal vigilance and the bearing of moral witness.³⁶ Finally, there is the special nature of the street as a forum for protest. No other forum is so readily accessible—and taking to the street is a particularly emphatic way to express an opinion.

33. *Id.*

34. Rarick, *Shoving Match*, *supra* note 29.

35. Though counter-demonstrations have greeted the increasingly visible speech activities of the Ku Klux Klan and other white supremacist groups, *see supra* note 17, the NAACP has consciously decided to ignore such groups, thereby denying them the added publicity that counter-demonstration can produce. *Watching the Klan Watchers*, PLAIN DEALER (CLEVELAND), Mar. 5, 1994, at 10B; Robert L. Steinback, *Ignoring Klan Is a Good Way To Defeat Hatred*, MIAMI HERALD, Jan. 19, 1993, at B1. Others, such as Guerry Hodderson of the Freedom Socialist Party, disagree: “Nazis thrive on obscurity. . . . They’re growing and we need to defend ourselves now, rather than when they’re strong and marching down Fourth Avenue.” Bond, *Anti-Skinhead Rally*, *supra* note 17. Some NAACP members disagree with the organization’s decision to eschew counter-demonstration. *Watching the Klan Watchers*, *supra*. A few have even resigned from leadership positions in order to confront the Klan in person. *Id.* Lacy Steele, President of the NAACP’s Seattle chapter, said that following police instructions to ignore a Nazi rally would be fatal to the ideals of human rights. Bond, *Anti-Skinhead Rally*, *supra* note 17. “Had we [the black community] listened to what the authorities said,” observed Steele, “we would not be where we are today.” *Id.*

36. Don Terry, *Seven Hills Journal*; *On Demjanjuk’s Street, Support Meets Outrage*, N.Y. TIMES, Sept. 24, 1993, at A10 [hereinafter Terry, *Seven Hills Journal*].

1. *Advancing Public Discourse Through the Juxtaposition of Competing Viewpoints*

Robust debate on public issues is essential to the vitality of our democracy.³⁷ Citizens often make choices on matters of public policy based on their assessment of competing viewpoints.³⁸ One virtue of counter-demonstration is that it results, almost literally, in the collision of competing viewpoints. By placing them in close juxtaposition, counter-demonstration sharpens the debate by highlighting differences between the two sides. Thus, counter-demonstration advances public discourse on a given subject by presenting citizens with a stark choice,³⁹ in a dramatic context, between rival perspectives.

2. *The Most Direct Means of Confronting and Refuting a Rival Message*

The obvious appeal of counter-demonstration is that it affords protesters the most direct means of confronting and refuting a message that they oppose. By appearing *in person* to counter an opponent, one conveys a more emphatic message, and evinces more steadfast commitment to a cause, than if one had merely mailed a letter to the editor. In the words of one pro-choice counter-demonstra-

37. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.”) (citation omitted); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”).

38. As Thomas Jefferson observed, “[T]he public judgment will correct false reasonings and opinions, on a full hearing of all parties.” SAUL K. PADOVER, *THOMAS JEFFERSON AND THE FOUNDATIONS OF AMERICAN FREEDOM* 132 (1965) (quoting second inaugural address).

39. Occasionally, the very starkness of the choice may prompt some citizens to discern that *both* sides are wrong and that, as in Hegelian dialectic, the truth may be found in a synthesis of the two perspectives. See WILL DURANT, *THE STORY OF PHILOSOPHY* 223-24 (1926) (describing the “dialectical movement” in Hegel’s philosophy). Once again, counter-demonstration will have helped to produce this insight by juxtaposing the rival viewpoints.

tor: "We are pro-active. We are here in their face. We are not violent. We are on a mission to expose their lies."⁴⁰

Meeting the enemy face to face is qualitatively *different* from countering his or her message through any other medium of expression. It is more dramatic, more forceful, permits immediate give and take with the other side, and—from a protester's perspective—is capable of affording greater emotional release.

3. *Sharing the Unique Forum*

In many instances, there is a specific forum which is uniquely pertinent to a debate. Counter-demonstration is often the result of rival groups clamoring to demonstrate at the same unique forum.⁴¹

In the context of any public issue, it is often the case that one forum is particularly symbolic of, or singularly relevant to, the debate. Demonstrators protesting government policy, for example, have stationed themselves in the park opposite the White House,⁴² along the route of a presidential motorcade,⁴³ in the shadow of the Republican national convention,⁴⁴ outside a foreign embassy,⁴⁵ in the audience at a governor's inauguration speech,⁴⁶ and in front of a mayor's house.⁴⁷ In *Cox v. Louisiana*,⁴⁸ civil rights activists marched on the courthouse where their brethren were jailed.⁴⁹ Holocaust survivors have picketed

40. Joe Frolik, *Operation Rescue Softens Style, Image; Anti-Abortion Activists Use New Tactics*, PLAIN DEALER (CLEVELAND), July 13, 1993, at 10A.

41. *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); Terry, *Seven Hills Journal*, *supra* note 36 (Holocaust survivors and Ku Klux Klansmen both seek access to the same unique forum, the street where John Demjanjuk resides, to express outrage or support at the suspected Nazi prison guard's return to the United States).

42. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

43. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975).

44. *Texas v. Johnson*, 491 U.S. 397 (1989).

45. *Boos v. Barry*, 485 U.S. 312 (1988).

46. *ACT-UP v. Walp*, 755 F. Supp. 1281 (M.D. Pa. 1991).

47. *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *New Alliance Party v. Dinkins*, 743 F. Supp. 1055 (S.D.N.Y. 1990).

48. 379 U.S. 536 (1965).

49. *Id.* at 539-42. At oral argument before the U.S. Supreme Court, the prosecution unwittingly supplied an illustration of the "unique forum" concept when citing testimony adduced at trial:

The trial judge went to great lengths in asking [one of the defendant protesters] on the witness stand, "Why the courthouse? [The jail and the courthouse were both in the same building.] Why did you come down here? Why not on the old State Capitol grounds or some other part of town, some public park? Why here?" And [the defendant] says, "Here's where they were arrested and we came to protest it; we came here."

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the home of John Demjanjuk,⁵⁰ advocates and opponents of gay rights have raised their voices at New York City's annual Gay Pride Parade,⁵¹ anti-war protesters have sailed before the viewing stand at a parade of Navy ships⁵²—and, as we have seen so often, protesters on both sides of the abortion debate have confronted each other at clinics⁵³ and doctors' homes.⁵⁴

In all of these cases, protesters identified a forum that was itself resonant with meaning—a forum whose unique connection to the controversy amplified their message, lent it gravity, or imbued it with poignancy. A unique forum may well exist for many public controversies, contestants on both sides of the debate will likely clamor for access to it, and access to the forum may be particularly desirable at a specific moment in time—the appearance there, for example, of a public official or ceremony. All these factors point not only to the likelihood that counter-demonstrations will take place, but also to the recognition that they should be *permitted* to take place.

4. *Vigilance as a Message in Itself*

Confronting an opponent in person may not merely be desirable, it may be part and parcel of the *message*. In some instances, one's very *presence* there is meant to convey resistance, vigilance, and the bearing of moral witness against those on the other side. This is very much the message of many pro-life protesters, whose continuous presence at abortion clinics is meant to convey both resolute vigilance and moral outrage.⁵⁵ The very same message is advanced by the Jewish groups and Holocaust survivors who patrol the street where John Demjanjuk resides.⁵⁶ Such a message can only be conveyed by *being there*. Particularly with a message of vigilance, it is necessary for the protester to be within sight of the confronted evil.

marks of Ralph Roy, counsel for the State of Louisiana, at oral argument in *Cox v. Louisiana*).

50. Terry, *Seven Hills Journal*, *supra* note 36. At the City's request, a state trial court enjoined the simultaneous presence on Demjanjuk's street of groups with opposing viewpoints on his return to the United States. *City of Seven Hills v. Aryan Nations*, No. 258726, C.P. Ct., Cuyahoga County, Ohio (Dec. 15, 1993), *aff'd*, No. 66754, 1995 Ohio App. Lexis 575 (Ohio Ct. App. Feb. 16, 1995).

51. *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

52. *Bay Area Peace Navy v. United States*, 914 F.2d 1224 (9th Cir. 1990).

53. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994).

54. *Frisby v. Schultz*, 487 U.S. 474 (1988).

55. *See, e.g., Madsen*, 114 S. Ct. 2516.

56. Terry, *Seven Hills Journal*, *supra* note 36.

To interfere, then, with the right of such speakers to be present at such a forum—to bar them, for example, from sharing the forum with those whom they oppose—is literally to suppress the *content* of their message.

5. *The Special Nature of the Street as a Forum for Protest*

To the extent that counter-demonstration represents a distinct form of street protest, its appeal to prospective speakers is two-fold: No other forum is so readily accessible as the street, and taking to the street is a particularly emphatic way to express an opinion.

Streets and sidewalks have long been assigned special status under American law as permissible venues for public assembly and debate.⁵⁷ Moreover, streets and sidewalks do not lose their status as traditional public fora simply because they run through a residential neighborhood.⁵⁸

But even beyond the special legal status with which it is endowed, the street is a forum like no other because it is always there, readily accessible, and available to everyone. Perhaps most important, protestors can make themselves heard there without anyone's assistance. Unlike a letter to the newspaper, their voices will be heard regardless of whether an editor agrees to print their message. Unlike talk radio, their voices will be heard regardless of whether they can get through to the disc jockey. Their voices will be heard regardless of whether television stations decide to cover the event. In short, the street is superdemocratic. It is there for everyone and, even though it is not a medium that will widely disseminate a message, it permits one's ideas to be conveyed unedited.

Moreover, taking one's message to the street is a stronger, more emphatic way to speak than writing a letter to the editor. There is something about it that conveys more conviction and more resolve.⁵⁹ Holding a sign in the rain simply evinces greater *commitment* than any

57. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (striking down an ordinance requiring a permit to use public streets and parks for speech activities) ("[U]se of the streets and public places [for assembly and debate on public issues] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.").

58. *Frisby*, 487 U.S. 474.

59. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 840 (2d ed. 1988) (observing that civil rights activists of the 1960s took to the streets "because no other medium could adequately register either the intensity of their protest or the solidarity of their movement").

letter, no matter how eloquent. It is also a better vehicle for venting one's anger, for displaying one's outrage.

All of these factors make counter-demonstration—a mode of expression that is inextricably tied to the street—an especially vital and accessible means of protest.

D. The Few Cases Touching Upon This Subject

Only two cases⁶⁰ expressly address the question of First Amendment protection for counter-demonstration: *City of Seven Hills v. Ar-*

60. Aside from *Seven Hills* and *Olivieri*, there is little beyond a smattering of dicta on the question. *Grayned v. Rockford*, 408 U.S. 104, 115-16 (1972) ("[T]wo parades cannot march on the same street simultaneously, and government may allow only one."); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (overturning disorderly conduct convictions of protesters who were arrested while picketing mayor's residence); *id.* at 117 (Black, J., dissenting) ("These facts disclosed by the record point unerringly to one conclusion, namely, that when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protesters of their grievances."); *Shamloo v. Mississippi State Bd. of Trustees*, 620 F.2d 516, 523 (5th Cir. 1980) (upholding requirement that on-campus demonstrations be scheduled in advance with university officials, but striking down a provision that vested officials with the power to disapprove all but "wholesome" activities) (observing that it had previously upheld advance registration requirements, which the court described as "a reasonable method to avoid the problem of simultaneous and competing demonstrations"); *Bayless v. Martine*, 430 F.2d 873, 878 (5th Cir. 1970) (upholding university regulation requiring 48-hour advance reservations for on-campus meetings) ("The requirement of reserving the Student Expression Area 48 hours in advance is a reasonable method by which the problem of simultaneous and competing demonstrations could be avoided. While a university could be required under appropriate circumstances to permit both the Students for a Democratic Society and the Young Americans for Freedom to demonstrate, no one could reasonably contend that the Constitution required the college to permit such demonstrations to take place at the same time and in the same area."); *Partisan Defense Comm. v. Ryan*, 841 F. Supp. 247 (C.D. Ill. 1994) (state officials granted plaintiff a permit to conduct a counter-demonstration on the north steps of the State Capitol building while the KKK would be holding a rally on the east steps; plaintiff also sought, but was denied, permission to point his sound system in the Klan's direction in order to drown out their speech; district court rejects plaintiff's prayer for injunctive relief); *A Quaker Action Group v. Morton*, 362 F. Supp. 1161 (D.D.C. 1973) (upholding Interior Department regulations governing demonstrations on the White House sidewalk and in Lafayette Park permitting simultaneous demonstrations but requiring that the protest groups supply their own marshals), *aff'd*, 516 F.2d 717 (D.C. Cir. 1975). *Cf. Sanders v. United States*, 518 F. Supp. 728, 730 (D.D.C. 1981) (rejecting civil rights claims by plaintiff who asserted that his First Amendment freedoms had been violated when, for the purpose of publicizing what he believed were three mysterious deaths in South Carolina, he ventured without a permit onto the Ellipse in Washington, D.C. while an annual event, the "Pageant for Peace," was being held, and, after placing three small signs beneath the South Carolina Christmas tree and then standing beside the tree with a larger sign, he was arrested) ("[M]ore fundamental[] is the interest in guaranteeing citizens the right to participate in events or demonstrations of their own choosing without being subjected to interference by other citizens. A physical intrusion into another event for the purpose of

yan Nations⁶¹ and *Olivieri v. Ward*.⁶² In both cases, counter-demonstrators were enjoined from appearing at a desired forum at the same time as the group they opposed.

1. Seven Hills

Anticipating the return of its most famous resident, accused Nazi war criminal John Demjanjuk,⁶³ the City of Seven Hills, Ohio imposed

interjecting one's own convictions or beliefs is by definition an interference, regardless of how insubstantial or insignificant it might appear. As such, it is an interference with the rights of other citizens to enjoy the event or demonstration in which they have chosen to participate, and in an area reserved for them.").

Though it does not directly address the right to counter-demonstrate, one case, *We've Carried the Rich for 200 Years, Let's Get Them Off Our Backs-July 4th Coalition v. Philadelphia*, 414 F. Supp. 611 (E.D. Pa. 1976), comes sufficiently close to warrant our attention. Vowing to "fight [the rich] on the day they choose to celebrate their bloodsoaked rule," plaintiffs, "an amalgam of self-styled dissidents," sought to conduct a massive counter-demonstration in Philadelphia on the date of the Bicentennial, with a view toward "dramatizing the injustices of the American System as it has evolved over the last two centuries." *Id.* at 612. City officials rejected plaintiffs' permit applications for a parade and cultural events. *Id.* at 613. The court held that plaintiffs should be permitted to hold their parade and rally, but not within 12 blocks of the officially sponsored festivities, which were scheduled to include a speech by the President of the United States and a six to eight hour parade with 50,000 participants and an estimated 300,000 spectators. *Id.* at 613-14. Observing that "two parades cannot march on the street simultaneously and the city may allow only one," *id.* at 613 (citing *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941)), the court asserted:

[T]he vast majority of the people that day will be exercising First Amendment rights by attending and participating in the officially sponsored activities. *It seems to me that they ought to be free to do so without fear of interference from those who wish to promote an opposing view.* Moreover, in light of the plaintiffs' militant attitude and provocative posture as exemplified in their broadside . . . , *common sense dictates that the two parades should be kept separate in order to avoid any untoward incident which would trigger a confrontation and disrupt the peaceful activities of either or both groups.*

Id. at 614 (emphasis added). Though the court's language evinces little enthusiasm for any right to counter-demonstrate, *July 4th Coalition* can best be explained by the huge number of people involved, and the physical impossibility of juxtaposing the two events in one place, *id.* at 614-15 (citing the convergence of cars and people within a comparatively limited physical space). The plaintiffs estimated that 5,000 to 10,000 participants would attend their parade and rally, *id.* at 612-13, while the official festivities were to involve a combined 350,000 participants and spectators, *id.* at 613.

61. No. 258726, C.P. Ct., Cuyahoga County, Ohio (Dec. 15, 1993), *aff'd*, No. 66754, 1995 Ohio App. LEXIS 575 (Ohio Ct. App. Feb. 16, 1995).

62. 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

63. In 1981, Mr. Demjanjuk was stripped of his U.S. citizenship in connection with allegations that he had participated in the Nazi campaign of genocide known as the Holocaust. After extradition and trial in the State of Israel, Mr. Demjanjuk was convicted and sentenced to death. But the Israeli Supreme Court overturned his conviction in early September 1993, thereby paving the way for his return to the United States. *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio, at 1 n.1.

a virtual ban on picketing in its residential neighborhoods.⁶⁴ Several days later, just as Mr. Demjanjuk was gaining his release from Israeli prison authorities,⁶⁵ picketers staged a series of protests at his Seven Hills home.⁶⁶ These protests, held on September 22 and 23, 1993,⁶⁷ were led by Rabbi Avi Weiss and included survivors of the Holocaust.⁶⁸ On September 25, 1993, members of the Ku Klux Klan marched at the same location in support of Mr. Demjanjuk.⁶⁹ Two days later, the City of Seven Hills filed a civil suit in state court seeking to enjoin parties named and unnamed from violating its picketing ordinance.⁷⁰ The court issued a temporary restraining order the next day,⁷¹ and protests continued in compliance with a series of injunctive schemes throughout the autumn months of 1993.⁷²

After a three-day evidentiary hearing in late October, the court issued a permanent injunction on December 15, 1993. In the opinion that accompanied its injunction, the court struck down the city's picketing ordinance as unconstitutionally overbroad,⁷³ but left in place—with minor modifications—a detailed order governing the conduct of demonstrations on Mr. Demjanjuk's street.⁷⁴

The permanent injunction decreed that protests could be staged seven days a week, but held that no more than twenty-five demonstrators could use the forum at any one time.⁷⁵ Prospective picketers were required to register in advance with the Seven Hills Law Department in order to protest during one of two time slots (either from

64. The ordinance read in pertinent part: "It is unlawful for any person to engage in unlawful [sic] picketing before or about the residence or dwelling occupied by any individual in the City of Seven Hills." SEVEN HILLS, OHIO, CODIFIED ORDINANCE § 511.02 (1993). The ordinance defined "unlawful picketing" as: "[P]icketing . . . directed at or conducted primarily before, or about, or in the immediate vicinity of the land upon which the dwelling of any individual is situated. . . ." *Id.* § 511.01(b)(1).

65. Mr. Demjanjuk made his return to the United States on September 22, 1993. *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio, at 1 n.1.

66. Terry, *Seven Hills Journal*, *supra* note 36.

67. Brief for Defendant/Cross-Appellant Rabbi Avi Weiss at 1, *City of Seven Hills v. Aryan Nations*, No. 66754, 1995 Ohio App. LEXIS 575 (Ohio Ct. App. Feb. 16, 1995) [hereinafter Weiss Brief].

68. Terry, *Seven Hills Journal*, *supra* note 36.

69. Weiss Brief, *supra* note 67, at 1.

70. Weiss Brief, *supra* note 67, at 1. The city's lawsuit was filed on September 27, 1993. *Id.*

71. *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio at 1 (temporary restraining order issued on Sept. 28, 1993).

72. Weiss Brief, *supra* note 67, at 1.

73. *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio, at 5-6.

74. *Id.* at 6-7.

75. *Id.* (permanent injunction at 1).

10:00 a.m. to noon or from 2:00 p.m. to 4:00 p.m.).⁷⁶ The Law Department was ordered to ensure, when scheduling the protests, that no groups with differing opinions regarding the Demjanjuk affair be permitted simultaneous access to the forum.⁷⁷

Conspicuously absent from the record in *Seven Hills* is any suggestion that the rival protest groups were poised to clash with one another. The most visible counterparts—Rabbi Weiss and the Holocaust survivors on one side, the Ku Klux Klan on the other—both testified that they would not initiate violence, even if their picketing brought them face to face with the other side.⁷⁸ Nevertheless, the trial court summarily concluded that the simultaneous presence of these groups “poses a clear impending danger of irreparable injury to the City and its residents.”⁷⁹

76. *Id.* (permanent injunction at 1-2).

77. *Id.*

78. Weiss Brief, *supra* note 67, at 26-27. Rabbi Weiss, leader of the Coalition for Jewish Concerns, repeatedly testified to his lifelong commitment to non-violent protest:

Q: And all the picketing that you have taken part in has been peaceful, correct?

A: Absolutely. Everything I do is peaceful.

Trial Transcript at 80-81, *City of Seven Hills v. Aryan Nations*, No. 258726, C.P. Ct., Cuyahoga County, Ohio (Dec. 15, 1993) [hereinafter Trial Transcript]. The Rabbi's group had cooperated fully with Seven Hills police during demonstrations near the Demjanjuk home:

Q: The police have never had to use force or use the threat of arrest as a means of crowd control with regard to your protests?

A: Never. Whatever the police have asked us to do . . . we immediately followed their orders.

Id. at 119-20. Robert Armstrong, Grand Dragon of the State of Ohio and National Imperial Chaplain of the Ku Klux Klan, consistently testified that his group would not initiate violence, even while sharing the forum with Jewish demonstrators:

Q: Isn't it a fair statement that when the KKK is there alone there doesn't seem to be a problem, but when the KKK is joined with an opposing side there is the real potential for injuries?

A: With—if we demonstrate, there will be no injuries from any part of us. We will not bother anyone. We hold up protest signs but we will not attack anyone.

* * *

Q: [W]ould it be possible for you and your group to protest at the same time as the Jews?

A: It would be possible because we can contain ourselves. If they can contain themselves [sic], that's fine.

* * *

Q: So if the Jewish protesters were [able] to remain non-violent, you're confident that your protesters would remain non-violent as well?

A: Absolutely.

Id. at 172, 176, 177.

79. *City of Seven Hills*, No. 258726, C.P. Ct., Cuyahoga County, Ohio, at 6.

This conclusion was based on little, if any, concrete evidence. The testimony that the city presented in support of injunctive relief may be categorized into three broad classes of argument:

- (1) *Clandestine information* available to the city showed violence to be the probable result of counter-demonstration;
- (2) *The nature of the groups* seeking to demonstrate made violence the probable result of counter-demonstration;
- (3) *The nature of counter-demonstration itself* made violence the probable result of counter-demonstration.

The clandestine information—which linked Rabbi Weiss to a terrorist organization—turned out at trial to be based on a ludicrous misunderstanding, and utterly erroneous.⁸⁰ Concerns about the violent proclivities of the protest groups were based on unsubstantiated opinions,⁸¹

80. Seven Hills Police Chief John Fechko claimed to have received clandestine information from members of the Cleveland Jewish community linking Rabbi Weiss to the Kach Party, an organization known for its violence and potentially responsible for a political murder somewhere in New Jersey within the last decade. Trial Transcript, *supra* note 78, at 235-37, 239-40. Later testimony showed that belief to have been founded on a misunderstanding and completely erroneous. First, Chief Fechko mistakenly assumed that Kach was the name of the Rabbi's activist group, the Coalition for Jewish Concerns:

Q: I'll ask you again. Do you know what the Kach organization is, sir?

A: It's the Coalition for Jewish Concerns.

Id. at 254. In fact, nothing of the sort is true. Fred Taub, a member of the Coalition for Jewish Concerns, exposed Chief Fechko's mistake in his testimony:

Q: Sir, are you affiliated with a group called Committee of Jewish Concerns, I believe it's called Kach?

A: No. A group called Coalition for Jewish Concerns.

Q: For Jewish Concerns?

A: Correct.

Q: Is that what "Kach" stands for?

A: No. I think you are referring to a different organization.

Id. at 275. It is a very different organization indeed. Mr. Taub later testified that Kach was an Israeli political party no longer in existence. *Id.* at 299. Chief Fechko erroneously believed that the Coalition for Jewish Concerns was known by the English acronym "CJC," which he took to be Kach. *Id.* at 235, 254-56. In fact, the Coalition for Jewish Concerns is otherwise known only by its Hebrew name, the English transliteration of which is "Amcha." *Id.* at 300. It is not only distinct from the Kach Party, *id.*, but absolutely committed to the principle of non-violent protest—a fact expressly testified to by its leader, Rabbi Weiss, *id.* at 81, 121, and its principal Cleveland organizer, Mr. Taub, *id.* at 300. Chief Fechko's testimony that clandestine information linked Rabbi Weiss to the Kach Party was thus wholly without foundation, based on faulty assumptions, and incapable of supporting the assertion that counter-demonstration posed a clear and present danger of lawlessness.

81. Like his belief that Rabbi Weiss was the leader of a militant extremist group, Chief Fechko's opinions regarding the other named defendants—the KKK, the Aryan Nations, and the Jewish Defense Organization—were equally without a strong factual foundation. On cross-examination, the Chief conceded that his assessment of those groups was based solely upon news accounts, Trial Transcript, *supra* note 78, at 233; that he had never inquired into their respective histories, beliefs, tactics, or tendencies, *id.* at 234, 250-53; that he had never studied their relationships with one another, *id.* at 253; that he had never

were contradicted by the testimony of the protesters themselves,⁸² and were founded upon an unproven theory—a sort of “spontaneous combustion” thesis—in which the admixture of particular groups is regarded, *a priori*, as the recipe for an explosion.⁸³ Finally, taking the

interviewed any of their members to determine the seriousness of their intent to engage in violent conduct in Seven Hills, *id.* at 234; and that none of their members had ever threatened to engage in such conduct, *id.* at 234. He spoke interchangeably of the Jewish Defense League (“JDL”) and the Jewish Defense Organization (“JDO”), and thus appeared ignorant of their separate identities, *id.* at 242-45; he asserted incorrectly that the JDL still exists, *id.* at 251-52, displaying an unawareness that the JDL disbanded after the death of Meir Kehane, *id.* at 302; indeed, he had never heard of Meir Kehane, *id.* at 252; nor could he identify Betar, *id.* at 252, a Jewish youth group that had joined in several peaceful protests in Seven Hills by the time of Chief Fechko’s testimony in October 1993, *id.* at 293-94.

Members of the Seven Hills City Council, one of whom predicted “chaos” in Seven Hills if counter-demonstrations were permitted to occur, *id.* at 41, likewise proved unable to identify a specific threat:

Q: Councilman, let me take you in a somewhat different direction. Are you aware of any threats by the protesters who have been on [Mr. Demjanjuk’s] street of violence?

A: No.

id. at 51 (testimony of Councilman John Miller). Councilman Frank J. Petro testified that he felt threatened by the protests, but when asked to articulate a reason for his fear, he could offer nothing more than vague apprehension:

Q: Okay. So there is a possibility of some threat or harm, but you can’t point to any specific incident that represents an imminent threat of violence, isn’t that true?

A: Not at this time.

* * *

Q: All right. So there is some vague, undifferentiated fear of possible future violence?

A: Yes.

Id. at 35, 36.

82. See *supra* note 78 (quoting the testimony of Rabbi Weiss and of Robert Armstrong, Grand Dragon of the State of Ohio and National Imperial Chaplain of the Ku Klux Klan).

83. Chief Fechko was asked what would happen if the Coalition for Jewish Concerns, the Ku Klux Klan, and the Aryan Nations Loyalist Party were permitted to share the same forum. He was never qualified as an expert, and during the course of his 24-year career, received no riot control training beyond the minimum afforded police cadets. Trial Transcript, *supra* note 78, at 210. Chief Fechko opined:

A: In my professional opinion, if those three groups protested at the same time, at the same location, I think violence would erupt.

Id. at 218. On direct examination, Mayor George Chandick offered a similar assessment of potential encounters:

Q: What do you think would happen if the Ku Klux Klan was there for picketing at the same time the Rabbi’s group was there?

A: I would hate to imagine.

* * *

Q: Do you think that if those groups were massed together that violence would be imminent?

A: There would be no question in my mind.

spontaneous combustion thesis to an even higher plane of abstraction, both the Mayor⁸⁴ and the Police Chief⁸⁵ asserted that counter-demonstration, by its very nature, always presents an unacceptable invitation to violence. Whether such a record is sufficient to support a broad injunctive⁸⁶ ban on counter-demonstration has yet to be decided on appeal.⁸⁷

2. *Olivieri*

Taken superficially, *Olivieri v. Ward*⁸⁸ might be misread to offer support for the proposition that counter-demonstrators can be temporally separated from one another consistent with the First Amend-

Id. at 63. Councilman John Miller articulated his own fears regarding these groups:

Q: What do you think would happen if the Nazis and the [S]kinheads and the Aryan Nations were picketing in your city, sir?

A: All at the same time?

Q: Yes, sir.

A: We would have chaos.

Id. at 41. On direct examination, Mayor Chandick stated the reasoning behind his opinion:

Q: What would happen if you included the Aryan Nations and the [S]kinheads and the neo-Nazis to [the Rabbi's] group, sir?

A: [Y]ou'd have to be kidding because we would be putting together antagonistic groups that—that have been well-known throughout the entire country.

Id. at 64. In effect, the Mayor asserted that the interaction of these groups might be inferred from common knowledge, revealing that his opinion was unsubstantiated by fact.

84. Trial Transcript, *supra* note 78, at 69.

85. *Id.* at 218.

86. It is black-letter law that an injunction shall not be issued absent the threat of irreparable harm. In short, there must be some precipitating event, some tangible display of impending violence to justify an injunction. *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 795 (5th Cir. 1989). An injunction against the exercise of First Amendment freedoms, moreover, is an extraordinary remedy. *Id.* at 790. The Supreme Court has held that restraints based upon the fear of violent reaction to the prohibited expression are improper, absent a clear and present danger of imminent lawlessness:

[F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (citations omitted) (emphasis added). Recently, the Supreme Court held that *injunctions* directed at speech activities must be subjected to a level of judicial scrutiny even *more* exacting than that traditionally reserved for legislation touching upon speech. *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2524-25 (1994).

87. Though a state appellate court recently affirmed the injunction, *City of Seven Hills v. Aryan Nations*, No. 66754, 1995 Ohio App. LEXIS 575 (Ohio Ct. App. Feb. 16, 1995), the Ohio Supreme Court recently granted review. *Seven Hills v. Aryan Nations*, No. 95-730 (Ohio Supreme Court) (review granted July 19, 1995). Tom Breckenridge, *Court Throws Out Seven Hills' Ban on Home Picket[ing]*, *PLAIN DEALER* [CLEVELAND], Feb. 22, 1995.

88. 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

ment. But a careful reading of *Olivieri* reveals that the Constitution requires precisely the opposite result.

Olivieri grew out of counter-demonstrations against New York City's Gay Pride Parade, an annual event along Fifth Avenue that passed directly in front of St. Patrick's Cathedral, the Apostolic See of the Roman Catholic Archdiocese of New York.⁸⁹ Members of Dignity, an organization of gay and lesbian Catholics, sought to hold a peaceful vigil before the cathedral steps while the parade passed by. The district court summarized the character and content of Dignity's message:

Dignity sought to communicate . . . that, notwithstanding the opposition of the institutional Church and its officials, Catholic gays need not choose between their homosexuality and their religion. . . . The audience Dignity is trying to reach includes all other marchers in the Parade, especially Catholic or ex-Catholic ones, as well as Parade spectators in the Cathedral area.⁹⁰

In response to both Dignity and the Gay Pride Parade itself, an amalgam of conservative religious groups named the Committee for the Defense of St. Patrick's ("the Committee") also sought to stand on the cathedral sidewalk as the parade went by.⁹¹ To avoid a potential conflict between these two groups, beginning with the 1983 parade, New York City police issued orders "freezing" the sidewalk in front of the cathedral, thereby denying access to Dignity, the Committee, and pedestrians during the Gay Pride Parade.⁹²

In 1986, Dignity challenged the police order freezing the sidewalk. The district court concluded that the order prohibiting Dignity from demonstrating on the sidewalk during the parade was unconstitutional, and therefore enjoined police from preventing fewer than 100 Dignity members from congregating on the cathedral sidewalk during the parade.⁹³

The City of New York appealed, and due to the parade's imminence, the Second Circuit urged the parties to reach an agreement.⁹⁴ Both parties then agreed, in separate letters to the court, to protest for forty-five minutes in an enclosed "pen" in front of the cathedral, with their protests separated by thirty minutes.⁹⁵ The groups could not

89. *Id.* at 603.

90. *Olivieri v. Ward*, 637 F. Supp. 851, 855 (S.D.N.Y. 1986), *aff'd*, 795 F.2d 1005 (2d Cir. 1986), *modified*, 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

91. 637 F. Supp. at 857.

92. *Id.* at 856.

93. *Id.* at 875, 879.

94. 801 F.2d at 604.

95. *Id.*

agree on a proper number of demonstrators, and on its own motion, the Second Circuit imposed the following scheme: twenty-five members of Dignity were permitted to protest within the pen for thirty minutes, and, after a thirty-minute interval, twenty-five members of the Committee were permitted to do the same.⁹⁶ While neither group could be present in the pen during the other's demonstration, both were expressly allowed to protest *while* the parade passed by.⁹⁷

The district court had banned the Committee from the cathedral sidewalk altogether, finding that the Committee sought only to disrupt the vigil held there by Dignity.⁹⁸ The Second Circuit overturned this restriction as violative of the Committee's First Amendment rights. The court of appeals noted that the conflicting values held by gay demonstrators and members of the conservative Committee presented a risk of conflict, but held:

[T]he potential for confrontation and violence is obviously present when opposing groups share the same forum at the same time. It is not up to the City or its officials to determine those issues worth debating in the public forum. In the field of expression all ideas are considered equal. Thus both groups are entitled to be present at St. Patrick's Cathedral during the Gay Pride Parade.⁹⁹

Thus, while Dignity and the Committee were not afforded simultaneous access to the pen, the Second Circuit expressly affirmed the Committee's right to voice its defense of the Church against open homosexuality in a uniquely salient forum (in front of St. Patrick's Cathedral) at a uniquely salient time (while the Gay Pride Parade passed by).¹⁰⁰

96. *Id.*

97. *Id.*

98. *Id.* at 606.

99. *Id.*

100. The Committee literally viewed itself as defending the cathedral from sacrilege. This stance created conflict during prior Gay Pride Parades. Participants in the parade had aimed extravagant gestures of derision and contempt at the Catholic faithful (excepting Dignity) in previous years, *Olivieri*, 637 F. Supp. at 855-57, and, as a result of the tension these affronts engendered, parade participants and Committee members had engaged in violent scuffles, *id.* at 857.

3. *The Missing Element in Seven Hills and Olivieri: An Express Recognition That Counter-Demonstration Is a Unique Form of Expression Whose Protection Should Be No More Subject to Compromise than the Right to Protest Generally*

Seven Hills and *Olivieri* present a variety of instructive similarities and contrasts. Like the City of New York, the town of Seven Hills sought to avoid violence by “freezing” the forum where protesters wished to gather. Like the Ohio trial court, the *Olivieri* district court held such a freeze unconstitutional, but went on to grant only compatible groups (Dignity and the Gay Pride marchers) simultaneous access to the forum in question. Like the cathedral in *Olivieri*, Mr. Demjanjuk’s house is an especially potent symbol to Rabbi Weiss precisely when his opponents seek to use the house to their own advantage. Therefore, like the Second Circuit, the *Seven Hills* court should have crafted a remedy that granted opposing groups (like the Gay Pride marchers and the Committee) simultaneous access to the desired forum.

Olivieri is significant because the Second Circuit held that the Committee had a right to counter-demonstrate (1) in *front* of St. Patrick’s Cathedral, and (2) *during* the Gay Pride Parade. The Committee’s message depended upon its timing and venue because it was a message of resistance. The Committee sought to interpose itself between the Gay Pride Parade (which it saw as an affront to the Catholic Church) and the cathedral (which it saw as the very symbol of the Church).¹⁰¹ To the Committee, the only salient *time* to voice this message of opposition was during the parade itself, while marchers directed their derision at the cathedral. Likewise, the only salient *place* to demonstrate was in front of the cathedral, to “defend” it from desecration.

The very same logic applies to the *Seven Hills* scenario. Whenever anti-semitic groups rally in front of Mr. Demjanjuk’s home, they appropriate the symbolic value of his *being* home to enhance their own messages of anti-semitism and Holocaust revisionism. Consequently, it is then and there that Rabbi Weiss and his followers feel compelled to deliver their own message of opposition to Holocaust revisionism. The Rabbi’s message is one of resistance and vigil, which, like the Committee’s message in *Olivieri*, seeks by its presence to prevent a rival faction from appropriating without opposition the symbolic value of a special site.

101. *Id.* at 855.

A superficial reading of *Olivieri* might focus only on the Second Circuit's administrative separation of Dignity and the Committee.¹⁰² But a complete reading shows that the Second Circuit concluded that it was simply unconstitutional to banish the Committee from the Gay Pride Parade merely on the basis of its antagonism toward the marchers. Likewise, it was inappropriate for the *Seven Hills* court to conclude that the First Amendment rights of the rival factions were nullified by their mutual antagonism.

Though the Second Circuit's *Olivieri* decision is a profoundly important step in the right direction, its analysis lacks the same critical element that is missing in *Seven Hills*: an express recognition that counter-demonstration is a unique form of expression whose protection should be no more subject to compromise than the right to protest generally. That proposition is discussed in the next section of this Article.

III. Positive Arguments in Favor of a Right to Counter-Demonstration: The Right Can be Found in Existing Law and in the Philosophical Justifications for the First Amendment

Two distinct arguments in favor of a right to counter-demonstration can be asserted: one based on existing free speech precedent, and the other based on the philosophical justifications for the First Amendment. In both contexts, the *reasons* for tolerating speech that engenders the risk of public disorder apply with equal force to demonstrators and counter-demonstrators alike.

A. Existing Precedent

The right to counter-demonstration can be found in existing case law implicitly in every decision balancing the right to free expression against concerns for public safety and civic order. This Article examines existing precedent at two separate levels: first, the limitations on government power to restrict potentially volatile demonstrations; and then, the limitations on government power to punish seditious speech.

102. Any such analysis would, even if taken alone, provide no compelling reason to uphold the *Seven Hills* court's temporal separation of opposing groups on Mr. Demjanjuk's street. It must be noted that in *Olivieri*, unlike *Seven Hills*, both Dignity and the Committee *consented* to being segregated into separate time slots. *Olivieri*, 801 F.2d at 604, 607. No such consent was ever manifested by any of the protesters in *Seven Hills*.

1. *Limitations on Government Power to Restrict Potentially Volatile Demonstrations*

First Amendment jurisprudence has long imposed severe limitations on government's power to restrict public demonstrations, even where the potential for discord or conflict is great. Based on a commitment to "robust,"¹⁰³ "uninhibited,"¹⁰⁴ even "provocative"¹⁰⁵ debate, federal courts have held that the right to demonstrate may not be left to the unfettered whims of local officials.¹⁰⁶ When issuing a permit, officials may consider neither the controversial nature of the speaker's viewpoint¹⁰⁷ nor its potential for inspiring a hostile response.¹⁰⁸ If a hostile audience actually materializes, the government is not only barred from silencing the speaker,¹⁰⁹ but often has an affirmative duty to *protect* the speaker.¹¹⁰

These well-established precedents, and the reasoning on which they are based, apply just as readily to *counter*-demonstration as to any other form of protest.

a. General Limits on State Authority to Deny or Condition Permits

Courts have consistently invalidated licensing schemes that vested government officials with discretionary power to grant or withhold permission to demonstrate.¹¹¹ Any scheme that vests arbitrary

103. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

104. *Id.*

105. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

106. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990). *See infra* notes 111-116 and accompanying text.

107. *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 372 (D.C. Cir. 1992) (holding that officials may only consider the nature of the speech and the potential response if there is a compelling state interest at stake and finding the restriction in this case was necessary to serve the asserted compelling interest).

108. *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972). *See infra* notes 117-137 and accompanying text.

109. *Glasson v. City of Louisville*, 518 F.2d 899, 905 (6th Cir. 1975).

110. *Id.* at 906; *Sabel v. Stynchcombe*, 746 F.2d 728, 731 n.7 (11th Cir. 1984). *See infra* notes 138-156 and accompanying text.

111. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (striking down ordinance permitting government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order, and holding that the ordinance unconstitutionally required the administrator to examine the *content* of the prospective speaker's message—and to charge a higher fee for controversial viewpoints) (a permit requirement "may not delegate overly broad licensing discretion to a government official"); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (striking down a parade permit scheme whose administration effectively vested unfettered discretion in licensing officials); *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (observing that Supreme Court precedents "make[] it clear that a State or municipality cannot 'require all who wish to disseminate ideas to present them first to police authorities for their consideration and

discretion in the licensing official "has the potential for becoming a means of suppressing a particular point of view."¹¹² If a regulation leaves room for assessing the speaker's viewpoint in deciding whether or not to grant a permit, "the danger of censorship and abridgment of our precious First Amendment freedoms is too great' to be permitted."¹¹³

These principles are so firmly grounded in precedent that a district judge, confronted thirty years ago with the suppression of Vietnam War protesters, observed even then that:

It is established beyond need for an extended discussion that municipalities cannot validly leave decisionmaking for allowance of peaceful parades or demonstrations to the unbridled dis-

approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminate[d]" (quoting *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (striking down ordinance that prohibited soliciting union membership without first obtaining a discretionary permit from the mayor or city council); *Kunz v. New York*, 340 U.S. 290 (1951) (striking down an ordinance vesting discretionary power in the city police commissioner to control in advance the right of citizens to speak on religious matters in the streets of New York); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (reversing disorderly conduct conviction of Jehovah's Witnesses convicted on the grounds that they used a public park for Bible talks without first obtaining a permit from city officials even though there existed no statute or ordinance imposing a permit requirement); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down an ordinance prohibiting the distribution of circulars, pamphlets, or literature of any kind without permission from the city manager because ordinance contained no restrictions or limitations on the city manager's discretion); *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985) (striking down ordinance requiring persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection determined by discretion of police chief); *Rubin v. City of Santa Monica*, 823 F. Supp. 709 (C.D. Cal. 1993) (permit scheme governing demonstrations in public parks struck down because it vested undue discretion in the licensing official); *id.* at 711 n.3 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) as identifying "two evils" in speech licensing schemes "that will not be tolerated:" vesting "unbridled discretion" in the licensing authority, and "fail[ing] to place limits on the time within which the decisionmaker must issue the license."); *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965) (enjoining city officials from prohibiting a parade intended to protest U.S. military intervention in Vietnam).

112. *Forsyth*, 505 U.S. at 130 (quoting *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

113. *Id.* at 131 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). Accordingly, "[a] permit scheme is constitutional as a reasonable time, place, and manner restriction [only] if it is content neutral, narrowly tailored to serve a significant government[] interest, and leaves open ample alternatives for communication." *Gay & Lesbian Services Network, Inc. v. Bishop*, 832 F. Supp. 270, 275 (W.D. Mo. 1993) (citing *Forsyth*, 505 U.S. at 130). "The burden of proof on these [] factors falls squarely on the government." *Id.* (citing *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 n.5 (1984)). "If it is determined that the permit scheme is not content neutral, then it must be enjoined unless the [state] can show that it is narrowly tailored to achieve a compelling government interest." *Id.* (citing *Burson v. Freeman*, 504 U.S. 191 (1992)).

cretion or mere opinion of a local official. The lodging of any such broad discretion in a public official would permit such official to say which expressions of view . . . will be permitted . . . a power fraught with possibilities for selective administration that would in effect deprive some groups of the equal protection of the laws.¹¹⁴

Accordingly, a permit scheme will survive constitutional scrutiny only if it employs content neutral criteria.¹¹⁵ Without such standards, “‘post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.’”¹¹⁶

b. Limiting the Denial of Permits Based on the Anticipation of Violence

So committed is our jurisprudence to protecting the expression of minority opinions that it forbids licensing authorities from considering either the controversial nature of a speaker's viewpoint¹¹⁷ or its potential for inspiring a hostile response.¹¹⁸ Once again, these principles were regarded thirty years ago as settled law:

114. *Hurwitt*, 247 F. Supp. at 1000-01.

115. *Gay & Lesbian Services Network*, 832 F. Supp. at 275 (striking down, as a content-based restriction on speech, a parade permit scheme affording free police services for five mainstream parades, including the Easter and St. Patrick's Day parades, but requiring all other parade organizers to hire a specified quantity of off-duty police officers to furnish traffic and crowd control).

116. *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1064 (S.D.N.Y. 1990) (demonstrations at the mayor's mansion in New York City) (quoting *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1989)). *Accord Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (holding that statutes and ordinances requiring permits as a prerequisite for speech in public places must be invalidated “in the absence of narrowly drawn, reasonable, and definite standards for the officials to follow”).

117. *Forsyth*, 505 U.S. at 134 (under the ordinance struck down, assessment of fees depended on the amount of hostility a speaker was likely to incur); *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 372 (D.C. Cir. 1992) (affirming grant of injunction requiring issuance of parade permit to KKK) (“the government may not impose even a place restriction on a speaker's use of a public forum on the basis of what the speaker will say” unless it is necessary to advance a compelling state interest); *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1524 (11th Cir. 1985) (“Such an inquiry into the content of the speakers' views in determining how much police protection is needed and as a consequence, how much the speakers would have to pay to voice their views, constitutes an impermissible price tag on the exercise of free speech based on the content of the speech.”); *Hurwitt*, 247 F. Supp. at 1001 (speech may not be prohibited “merely because the views expressed may be so unpopular at the time as to stir the public to anger”).

118. *Forsyth*, 505 U.S. at 134 (“Listeners' reaction to speech is not a content neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”) (citations omitted); *Cen-*

It is . . . 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 create, unrest or even disturbance. This is so because under such a doctrine, unpopular political groups might be rendered virtually inarticulate.¹¹⁹

The Supreme Court recently reaffirmed these principles in *For-syth County, Georgia v. Nationalist Movement*,¹²⁰ where it struck down a licensing scheme that permitted the administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.¹²¹ The Court observed that under this ordinance, “[t]he fee assessed will depend on the administrator’s measure of the amount of *hostility* likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle-throw-

tral Fla. Nuclear Freeze Campaign, 774 F.2d at 1525 (holding that city cannot fix costs for a demonstration based on the potential for a hostile reaction: “Otherwise, the result would operate to charge more for speech which is unpopular or controversial, in the mind of a public official.”); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754-55 (7th Cir. 1972) (holding that Nazis were entitled to injunctive relief after city officials denied their application for permit to hold demonstration in public park) (“As to the possibility of there being hostile audience members causing violence, the law is quite clear that such considerations are impermissible in determining whether to grant permits. . . . [I]t is impermissible even to consider the threat of a hostile audience when ruling on a permit application or a request for injunction against a demonstration.”) (citations omitted); *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 674-75 (N.D. Ill. 1976) (ruling that city official wrongfully denied parade permit to civil rights marchers) (stating that the possible presence of a hostile and violent audience is an impermissible consideration in granting an injunction or withholding a permit); *Hurwitz*, 247 F. Supp. at 1001 (potential that speaker’s viewpoint may “stir the public to anger, invite dispute, and thus create, or appear . . . to create, unrest or even disturbance” cannot be the basis for withholding a permit); *Williams v. Wallace*, 240 F. Supp. 100, 109 (M.D. Ala. 1965) (granting civil rights activists injunctive relief ordering the State of Alabama to permit, and not to interfere with, plaintiffs’ plans to march from Selma to Montgomery) (“The [State’s] contention that there is some hostility to this march will not justify its denial. Nor will the threat of violence constitute an excuse for its denial.”) (citations omitted); *Village of Skokie v. National Socialist Party of Am.*, 366 N.E.2d 347, 353 (Ill. App. Ct. 1977) (declining to grant injunction sought by the Village of Skokie to prohibit Nazi demonstration) (holding that the possible presence of a hostile and violent audience is an impermissible consideration in granting an injunction or withholding a permit). *Accord* *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990) (affirming that 75-yard security zone established around viewing stand and vessels in naval parade violated First Amendment rights of demonstrators who, by sailing past the onlooking dignitaries, hoped to present an anti-war message) (“[T]he government . . . is not free to foreclose expressive activity in public areas on mere speculation about danger.”) (citation omitted).

119. *Hurwitz*, 247 F. Supp. at 1001.

120. 505 U.S. 123 (1992).

121. *Id.*

ers, for example, may have to pay more for their permit.”¹²² In striking down the ordinance, the Court concluded: “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”¹²³

Forsyth represents the continued vitality of a long line of cases—stretching back through the anti-war and civil rights movements—in which unpopular ideas have been guaranteed access to the marketplace of ideas.¹²⁴ These cases exemplify a commitment to open debate that is all the more emphatic when one examines their underlying facts. In virtually all of these cases, the would-be demonstrators were facing a threat of violence that was more than merely hypothetical.

In *Forsyth* itself, the ordinance had been enacted “[a]s a direct result”¹²⁵ of two violent demonstrations in which civil rights activists, protesting racial discrimination in a rural Georgia county, were confronted by hostile residents. The first march was brought to a premature halt when 400 Klan members, shouting racial slurs, began throwing rocks and beer bottles.¹²⁶ The second march featured 20,000 marchers, 1000 counter-demonstrators, and 3000 law enforcement officers.¹²⁷ It was punctuated (though not halted) by rock-throwing, and produced sixty arrests.¹²⁸

Proposed marches by Klansmen and Nazis, which produced some of the most famous cases in this line of precedent, likewise involved a substantial threat of violence. In *Village of Skokie v. National Socialist Party of America*,¹²⁹ the court declined to enjoin a group of Nazis from marching through an Illinois suburb populated by hundreds of Holocaust survivors.¹³⁰ While refusing to prevent the march, the court acknowledged that evidence had been presented showing that “if the defendants ever appear in Skokie to demonstrate, there . . . is a virtual certainty that thousands of irate Jewish citizens [will] physically attack [them].”¹³¹ In *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*,¹³² the KKK obtained an injunction permitting it to march in Washington, D.C., even though its previ-

122. *Id.* at 134 (emphasis added).

123. *Id.* at 134-35 (citations omitted).

124. *See supra* notes 117-119 and accompanying text.

125. 505 U.S. at 126.

126. *Id.* at 125.

127. *Id.* at 125-26.

128. *Id.*

129. 366 N.E.2d 347 (Ill. App. Ct. 1977).

130. *Id.* at 349.

131. *Id.* at 353.

132. 972 F.2d 365 (D.C. Cir. 1992).

ous rallies there had been cut short by violent crowds,¹³³ resulting in brick-throwing, injuries, and multiple arrests.¹³⁴

The anti-war and civil rights eras likewise contributed to this line of cases—and likewise produced factual records bristling with violence. Vietnam protest marches were routinely subjected to guerilla attacks by a variety of patriots, including the Hell's Angels, who ripped banners and disabled loud-speakers.¹³⁵ Civil rights marchers were greeted by flying "rocks, bricks, pieces of concrete, and explosive devices."¹³⁶ Through it all, courts have held firm to the notion that access to public fora should not depend on the popularity of one's views:

Thus, our laws bespeak what should be; for were it otherwise, enjoyment of constitutional rights by the peaceable and law-abiding would depend on the dictates of those willing to resort to violence.¹³⁷

- c. The Presence of a Hostile Audience Does Not Authorize Government Officials to Silence the Unpopular Speaker; Nor May She Be Silenced on the Grounds that Her Message is Offensive to Some or Even All of Her Listeners.

The *reason* for affording minority opinions such considerable protection was best explained by the Supreme Court in *Terminiello v. City of Chicago*,¹³⁸ in which Justice Douglas observed:

[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. . . . Accordingly *a function of free speech under our system of government is to invite dispute. 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.* Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas

133. *Id.* at 367.

134. *Id.* at 369.

135. *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1000 (N.D. Cal. 1965).

136. *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 672 (N.D. Ill. 1976).

137. *Id.* at 675.

138. 337 U.S. 1 (1949) (reversing breach-of-the-peace conviction of Christian Veterans of America member who made racially inflammatory speech).

either by legislatures, courts, or dominant political or community groups.¹³⁹

Based on this reasoning, it has long been established that the presence of a hostile audience does not authorize government officials to silence the unpopular speaker; nor may she be silenced on the grounds that her message is offensive to some or even all of her listeners.¹⁴⁰

139. *Id.* at 4-5 (citations omitted) (emphasis added).

140. See *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (overturning flag-burning conviction and holding that "the government may [not] ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence," nor may it "assume that every expression of a provocative idea will incite a riot"); *Street v. New York*, 394 U.S. 576, 592 (1969) (overturning flag-burning prosecution) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) ("[T]he 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'") (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)); *Terminiello*, 337 U.S. at 5 (As construed by the trial court, the breach-of-the-peace ordinance "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."); *Glasson v. City of Louisville*, 518 F.2d 899, 899 (6th Cir. 1975) (protester brought civil rights action against police officers who tore up a sign she was holding along a motorcade route to be traveled by President Nixon) (imposing liability where the police officers destroyed the protest sign because they deemed it "detrimental" to the President or to the United States, . . . and the only threat to public order . . . was that from a hostile crowd who did not approve of the sign but who, because of their number in relation to the number of policemen . . . , presented no imminent threat of disorder. . . ."); *id.* at 905 ("[A] hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker's message. . . ."); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 83 (2d Cir. 1968) (holding that bus terminal "operated by port authority is appropriate place for distributing leaflets, carrying placards and conducting discussions with passers-by publicizing anti-war views to general public and to servicemen," and that, since these activities were entitled to First Amendment protection, plaintiff was entitled to injunctive relief affording him access to the terminal); *id.* at 92 ("The potential provocation caused by heated debate is not a valid reason to preclude discussion."); *Village of Skokie v. National Socialist Party of Am.*, 366 N.E.2d 347, 355 (Ill. App. Ct. 1977) ("But '[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers,' or simply because bystanders object to peaceful and orderly demonstrations.") (quoting *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970)); see also *Coates v. City of Cincinnati*, 402 U.S. 611, 611 (1971) (striking down ordinance that prohibited sidewalk meetings by three or more people conducted "in a manner annoying to persons passing by"); *id.* at 615 (holding that "public intolerance or animosity" cannot be the basis for abridging the rights of free assembly and association); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (holding that arrest, breach-of-the-peace conviction, and punishment of civil rights protesters who merely marched peacefully on a sidewalk around State House grounds to publicize their dissatisfaction with the prevailing atmosphere of race discrimination violated their speech, assembly, and petition rights) (asserting that a state cannot criminalize "the peaceful expression of unpopular views"); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1558 (6th Cir. 1992) (holding that "privately funded menorah display erected during Chanukah in traditional public forum did not violate [E]stablishment [C]lause" because it could not be seen

A good example of this principle may be found in *Glasson v. City of Louisville*,¹⁴¹ where a solitary anti-Nixon protester, waiting along the route of a Presidential motorcade amid a sea of Nixon supporters,¹⁴² unfurled a protest sign that read: "Lead us to hate and kill poverty, disease and ignorance, not each other."¹⁴³ The woman's sign prompted "grumbling and mutter[ed] threats" among onlookers across the street,¹⁴⁴ and this hostility escalated until a nearby police officer feared that "the crowd . . . [was] going to go over and get her—maybe hurt her."¹⁴⁵

Obedying a general directive "to destroy all signs detrimental to the President,"¹⁴⁶

Officer Medley then approached appellant and, according to his testimony, asked her "Would you please take this sign down Lady; it's detrimental to the United States of America." When Miss Glasson refused, and replied that she had a right to display it, Medley took it from her and tore it up. The hecklers across the street cheered and then immediately quieted down and began to disperse.¹⁴⁷

Holding that the officer was liable for violating the protester's First Amendment rights, the *Glasson* court observed that "hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker's message,"¹⁴⁸ and concluded:

To permit police officers to prohibit the expression of ideas which they believe to be "detrimental" or "injurious" to the President of the United States or to punish for incitement or breach of the peace the peaceful communication of such messages because other persons are provoked and seek to take violent action against the speaker would subvert the First Amendment, and would incorporate into that constitutional

by reasonable observer as a government endorsement of religion); *id.* at 1553 ("[T]he courts have recognized that we cannot allow the right of free speech to be restricted based on the hostile reaction of those who disagree with it. 'Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.'") (quoting *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)). See generally Note, *Hostile-Audience Confrontations: Police Conduct and First Amendment Rights*, 75 MICH. L. REV. 180 (1976) (reviewing cases); Note, *Protecting Demonstrators from Hostile Audiences*, 19 KAN. L. REV. 524 (1971) (reviewing cases).

141. 518 F.2d 899 (6th Cir. 1975).

142. *Id.* at 902.

143. *Id.* at 901.

144. *Id.* at 902.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 905.

guarantee a "heckler's veto" which would empower an audience to cut off the expression of a speaker with whom it disagreed. The state may not rely on community hostility and threats of violence to justify censorship.¹⁴⁹

Glasson is significant because it offers substantial First Amendment protection to a protester who was, in a very real sense, a solitary counter-demonstrator disseminating her message at a unique forum in the very midst of her opponents.

- d. The State has an Affirmative Duty to Protect the Unpopular Speaker and Therefore Must Act Within Reason to Facilitate Free Expression Even Though It Engenders a Risk of Public Disorder.

The government is not only barred from silencing a speaker confronted by a hostile audience,¹⁵⁰ but it often has an affirmative duty to *protect* that speaker.¹⁵¹ For example, the officer in *Glasson* destroyed the protester's sign rather than protecting her right to display it. The *Glasson* court observed:

149. *Id.* at 905-06 (footnote omitted).

150. See *supra* notes 138-149 and accompanying text.

151. See *Sabel v. Stynchcombe*, 746 F.2d 728, 729-30 (11th Cir. 1984) (overturning refusal-to-disperse convictions of Revolutionary Communist Party demonstrators who, in the course of a May Day rally, inspired a hostile reaction by almost 200 onlookers); *Wolin v. Port of New York Auth.*, 392 F.2d 83, 94 (2d Cir. 1968) (holding that group seeking to use bus terminal as public forum for communication of anti-war views was "entitled to protection by [t]erminal police" against disturbances provoked by hostile audience); *Downie v. Powers*, 193 F.2d 760, 762 (10th Cir. 1951) (reversing district court's dismissal of civil rights action brought by Jehovah's Witnesses against police department for standing by and failing to protect them when a mob burst into the auditorium where they were gathered and, using "sticks, rocks, guns and other instruments of violence, . . . attacked [them] and broke up the assembly"); *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1001 (N.D. Cal. 1965) ("[S]uppression by public officials or police of the right of free speech and assembly cannot be made 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."); cf. *Feiner v. New York*, 340 U.S. 315, 317 (1951) (upholding disorderly conduct conviction of speaker on public sidewalk whose "derogatory remarks concerning President Truman, the American Legion, the Mayor of Syracuse, and other local political officials" inspired a hostile crowd reaction); *id.* at 325-27 (Black, J., dissenting) ("It is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things. . . . [The officers'] duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere.") (citation omitted) (emphasis added); *id.* at 331 (Douglas, J., dissenting) ("It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech.").

A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights.¹⁵²

It is not enough for police to remain neutral in a hostile audience situation. They have an affirmative *duty* to protect the speaker: "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."¹⁵³

The Eleventh Circuit has identified a variety of options that police may pursue in carrying out their duty to protect. In *Sabel v. Stynchcombe*,¹⁵⁴ it overturned several refusal-to-disperse convictions of Revolutionary Communist Party demonstrators who, in the course of a May Day rally, inspired a hostile reaction by almost 200 onlookers. The court observed:

If police believed, as they stated, that they were less concerned with appellants' intrusions than with protecting them from an increasingly threatening crowd, they enjoyed an even greater range of choice. They could have taken steps to protect appellants while allowing the demonstration to continue, such as surrounding the speakers or arresting those spectators who threatened violence. Or they could have taken [Revolutionary Communist] Party members into temporary protective custody, curtailing the demonstration but not subjecting appellants to prosecution.¹⁵⁵

The court concluded that "the 'shouting,' 'shoving' and 'cursing'" that witnesses observed among the 200 onlookers "provided an insufficient basis for governmental restriction of protected speech."¹⁵⁶

These precedents show that, in balancing the right to free expression against concerns for public safety and civic order, our First Amendment jurisprudence leans heavily in favor of speech—even speech of the most provocative sort.

152. 518 F.2d at 906.

153. *Downie*, 193 F.2d at 764. *Accord Wolin*, 392 F.2d at 94; *Kelly v. Page*, 335 F.2d 114, 119 (5th Cir. 1964); *Hurwitt*, 247 F. Supp. at 1001.

154. 746 F.2d 728 (11th Cir. 1984).

155. *Id.* at 731 (citations omitted). See generally Note, *Hostile-Audience Confrontations: Police Conduct and First Amendment Rights*, 75 MICH. L. REV. 180 (1976) (proposing a standard for police conduct in the hostile audience situation); Note, *Protecting Demonstrators from Hostile Audiences*, 19 KAN. L. REV. 524 (1971) (reviewing cases and suggesting the optimum approach).

156. *Sabel*, 746 F.2d at 730 (citing *Cox v. Louisiana*, 379 U.S. 536 (1965) and *Gregory v. City of Chicago*, 394 U.S. 111 (1968)).

2. *Limitations on Government Power to Punish Seditious Speech*

This profound commitment to free expression even at the expense of public disorder is best exemplified in the Supreme Court's treatment of seditious speech. Throughout this century, government officials have sought to punish such provocative sentiments as opposition to the United States involvement in World War I,¹⁵⁷ calls for "class struggle"¹⁵⁸ and "revolutionary mass action,"¹⁵⁹ Communist Party membership,¹⁶⁰ waving a red flag,¹⁶¹ and burning the American flag.¹⁶²

In response to these prosecutions, the Supreme Court developed a constitutional standard that, starting with the "clear and present danger" test¹⁶³ and culminating in *Brandenburg v. Ohio*,¹⁶⁴ grew ever more protective of speech. While originally permitting punishment for mere *opposition* to government policies,¹⁶⁵ the Court subsequently rejected criminal liability even for speech that had "a dangerous tendency" to start an insurrection.¹⁶⁶ Finally, in *Brandenburg*, the Court established an even more protective standard, permitting punishment only for incitement that is both intended and likely to produce "imminent lawless action."¹⁶⁷

Thus, the Court has ruled that Julian Bond could not be denied a seat in the Georgia House of Representatives for expressing "sympathy with, and support [for] the men in this country who are unwilling to respond to the military draft";¹⁶⁸ that an anti-war activist could not be prosecuted for saying "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.";¹⁶⁹ and that a campus anti-war protester who joined other demonstrators in blocking a street

157. *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

158. *Fiske v. Kansas*, 274 U.S. 380 (1927).

159. *Gitlow v. New York*, 268 U.S. 652 (1925).

160. *Scales v. United States*, 367 U.S. 203 (1961); *Dennis v. United States*, 341 U.S. 494 (1951); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Whitney v. California*, 274 U.S. 357 (1927).

161. *Stromberg v. California*, 283 U.S. 359 (1931).

162. *Texas v. Johnson*, 491 U.S. 397 (1989); *Street v. New York*, 394 U.S. 576 (1969).

163. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

164. 395 U.S. 444 (1969).

165. *Debs v. United States*, 249 U.S. 211 (1919).

166. *Herndon v. Lowry*, 301 U.S. 242, 262 (1937).

167. 395 U.S. at 447.

168. *Bond v. Floyd*, 385 U.S. 116, 120 (1966).

169. *Watts v. United States*, 394 U.S. 705, 706 (1969).

could not be punished for declaring, after police dispersed the crowd, "‘We’ll take the fucking street later.’"¹⁷⁰

Overturning a flag-burning prosecution in *Texas v. Johnson*,¹⁷¹ the Court rejected the state’s assertion that a particular expression should be punishable if, due to its inherently offensive nature, an audience will likely be provoked by it to disturb the peace.¹⁷² The Court replied that "‘if it is the speaker’s *opinion* that gives offense, that consequence is a *reason* for according it constitutional protection,"¹⁷³ and concluded:

[T]he government may [not] ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether [it] "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁷⁴

Overturning an earlier flag-burning conviction in *Street v. New York*,¹⁷⁵ the Court stressed that "‘freedom to be intellectually . . . diverse or even contrary’" must be upheld regardless of any "‘fear that [such] freedom . . . will disintegrate the social organization.'"¹⁷⁶ The Court relied on the rationale that "‘[f]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.'"¹⁷⁷

B. Applying Existing Precedent to Government Restrictions on Counter-Demonstration

Having sketched the pertinent lines of precedent, this Article now applies them in the context of counter-demonstration. Though the right to counter-demonstration has not yet been expressly recognized by the courts, the basis for doing so already resides at the very core of our First Amendment jurisprudence. First, the argument for

170. *Hess v. Indiana*, 414 U.S. 105, 106-07 (1973).

171. 491 U.S. 397 (1989).

172. *Id.* at 408.

173. *Id.* at 409 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (Stevens, J., concurring)) (emphasis added).

174. *Id.* (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

175. 394 U.S. 576 (1969).

176. *Id.* at 593 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943)).

177. *Id.* (quoting *Barnette*, 319 U.S. at 642).

banning counter-demonstration is based upon a "spontaneous combustion" thesis that has long been rejected by the courts. Second, under existing precedent, the *reasons* for tolerating speech that engenders the risk of public disorder apply with equal force to demonstrators and counter-demonstrators alike. Ultimately, the same lines of precedent that support the right to address a manifestly hostile audience,¹⁷⁸ to demonstrate despite the concomitant risk of civil unrest,¹⁷⁹ and to advocate revolution in the abstract¹⁸⁰ likewise support the right to engage in counter-demonstration.

1. *The Argument for Banning Counter-Demonstration is Based upon a "Spontaneous Combustion" Thesis that Has Already Been Rejected Under Existing Precedent.*

Those who would ban counter-demonstration cite the need for averting a particular sort of danger—a danger common to all public protest. The fear is that counter-demonstrators will incite opposing protesters or onlookers to inevitable lawlessness. This "spontaneous combustion" thesis supported the trial court's ban on counter-demonstration in *Seven Hills*,¹⁸¹ and it motivated New York police to deny both conservative and gay Catholics access to the steps of St. Patrick's Cathedral during the Gay Pride Parade in *Olivieri*.¹⁸² The spontaneous combustion thesis is philosophically identical to the concerns for inevitable lawlessness that prompted official restrictions on provocative expression in *Forsyth*,¹⁸³ *Johnson*,¹⁸⁴ *Brandenburg*,¹⁸⁵ *Terminiello*,¹⁸⁶ *Sabel*,¹⁸⁷ and *Glasson*.¹⁸⁸ In each of those cases, authorities sought to restrict expression thought certain to produce explosive results. In each of those cases, the courts invalidated the restrictions as antithetical to the First Amendment. Further, each of those decisions was motivated by a judicial understanding of incitement—and its relation to free expression—that applies with equal force to counter-dem-

178. See *supra* notes 138-149 and accompanying text.

179. See *supra* notes 117-137 and accompanying text.

180. See *supra* notes 157-177 and accompanying text.

181. *City of Seven Hills v. Aryan Nations*, No. 258726, C.P. Ct., Cuyahoga County, Ohio (Dec. 15, 1993), *aff'd*, No. 66754, 1995 Ohio App. LEXIS 575 (Ohio Ct. App. Feb. 16, 1995). See *supra* notes 83-87 and accompanying text.

182. *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). See *supra* note 92 and accompanying text.

183. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

184. *Texas v. Johnson*, 491 U.S. 397 (1989).

185. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

186. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

187. *Sabel v. Stynchcombe*, 746 F.2d 728 (11th Cir. 1984).

188. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975).

onstration, and provides a philosophically compelling reason to grant counter-demonstration the same protection afforded other provocative speech.

The central premise of the spontaneous combustion thesis is the belief that groups with diametrically opposed viewpoints cannot share a forum without the substantial likelihood of violence.¹⁸⁹ Even if this were true, however, it would provide no constitutionally sound reason to distinguish counter-demonstration from other forms of provocative expression already protected by the First Amendment. All forms of *provocative* expression—the exhortation to revolution, the speech to a manifestly hostile audience, or the act of counter-demonstration—present a risk of public disorder, which risk in each case depends not so much upon the lawlessness of the speaker, as upon the reaction of the audience.¹⁹⁰

Attempts to limit counter-demonstration, or any other form of provocative speech, seek to preserve public order by simple and direct means: shielding a hostile or impressionable audience from the provocation that might otherwise ignite it. Such efforts withhold information from a public charged with self-governance,¹⁹¹ and prohibit individuals from engaging in expressive conduct due to potential *misconduct* by others.¹⁹² Restrictions such as these run directly counter to the philosophical justifications at the heart of First Amendment jurisprudence.

189. Authorities in the *Seven Hills* case predicted violent confrontations between demonstrators and counter-demonstrators despite the direct trial testimony of both sets of putative demonstrators that they remained committed to non-violent protest. See *supra* notes 78-85 and accompanying text.

190. This position was voiced with respect to seditious speech early in the history of modern First Amendment jurisprudence by Justice Holmes, who warned (before his conversion to a clear and present danger standard of review) that in certain volatile quarters even "a little breath would be enough to kindle a flame." *Frohwerk v. United States*, 249 U.S. 204, 209 (1919). That audience reaction is a *sine qua non* of provocative speech is self-evident; without the conscious choice of auditors to react violently, the expression cannot, as a matter of mere definition, be provocative. Thus:

[I]t is clear that expression which leads an opponent to violent counter-action nevertheless remains 'expression,' and that the ensuing conduct of the opponent is separable 'action.' This rule applies even where the speaker is deliberately provocative. The provocative nature of the communication does not make it any the less 'expression.' Indeed, the whole theory of free expression contemplates that expression will be provocative and arouse hostility in many circumstances. The audience, just as the speaker, has the obligation to maintain physical restraint.

THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 337 (1970).

191. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

192. *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 675 (N.D. Ill. 1976) (asserting that the enjoyment of constitutional rights should not depend "on the dictates of those willing to resort to violence").

2. *Under Existing Precedent, the Reasons for Tolerating Speech that Engenders the Risk of Public Disorder Apply with Equal Force to Demonstrators and Counter-Demonstrators Alike.*

The two lines of precedent that have been examined—limiting the government's power to restrict potentially volatile demonstrations¹⁹³ and to punish seditious speech¹⁹⁴—display a profound commitment to free expression even at the expense of public disorder. The *reasons* for that commitment apply with equal force to demonstrators and counter-demonstrators alike. Moreover, there is no principled basis for reading these precedents as conferring greater protection for demonstrators than for counter-demonstrators.

The primary reason for our tolerance of provocative speech (and its concomitant risk of public disorder) is that robust debate on public issues is essential to the vitality of our democracy. “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”¹⁹⁵ Accordingly, the Supreme Court has recognized “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁹⁶

Citizens often make choices on matters of public policy based on their assessment of competing viewpoints. This notion of a marketplace of ideas—in which viewpoints vie for acceptance in the market of public opinion¹⁹⁷—rests at the very heart of our First Amendment jurisprudence.

Since truth is derived from the clash of competing viewpoints, “a function of free speech under our system of government is to invite dispute. 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.”¹⁹⁸

Our commitment to the marketplace of ideas requires that it be held open to *all* viewpoints, even those “that we loathe and believe to be fraught with death.”¹⁹⁹ As Thomas Jefferson observed, “[T]he public judgment will correct false reasonings and opinions, on a full

193. See *supra* notes 103-156 and accompanying text.

194. See *supra* notes 157-177 and accompanying text.

195. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

196. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

197. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

198. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

199. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

hearing of all parties.”²⁰⁰ Accordingly, “the fitting remedy for evil counsels is good ones.”²⁰¹ If the government were free to banish controversial sentiments from the marketplace of ideas, the quality of our public decisionmaking would be impaired,²⁰² and we would drift inevitably toward a stifling orthodoxy.²⁰³ Thus, even when the clash of viewpoints seems likely to produce a disturbance, the government cannot suppress debate:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.²⁰⁴

The reasons for protecting robust debate even at the expense of public order apply with equal force to demonstrators and counter-demonstrators alike. Indeed, there is no principled basis for distinguishing between them. Counter-demonstration is no less a form of speech, no less a form of public advocacy, and no less a contribution to the marketplace of ideas. In fact, by promoting the close juxtaposition of competing viewpoints, counter-demonstration is especially well-suited to the goals of the First Amendment. It advances public discourse on a given subject by presenting citizens with a stark choice between rival perspectives.

200. PADOVER, *supra* note 38.

201. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

202. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (“Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*”).

203. *Terminiello*, 337 U.S. at 4-5 (permitting censorship or punishment of provocative speech “would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups”). *Accord West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

204. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508-09 (1969) (citation omitted).

Counter-demonstration is no less deserving of First Amendment protection merely because it entails the sharing of a forum by rival factions. Existing precedent already affords substantial protection for speakers who wish to venture into hostile territory.²⁰⁵ If Nazis have the right to march through Skokie,²⁰⁶ and if police must protect a solitary protester who unfurls an anti-Nixon sign amid a sea of antagonists,²⁰⁷ then counter-demonstrators cannot be barred from a forum merely because their views differ from the protesters already enconced there.

When government officials, animated by the spontaneous combustion thesis, ban the presence of counter-demonstrators at a particular forum, they are effectively permitting speech on a given subject only one viewpoint at a time. In recognizing that public meetings will necessarily involve the heated expression of opposing viewpoints, the California Supreme Court observed:

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.²⁰⁸

Because the First Amendment actively encourages the clash of competing viewpoints;²⁰⁹ because it limits would-be censors from considering either the controversial nature of a speaker's viewpoint²¹⁰ or its potential for inspiring a hostile response;²¹¹ and because it protects "uninhibited,"²¹² "provocative"²¹³ debate, even at the expense of "public inconvenience, annoyance, or unrest,"²¹⁴ the First Amendment likewise permits counter-demonstrators to deliver their message in the same forum, and at the same time, as those whose message they oppose.

205. See *supra* notes 117-156 and accompanying text.

206. *Village of Skokie v. National Socialist Party of Am.*, 366 N.E.2d 347, 354 (Ill. App. Ct. 1977) (declining to grant injunction sought by the Village of Skokie to prohibit Nazi demonstration). *Accord* *Collin v. Chicago Park Dist.*, 460 F.2d 746 (7th Cir. 1972) (holding that Nazi group was entitled to injunctive relief compelling city officials to issue a permit to hold demonstration in public park).

207. *Glasson v. City of Louisville*, 518 F.2d 899, 906 (6th Cir. 1975).

208. *In re Kay*, 464 P.2d 142, 147 (Cal. 1970) (citation omitted) (emphasis added).

209. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system is to invite dispute.").

210. *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 372 (D.C. Cir. 1992).

211. *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754 (7th Cir. 1972).

212. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

213. *Terminiello*, 337 U.S. at 4.

214. *Id.*

C. Abstract Philosophical Justifications for Protecting Provocative Speech—Developed Outside the Judicial Context—Likewise Support a Right to Counter-Demonstration.

The political and jurisprudential decision to place certain types of activity within the protective ambit of the Constitution is a decision to place that activity beyond the reach of ordinary politics. Such a decision is profoundly anti-democratic for it places beyond popular control the ability to limit, through the agency of law, the conduct so shielded.²¹⁵ Broadly speaking, there are two sorts of arguments advanced in favor of protecting free expression against majoritarian control: consequentialist and non-consequentialist.²¹⁶

In the consequentialist view, the value of free expression is not intrinsic to the act of expression itself, but rather is dependent upon the social good we believe free expression can achieve in the context of democratic self-government.²¹⁷ Free expression so conceived borrows its moral authority from democratic liberty.²¹⁸ The value of free speech in this context is its consequence of facilitating another basic right which can be derived from first principles as a basic moral claim against the state.²¹⁹

By contrast, the non-consequentialist view requires no link to another, higher principle in order to justify free expression. In this view, free expression is an end in itself, an independent *telos* toward which enlightened government should work for its own sake.²²⁰ This argument places free expression much closer to the core of human values than the consequentialist view. Rather than viewing expression as a means toward human happiness through the agency of democratic lib-

215. John Hart Ely wrote:

The Court may be purseless and swordless, but its ability importantly to influence the way the nation functions has proved great, and seems to be growing all the time. It may be true that the Court cannot *permanently* thwart the will of a solid majority, but it can certainly delay its implementation for decades . . . and to the people affected, that's likely to be forever.

JOHN H. ELY, *DEMOCRACY AND DISTRUST* 45 (1980). To decide that a course of conduct is beyond ordinary majoritarian control is to ascribe to the conduct in question a value deemed so basic as to be inseparable from freedom itself. The claim inherent in proclaiming a right fundamental is that the right itself represents an individual claim of autonomy against the state.

216. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 205 (1972).

217. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 6-7, 47-48 (1982).

218. *Id.*

219. *Id.*

220. *Id.* at 48-49.

erty, the non-consequentialist position views expression as a source of human happiness, and a basic human right in and of itself.

Both the consequentialist and the non-consequentialist views of free expression provide a variety of reasons for protecting provocative speech that poses a threat to public order. More precisely, both views of free expression impose distinct limitations upon the *legitimacy* of restrictions on free expression.²²¹

Under consequentialist principles, restrictions on free expression should only be permissible if the challenged expression fails to advance the goals invoked to justify free expression generally,²²² or if the social cost of achieving those goals is prohibitively high. Under non-consequentialist principles, as advanced by Thomas Scanlon, limitations on expression are only legitimate if they do not offend the fundamental autonomy of citizens who are content to submit to the legitimate authority of the state.²²³ Scanlon's thesis, discussed in greater detail below,²²⁴ presents a compelling argument that *no* restrictions on provocative speech are tolerable that seek to avoid the risk of civil disorder inherent in incitement. A brief review of both consequentialist and non-consequentialist justifications for protecting free expression reveals no principled reason why the First Amendment should protect the right to address a hostile audience or advocate lawlessness in the abstract, and not also protect counter-demonstration.

221. See Scanlon, *supra* note 216, at 208-09:

Now it is not in general sufficient justification for a legal restriction on a certain class of acts to show that certain harms will be prevented if this restriction is enforced. It might happen that the costs of enforcing the restriction outweigh the benefits to be gained, or that the enforcement of the restriction infringes some right either directly (e.g., a right to the unimpeded performance of exactly those acts to which the restriction applies) or indirectly (e.g., a right which under prevailing circumstances can be secured by many only through acts to which the restriction applies). Alternatively, it may be that while certain harms could be prevented by placing legal restrictions on a class of acts, those to whom the restriction would apply are not responsible for those harms and hence cannot be restricted in order to prevent them.

222. *Id.* at 205.

223. *Id.* at 216-17. Scanlon distinguishes his own limited notion of individual autonomy with respect to the state from the more comprehensive view of Kant. In Scanlon's view, a citizen can remain autonomous while still submitting his judgment to the collective judgment of the state if a rational and autonomous actor would submit without compromising his independence of judgment. *Id.* at 217-18.

224. See *infra* notes 240-243 and accompanying text.

1. *Consequentialist Principles*

Foremost among the consequentialist justifications for free expression is the idea that political truth can best be found in the open clash of competing ideas—that the airing of rival viewpoints is essential to democratic self-governance.²²⁵ Ever since Justice Holmes's dissent in *Abrams v. United States*,²²⁶ "[t]he marketplace of ideas theory [has] consistently dominate[d] the Supreme Court's discussion of freedom of speech. Marketplace imagery ('competition of ideas,' the value of 'robust debate') pervades judicial opinions and provides justifications for the court's [F]irst [A]mendment 'tests.'"²²⁷

Of course, the simultaneous presence of competing ideas in a general intellectual marketplace that makes them equally accessible to all is, in itself, insufficient to promote the search for truth. Essential to the dynamic of the marketplace is the open confrontation of opposing viewpoints.²²⁸ Thus:

Freedom of speech has become a central concern of western society because of the discovery among the Greeks that dialectic, as demonstrated in the Socratic dialogues, is a principal method of obtaining truth, and particularly of obtaining political and moral truth. . . . The method of dialectic is to confront ideas with

225. See *supra* notes 195-204 and accompanying text. The notion that free expression is basic to the process of democratic self-government is strongly associated with the work of Alexander Meiklejohn. In a series of lectures delivered at Harvard in 1948, Meiklejohn justified freedom of expression not only as a necessary precondition for self-government, but as an unavoidable consequence of the compact of self-rule among political equals. MEIKLEJOHN, *supra* note 202. For Meiklejohn, the democratic virtues of free expression exist at several levels. Not least among these virtues is the role free expression plays in helping to form citizens capable of, and accustomed to, the sort of reasoning needed to govern themselves—a view first expressed by Plato in *The Apology*. *Id.* at 16-19. In Meiklejohn's view, free expression is not a right based in natural law, but a course of conduct growing naturally out of a compact recognizing universal suffrage. *Id.* at 26-27. Free expression builds the mental capacity for self-government and fosters the intellectual climate in which the people can manifest their sovereignty through self-government. LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 49-50 (1986). More basically, free expression permits the working of self-government by ensuring the unimpeded flow of information, allowing the interchange of ideas necessary to permit informed choices. See SCHAUER, *supra* note 217, at 38-39. Since any limitation on the information available to the people would necessarily curtail their options, and consequently limit their sovereignty, government, as the servant of the sovereign people, has no right to filter the information by which its popular masters make law and decide policy. *Id.*

226. 250 U.S. 616, 624 (1919).

227. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (1989).

228. Thomas R. Neiben, *Free Speech, Persuasion and the Democratic Process*, in *PERSPECTIVES OF FREEDOM OF SPEECH* 235-37 (Thomas L. Tedford, John J. Makay & David L. Jamison eds., 1987).

opposing ideas in order that the pro and con of the dispute will lead to true ideas²²⁹

Counter-demonstration fosters precisely this sort of dialectic, by juxtaposing groups with deeply held, divergent viewpoints, and forcing demonstrators, counter-demonstrators, and those watching them to at least acknowledge the existence of—if not contemplate the opinions of—a committed opposition. By confronting protesters with direct opposition, counter-demonstrators transform a monologue into a dialogue conducted before an audience who as a result may begin to consider in rational terms the arguments presented by each side.

He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side, if he does not so much as know what they are, he has no ground for preferring either opinion.²³⁰

John Stewart Mill argued that mere awareness of opposing viewpoints was inadequate to the task of stimulating critical thought. For dialogue to be most effective in helping the listener perfect his beliefs:

He must be able to hear them from persons who actually believe them, who defend them in earnest and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of, else he will never really possess himself of the portion of truth which meets and removes that difficulty.²³¹

The opportunity to perceive beliefs so strongly held is the great dialectic benefit of public protest. Thomas Emerson addressed the value of public protest generally by noting that for both the protester and the public, demonstration affords an opportunity to make manifest the abstract:

The various modes of public assembly and petition play a vital role in the modern system of free expression. . . . [T]hey are of special and crucial significance for radical, unpopular or underprivileged individuals and groups.

* * *

[P]ublic assemblies possess important advantages for effective expression that do not inhere in other forms of communication. They permit face-to-face contact between the speaker and his audience, thereby increasing the flexibility of the interchange

229. *Id.* (quoting Walter Lippman, *The Public Philosophy—The Indispensable Opposition*, THE ATLANTIC, August 1939, at 189).

230. JOHN S. MILL, ON LIBERTY 35 (Hackett Publishing Co. 1978) (1859).

231. *Id.*

and enhancing the power of the communication. For the participants they evoke feelings of solidarity and mutual support. For the audience they evidence the intensity and dedication with which the views expressed are held.²³²

The same arguments apply with equal (if not greater) force to counter-demonstration, which presents participants with a particularly salient forum for enhancing the presentation of their message,²³³ bearing witness to the strength of their conviction,²³⁴ and engaging their ideological opponents in a direct contest of opposing viewpoints.²³⁵ In short, counter-demonstration is an apt example of the marketplace of ideas turned from abstraction into reality, where the proponents of opposing views are permitted to vie for public support while defending their position through their words, their conduct, and whatever message about their integrity (and the integrity of their beliefs) can be inferred therefrom.

The benefits of open confrontation and dialectic are surely every bit as present in counter-demonstration as in other forms of provocative speech. Moreover, it is in no way evident that counter-demonstration presents a greater risk of public disorder than other forms of provocative expression protected by the First Amendment.²³⁶

Even if a specific act of counter-demonstration *did* present a demonstrably greater risk to public safety than previously tolerated acts of provocative expression, that would not justify prohibiting counter-demonstration generally, any more than a greater threat of audience violence would justify a general ban on speech before hostile crowds. The obligation of authorities is often to defend the unpopular speaker from his censorial adversaries²³⁷ and—as is amply demonstrated by the Supreme's Court's holding in *Forsyth County*—that obligation is not changed by the degree of opposition the speaker may face.

It may well be that a community would find it cheaper to silence a speaker or prohibit a demonstration than to furnish police or possible military protection. But the constitutional right cannot

232. EMERSON, *supra* note 190, at 286.

233. *See supra* notes 41-54 and accompanying text.

234. *See supra* notes 55-56 and accompanying text.

235. *See supra* notes 37-40 and accompanying text.

236. In fact, the hostile audience cases (*see supra* notes 117-156 and accompanying text) present instances where the risk of public disorder was truly staggering, but was held not to justify foreclosing free expression. In *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133-36 (1992), for example, the Supreme Court held that the First Amendment would not permit local authorities to foreclose a protest march involving 20,000 marchers, 1000 counter-demonstrators, and 3000 law enforcement officers. *See supra* notes 125-128 and accompanying text.

237. *See supra* notes 150-156 and accompanying text.

be measured in financial terms. Many aspects of democracy, including holding elections and granting due process in criminal trials, are more costly than other modes of procedure. Yet this has never been considered grounds for dispensing with the democratic process.

* * *

[I]t would be an unusual situation if a determined showing of official force could not maintain order. If violence occurred despite such protection it would most probably be the result of willingness on both sides to incur it. Under these conditions violence would probably take place anyway, whether or not it was preceded by a public assembly.²³⁸

The essential “bargain” presented by counter-demonstration is the same as presented by other forms of provocative speech. The clash of conflicting ideas advances the search for political truth. The cost of this dialectic is the risk of civil disorder. In every modern case where courts have been confronted with this bargain, they have opted to protect expression whenever practical. The result with respect to counter-demonstration should be the same.

2. *Non-Consequentialist Principles*

Non-consequentialist limitations on the power of the state to regulate free expression compel a similar conclusion. The most basic of these limitations—the rights of citizens to express dissent and confront the government with grievances—is deeply implicated by limits on provocative speech. If the right to free expression is to remain in any sense a *right*, then it cannot be subject to the whim of a speaker’s opposition, to be withheld every time an angry crowd murmurs dissent. “To cut off expression when a hostile group creates a clear and present danger of disorder is to entrust enjoyment of constitutional rights to the opposition, and indeed to encourage violence and disorder in public assemblies.”²³⁹

Another significant non-consequentialist limitation on state regulation of provocative expression is suggested by Scanlon, who questions the legitimacy of any regulation that would prohibit speech to avoid incitement based on the acceptance of or reflection upon *ideas* expressed by the speaker.

238. EMERSON, *supra* note 190, at 340-41.

239. EMERSON, *supra* note 190, at 326 (criticizing shortcomings in the *Brandenburg* articulation of the clear and present danger test).

If I were to say to you, an adult in full possession of your faculties, "What you ought to do is rob a bank," and you were subsequently to act on this advice, I could not be held legally responsible for your act, nor could my act legitimately be made a separate crime. This remains true if I supplement my advice with a battery of arguments about why banks should be robbed or even about why a certain bank in particular should be robbed and why you in particular are entitled to rob it.²⁴⁰

The reason why advice, even the advice to commit a crime, should not give rise to criminal sanction (even if heeded) is that the auditor's reflection upon the wisdom of the advice, and not the advice itself, is what motivates the auditor to act.

A person who acts on reasons he has acquired from another's act of expression acts on what *he* has come to believe and has judged to be a sufficient basis for action. The contribution to the genesis of his action made by the act of expression is, so to speak, superseded by the agent's own judgment.²⁴¹

The intermediation of reason on the part of the auditor leads Scanlon to conclude that any principled restriction of free expression that takes seriously the autonomy of the individual would not justify limiting expression "where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the expression led the agents to believe (or increase their tendency to believe) these acts to be worth performing."²⁴²

Scanlon's principle encapsulates, as a general rule, the repeated decisions of the Supreme Court that prohibit foreclosing expression because the *opinion* expressed is likely to motivate the auditor to action. This is true whether the opinion expressed is feared as provocative by its power to incite the willing, or its repugnance to those who hear it.²⁴³

In either case, prohibition is illegitimate if it seeks to foreclose speech because it has the power to change minds. To hold otherwise and to assume (consistent with the spontaneous combustion thesis) "that every expression of a provocative idea will incite a riot,"²⁴⁴ is to

240. Scanlon, *supra* note 216, at 212.

241. *Id.*

242. *Id.* at 213.

243. In *Texas v. Johnson*, 491 U.S. 397 (1989), for example, the Court explicitly held that "if it is the speaker's *opinion* that gives offense, that consequence is a *reason* for according it constitutional protection." *Id.* at 409 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (Stevens, J., concurring)) (emphasis added). Likewise, with respect to incitement to violence, expression may be curtailed to preserve order only where lawlessness is both the imminent and intended result of the provocation. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

244. *Johnson*, 491 U.S. at 409.

view listeners as automata, incapable of directing their own misdeeds.²⁴⁵ The Supreme Court has expressly rejected such a view with respect to other forms of provocative speech, and the reasons for such a rejection apply with equal force to counter-demonstration.

IV. Conclusion

Counter-demonstration is an increasingly visible phenomenon in our society. Its appeal to the would-be protester, and its capacity to advance public discourse on a given subject, stem from a variety of factors. These include its emphasis on confronting one's rival in person, its consequent tendency to juxtapose competing viewpoints, and its recognition that one forum may be uniquely pertinent to a debate.

Only two cases have expressly addressed the question of First Amendment protection for counter-demonstration: *Seven Hills*²⁴⁶ and *Olivieri*.²⁴⁷ Neither expressly recognizes that counter-demonstration is a unique form of expression whose protection should be no more subject to compromise than the right to protest generally.

A right to counter-demonstration may be derived from two lines of well-established precedent—decisions limiting government power to restrict potentially volatile demonstrations, and decisions limiting government power to punish seditious speech. These precedents constitute a complete repudiation of the very argument—a spontaneous combustion thesis—that has been used to justify bans on counter-demonstration. Moreover, these precedents articulate *reasons* for tolerating provocative speech—even speech that engenders the risk of public disorder—that apply with equal force to demonstrators and counter-demonstrators alike. Finally, the philosophical underpinnings of the First Amendment likewise support a right to counter-demonstration.

Restrictions on counter-demonstration—like those governing any other form of protest—are valid only as a necessary expedient to pre-

245. Of course the only place where the law sanctions so cynical a view of audience reaction is in the context of fighting words, which "single[] out specific members of [the] audience" for insult or provocation. See EMERSON, *supra* note 190, at 338. The hallmark of fighting words is that they are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

246. *City of Seven Hills v. Aryan Nations*, No. 258726, C.P. Ct., Cuyahoga County, Ohio (Dec. 15, 1993), *aff'd*, No. 66754, 1995 Ohio App. LEXIS 575 (Ohio Ct. App. Feb. 16, 1995). See *supra* notes 63-87 and accompanying text.

247. *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). See *supra* notes 88-100 and accompanying text.

vent imminent lawless conduct.²⁴⁸ In exercising their First Amendment freedoms, counter-demonstrators otherwise have a right to deliver their message in the same forum, and at the same time, as those whose message they oppose.

248. *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).