A Parade of Horribles?

First Amendment Limitations on Street Procession Regulations

— by Terence R. Boga —

Americans love parading. Nationwide, street processions have long been used to promote an innumerable variety of political,[1] religious,[2] and social[3] causes. In fact, although the label "street" is appropriate in light of historical experience, it is important to recognize that communicative processions occasionally occur in other venues.[4]

Paraders enjoy First Amendment protection precisely because their conduct is inherently expressive. Nonetheless, as with other symbolic activities, a speech component alone does not garner constitutional immunity from restriction. The Supreme Court confirmed this principle more than sixty years ago when it observed that "regulation of the use of the streets for parades and processions is a traditional exercise of control by local government."[5]

There is now a substantial body of case law addressing the degree to which municipalities can regulate parades consistent with the First Amendment. These precedents resolve certain issues, such as how parade permits must be processed, whether the government can force parade organizers to include unwanted marching units, and which costs associated with parades can be recovered by the local government.[6] The law is less clear, however, as to important matters such as when can a public entity prevent someone from participating in a parade sponsored by the entity, and what restraints on parader conduct are permissible.

The Permit Process

Parade ordinances typically impose a permit requirement. The benefits of such a requirement are obvious. Among other laudable objectives, licensing enables government officials to provide procession organizers with the exclusive use of an area at a particular time, as well as to minimize the public inconvenience resulting from the closure of streets and sidewalks to travelers.

The cornerstone of an enforceable parade permit requirement is an adequate "parade" definition. Ordinance drafters can start with Supreme Court *dicta* interpreting the term. In one case, the Court declared that a group of march-

ers had no basis for disputing a finding that they were engaged in a parade because it was "enough that [the march] proceeded in an ordered and closed file as a collective body of persons on the city streets."[7] More recently, the Court used the term to refer to "marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[8]

These broad statements most likely will need qualification, however, as lower courts are increasingly faulting parade ordinances for being too expansive in scope. For example, the City of Clive, Iowa adopted a parade ordinance that imposed a permit requirement on processions involving ten or more persons.[9] Even though the abortion protestors challenging the ordinance had not raised the issue, the U.S. Court of Appeals for the Eighth Circuit deemed the provision to be further proof that the ordinance was not narrowly tailored enough to pass constitutional scrutiny.[10] As another example, the City of Lake Geneva, Wisconsin enacted a parade ordinance imposing a permit requirement on "any" street procession that did not comply with traffic regulations.[11] The plaintiffs challenged the ordinance alleging, among other things, that the terms "parade" and "assembly" were vague or overly broad as to the size of the group subject to the ordinance, as a "parade" could consist of only one person, while an "assembly" could be any group larger than a single person. Last March, a federal district court held the ordinance unconstitutional for improperly encompassing a one-person parade.[12]

Another integral component of the parade permitting process is the application deadline. Understandably, government officials prefer that permit requests be filed well in advance of the event in order to facilitate careful evaluation and adequate preparation for approved processions. At least in the view of the Seventh, Eighth and Ninth Circuits, however, these interests are outweighed by the need to accommodate spontaneous processions addressing topical issues.[13]

To avoid this dilemma, ordinance drafters should establish a multi-tiered application deadline. The time by which a permit must be requested should be contingent upon the proposed procession location. Clearly, it takes more time to plan for the re-routing of traffic on a highly-traveled thoroughfare than for side streets. By tying the advance filing period to area congestion levels, a jurisdiction can both create an opportunity for spur-of-the-moment parades, and preserve a reasonably lengthy permit processing period for when it is truly necessary.

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Finally, a parade permitting process must confine the decision-maker's discretion sufficiently so that the approval or denial of an application cannot be based on the content of a procession. This principle is illustrated by an often-cited Supreme Court decision overturning the convictions of civil rights activists who marched without a permit in violation of a Birmingham, Alabama ordinance.[14] Under the ordinance, the city commission had to issue the permit unless it found that the public welfare, peace, safety, health, decency, good order, morals, or convenience required refusal. The Court emphasized that parade licensing officials cannot be empowered to grant or withhold permission according to their own opinions of such factors.[15]

Parade permit criteria must be objective, but this mandate does not have to preclude administrative flexibility. The City of Chicago's parade ordinance, recently upheld by the Seventh Circuit,[16] is a useful model. Among other things, that ordinance allows for consideration of whether a procession will "substantially or unnecessarily interfere with traffic in the area contiguous to the route," and whether there is "a sufficient number of peace officers to police and protect lawful participants and non-participants from traffic related hazards in light of the other demands for police protection."[17]

Who Can Parade?

In many communities, there is a particular parade that has been regularly conducted for so

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long that it has become a local institution. The popularity of the procession inevitably results in a request to participate by a person or group that the parade organizer considers undesirable. How the First Amendment affects the approval or denial of such a request depends on whether the organizer is a private party or a public entity.

As to privately organized parades, the determinative case is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[18] There, the Irish-American Gay, Lesbian and Bisexual Group of Boston sued to be allowed to have a marching unit in the 1993 St. Patrick's Day-Evacuation Parade organized by the South Boston Allied War Veterans Council. The Council, an unincorporated association of individuals elected from various veterans' groups, was authorized by the City of Boston to organize and conduct the parade. The claim for inclusion rested solely on Massachusetts' Public Accommodations Law, and not on any allegation that the parade involved state action.

The Supreme Court unanimously held that the First Amendment precludes the government from compelling the private organizer of a parade to admit into its procession an "expressive unit" whose viewpoint it does not support. The Court resorted to a symphony analogy in explaining its ruling:

> Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actually made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that it is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.[19]

As to government-organized parades, there are surprisingly few decisions on point. The leading case is *Tacynec v. City of Philadelphia*,[20] which concerned the validity of rules limiting the number of string bands that could participate in the city's Mummers Parade. The plaintiffs, two string bands and their founders, argued that the rules violated their First Amendment rights of expression and association. Philadelphia responded that the restrictions were necessary to end the procession

before dark and, thereby, protect public safety. The Third Circuit concluded that the rules were content-neutral and furthered a substantial government interest, but it remanded the litigation for a determination regarding the availability of an adequate alternative forum from which the plaintiffs could express themselves.[21] Significantly, the court suggested that factors like audience size, the prestige of an alternate parade, and the sophistication of an alternate audience be evaluated.[22]

No other federal appellate court has squarely addressed the issue of a public entity's authority to deny participation in a parade that it has organized. In *dicta*, however, the U.S. Court of Appeals for the D.C. Circuit has opined that a government agency most likely could exclude marching units that are ideologically opposed to the theme of a particular procession.[23]

The dearth of case law guidance is unfortunate because this is not an academic issue with little chance of actually materializing. If a municipality conducts an Independence Day parade, is it constitutionally required to include a unit of animal rights activists that wishes to display graphic images of mutilated lab specimens? As another hypothetical, if the jurisdiction organizes a Thanksgiving Day parade, does a Native American tribe have a right to march a unit calling attention to conditions on its reservation? The answers are not obvious.

Cost Recovery

The cost of police protection for parades, particularly ones conducted by controversial groups, can be substantial. The prospect of such an expenditure understandably motivates many local governments to include a cost recovery provision in their parade ordinance.

Courts that have analyzed this issue have focused on whether the public safety fee amount is, or could be, based on the police response to actions of the audience rather than the conduct of paraders. Uniformly, cost recovery provisions have been invalidated if they allow the possibility of a hostile crowd to influence calculation of the fee.[24] By contrast, a cost recovery provision that required the fee to be set without reference to the likely reactions of parade viewers survived scrutiny.[25]

Parader Conduct

The Supreme Court announced long ago that local governments may regulate the "time, place and manner" of parades "in relation to other proper uses of the streets."[26] That declaration, of course, raises the question of what restraints can validly be imposed on parader conduct.

Case law regarding time and place regulations is inconsistent because the courts vary in their willingness to defer to government justifications for a parade restriction. At one end of the spectrum, the Ninth Circuit invalidated a 75-yard security zone established by the Coast Guard ostensibly to safeguard

guests invited to watch its Fleet Week event from the Aquatic Park Pier in San Francisco. The court reasoned that the government's "mere speculation about danger" was an insufficient basis for barring water-borne demonstrators from approaching within 25 feet to the pier.[27] At the other end of the spectrum, the Second Circuit allowed the City of New York to deny a permit for an anti-war march past the United Nations headquarters to be held days before the United States' preemptive attack on Iraq earlier this year.[28] The court accepted the city's argument that the proposed event differed qualitatively from regularly approved, large-scale cultural parades, and it stressed the short notice and lack of detail in the march organizers' application.[29] Both the Eleventh Circuit and the D.C. Circuit have found a middle ground between these extremes.[30]

There is consistency, by contrast, in the case law regarding regulations targeting the manner in which parades are conducted. That consistency generally favors paraders in terms of what can be worn,[31] what can be carried,[32] and what can be said.[33]

It is important to be mindful of these precedents, but ordinance drafters should not shy away from crafting restrictions for paraders' non-expressive conduct. A prohibition on gas mask possession, for example, has no effect on speech, and it minimizes the chance that unruly demonstrators can resist law enforcement officers.[34]

Conclusion

Local governments wield considerable regulatory authority over parades, despite the limitations imposed by the First Amendment. This authority can be used to require paraders to obtain a permit, to pay for some police protection costs, and to refrain from certain types of conduct. A municipality, therefore, should not be reluctant to adopt street procession regulations if necessary to promote the public safety and welfare in its jurisdiction.

Notes

1. *E.g.*, Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969) (civil rights).
2. *E.g.*, Cox v. State of New Hampshire, 312 U.S. 569 (1940) (Jehovah's Witnesses' proselytization).
3. *E.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (cultural pride).
4. *See* Bay Area Peace Navy v. U.S., 914 F.2d 1224 (9th Cir. 1990) (anti-militarization boat parade in San Francisco Bay).
5. *Cox*, 312 U.S. at 574.
6. *E.g.*, *Shuttlesworth*, 394 U.S. 147 (1969) (permit process); *Hurley*, 515 U.S. 557 (1995) (inclusion of unwanted marching unit); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) (cost recovery).
7. *Cox*, 312 U.S. at 574.
8. *Hurley*, 515 U.S. at 568.
9. Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996).
10. *Id.*
11. Trewhella v. City of Lake Geneva, Wis., 249 F. Supp.2d 1057 (E.D. Wis. 2003).
12. *Id.* at 1076.
13. *See* Church of American Knights of Ku Klux Klan v. City of Gary, Indiana, 334 F.3d 676 (7th Cir. 2003) (invalidating 45-day advance filing requirement); Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996) (invalidating five-day advance filing requirement); N.A.A.C.P., Western Region v. City of Richmond, 743 F.2d 1346 (9th Cir. 1984) (invalidating 20-day advance filing requirement). *See also* Mardi Gras of San Luis Obispo v. City of San Luis Obispo, 189 F. Supp.2d 1018 (C.D. Cal. 2002) (invalidating 60-day advance filing requirement).
14. Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969).
15. *Id.* at 150-51.
16. MacDonald v. City of Chicago, 243 F.3d 1021 (7th Cir. 2001).
17. *Id.* at 1026 (quoting Chicago Ordinance 10-8-330(h)).
18. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).
19. *Id.* at 574.
20. Tacynec v. City of Philadelphia, 687 F.2d 793 (3rd Cir. 1982).
21. *Id.* at 800-01.
22. *Id.* at 798-99.
23. Mahoney v. Babbitt, 105 F.3d 1452, 1456 (D.C. Cir. 1997) ("We do not mean to suggest that even the government has an obligation to provide a place for all viewpoints in its parade. For example, if the Department of Defense or some other agency of the government were conducting a parade in celebration of the returning veterans of an American war, few would suppose that opponents of the war could successfully demand the right to sponsor units therein.").
24. *See* Forsyth County, Ga., v. Nationalist Movement, 505 U.S. 123 (1992); Church of American Knights of Ku Klux Klan v. City of Gary, Indiana, 334 F.3d 676 (7th Cir. 2003); Mardi Gras of San Luis Obispo v. City of San Luis Obispo, 189 F. Supp.2d 1018 (C.D. Cal. 2002).
25. *See* Cox v. State of New Hampshire, 312 U.S. 569 (1940); Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir. 1991).
26. *Cox*, 312 U.S. at 576.
27. Bay Area Peace Navy v. U.S., 914 F.2d 1224, 1228 (9th Cir. 1990).
28. United for Peace and Justice v. City of New York, 323 F.3d 175 (2d Cir. 2003).
29. *Id. See also* Million Youth March, Inc. v. Safir, 155 F.3d 124 (2d Cir. 1998) (overturning injunction requiring the city to approve rally at size, time, and place requested by organizers).
30. *See* Nationalist Movement v. City of Cumming, Ga., 92 F.3d 1135 (11th Cir. 1996) (upholding ordinance banning Saturday morning parades near courthouse based on city's evidence of high congestion level during prohibition period); Christian Knights of Ku Klux Klan Invisible Empire, Inc., v. District of Columbia, 972 F.2d 365 (D.C. Cir. 1992) (requiring issuance of parade permit despite police concerns about crowd violence, but rejecting notion that threat of violence cannot be basis for restricting procession route).
31. *See* National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) (overturning denial of stay of injunction prohibiting wearing of Nazi uniform); Church of American Knights of Ku Klux Klan v. Kerik, 232 F. Supp. 2d 205 (S.D.N.Y. 2002) (invalidating statute prohibiting mask-wearing at public gatherings).
32. *See* Edwards v. City of Coeur d'Alene, 262 F.3d 856 (9th Cir. 2001) (invalidating ordinance prohibiting signs attached to wooden or plastic handles). Cf. People v. Dury, 199 Cal. Rptr. 577 (Cal. App. Dep't Super. Ct. 1983) (upholding ordinance limiting thickness of sign supports).
33. Beckerman v. City of Tupelo, Miss., 664 F.2d 502 (5th Cir. 1981) (invalidating ordinance prohibiting the use of profanity).
34. *E.g.*, Beverly Hills, Cal., Municipal Code, § 4-3.209(f) (2000), which prohibits persons in demonstrations, picket lines, parades and assemblies from carrying, possessing, or wearing "any gas mask or similar device designed to filter all air breathed and that would protect the respiratory tract and face against irritating, noxious or poisonous gases." **ML**