1993

Freedom of Speech - Was the NAACP Right to Fire One of Its Lawyers for Representing the KKK At Issue

Richard Delgado
University of Alabama - School of Law, rdelgado@law.ua.edu

Yale Rosenberg

Merker Rosenberg

Freedom of Speech

Was the NAACP right to fire one of its lawyers for representing the KKK?

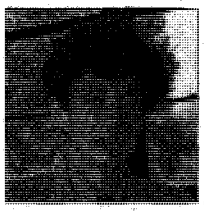
It's hard to think of a more mismatched attorney-and-client pair than Anthony Griffin and Michael Lowe. Griffin is a black lawyer who was counsel to the Texas chapter of the NAACP. Lowe is Grand Dragon of the Texas Ku Klux Klan, and has resisted the Texas Human Rights Commission's subpoena for his organization's mailing list.

Griffin was assigned Lowe's case by the Texas chapter of the American Civil Liberties Union. His acceptance of Lowe as a client drew fire from black groups, and culminated in his dismissal by the NAACP who saw the representation as a conflict of interest. (See Developments, page 21.)

Griffin's former instructors, Yale and Irene Merker Rosenberg, both law professors at the University of Houston Law Center, believe he is a hero who has demonstrated exceptional courage and respect for the right to privacy and free speech.

According to Richard Delgado of the University of Colorado Law School at Boulder, Griffin's devotion to the First Amendment may be admirable, but the NAACP has an equally important—if not greater—interest in protecting African-Americans from KKK harassment.

Yes: More Than Speech Was at Stake



BY RICHARD DELGADO

Did the National Association for the Advancement of Colored People act wisely in discharging Griffin as the organization's attorney? I believe it did, even though in letting him go, the organization was in effect punishing Griffin for exercising his First Amendment rights. For, by agreeing to help a racist organization, the attorney was injuring the NAACP in the exercise of its rights under the 14th Amendment.

And in this standoff, the lawyer must be the clear loser. Any other interpretation would be hubris—putting the lawyer's interests at the center, the client's at the periphery.

But beyond hubris, the NAACP was right in insisting its own racial justice and equality interests should trump the First Amendment formalist values Griffin tried so misguidedly to advance. If the two values were in tension—as they were in this case—the organization acted correctly in telling Griffin to find another job.

Richard Delgado is co-author of an anthology on critical race studies, "Words That Wound" (Westview, 1993).

Griffin chose to protect speech rather than equality, and protecting equality is what the NAACP does.

But we hear the ACLU saying that free expression is the surest guarantor of progress for minorities. ACLU president Nadine Strossen has written that if African-Americans knew their own self-interest, they would realize that a vital First Amendment is an indispensable precondition of racial justice. Without it, how could Martin Luther King Jr. have spoken as he did? How could civil rights activists have awakened the nation's conscience?

That argument, of course, is paternalistic. It asserts that blacks do not know their own history and cannot recognize their own self-interest. But it is also wrong. Recent scholarship has shown that free speech may be a reasonably good corrective for small errors, a reasonably effective way of dispelling individual or social misconceptions that are limited in scope.

Racism Still With Us

But it is a poor way of correcting systemic social ills, like racism or sexism, that are so integrated into our thought and meaning patterns as to be second nature. The racism of today is rarely recognized as such. Anyone speaking out against it is seen as incoherent or humorless. At most, we deem it "subtle"—nothing to worry about.

History demonstrates the limited efficacy of speech and free speech law. In the 1960s, civil rights activists marched, sat in, picketed, were arrested and convicted. Years later, their convictions might be reversed on appeal—if the demonstration had been prayerful, mannerly and not too disruptive.

But the First Amendment, as then understood, afforded little protection to Martin Luther King Jr. and his movement.

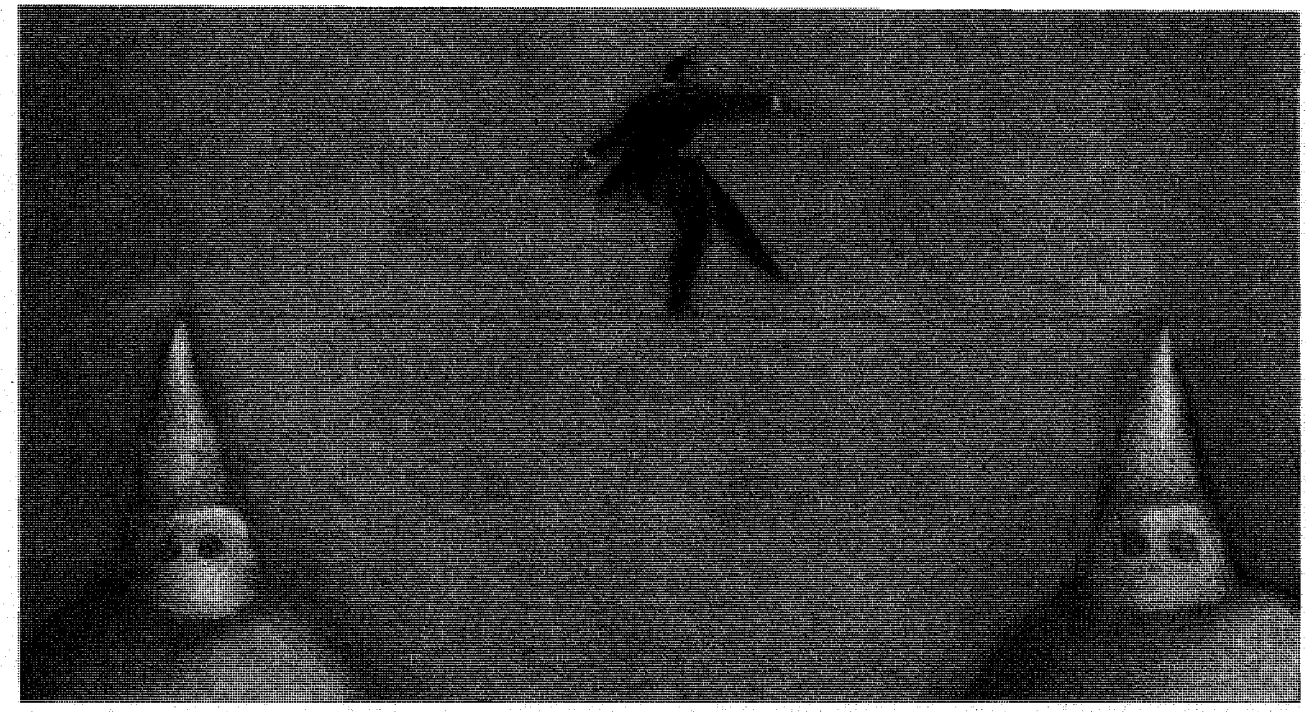
The current landscape of First Amendment "exceptions" and special doctrines makes the same point: The system of free speech is much more helpful to the majority than the minority.

When a defense agency, writer, large corporation, teacher, or other empowered actor needs protection against harmful speech, we quickly come up with an exception to the First Amendment (e.g., official or trade secrets, libel, copyright, etc.).

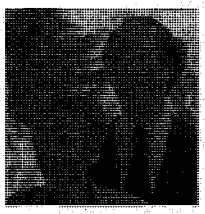
But when some of the most defenseless persons in our society, young black undergraduates at dominantly white institutions, ask for protection in the form of a hate-speech code, we reply that the First Amendment must be seamless.

The system of free speech does not operate evenly, does not afford protection for minorities when they need it most. ■

ABAJ/RICHARD HARRIS



No: Civil Liberties Belong to Everyone



BY YALE ROSENBERG AND IRENE MERKER ROSENBERG

As Yogi Berra might have put it, the case of Anthony Griffin, the Ku Klu Klan, the Texas Human Rights Commission and the state unit of the NAACP is a matter of déja vu all over again in a lot of ways.

Griffin is acting in the grand tradition of the practice of law in this country. Throughout this nation's history, distinguished lawyers have stepped forward to defend the Bill of Rights against governmental attack, through the representation of individual clients whose rights were under assault—regardless of whether those individual clients were upstanding or reprehensible.

Few should understand that point as well as the NAACP. In the 1940s, the state of Alabama demanded that the NAACP turn over the names and addresses of all its local members and agents.

Irene Merker Rosenberg and Yale Rosenberg teach criminal procedure and federal jurisdiction, respectively. Irene Rosenberg is former chair of the board of the Houston chapter of the American Civil Liberties Union.

Much like Grand Dragon Michael Lowe who refused to turn over his organization's membership list to the Texas Commission on Human Rights, the NAACP resisted, claiming that the state's demand infringed its First Amendment freedom of association.

In a landmark decision, the U.S. Supreme Court agreed, noting that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

Granted, the Supreme Court decision may not be dispositive here because the state of Texas may be able to show a more compelling need for the information than did the state of Alabama.

Danger in Limiting Freedoms

However, unless the state is challenged in a judicial forum to prove that a compelling interest exists, there is a distinct danger that the First Amendment associational freedom will be diminished, and in a way that the NAACP might not appreciate when it is its turn at bat again.

If we define constitutional rights so narrowly that they protect just what we want protected and no more—the essential core—subsequent litigation to ascertain their scope will be biting at the very edges of our rights, risking incursions on, and possible destruction of, the values we deem most important.

In the 1970s, the Nazi Party wanted to hold a rally in Skokie, Ill., no doubt precisely because many victims of the Holocaust lived there. Skokie officials tried to stop the demonstration by an injunction and vague and onerous ordinances.

Representing the Nazis, a Jewish lawyer for the ACLU fought those efforts on First Amendment grounds and won.

Many Jews were outraged by the ACLU's position and left the organization, not realizing that the government's actions effectively diminished every citizen's freedom to participate in the marketplace of ideas. It took some time for the ACLU to recover.

The Jews who left the ACLU over Skokie were wrong, and so is the Texas NAACP. We are Jews, and we understand very well who both the Nazis and the KKK are.

And so does Anthony Griffin understand.

But unfortunately, when you defend civil liberties, although the principles are lofty, the clients are often unappetizing and the work can get mighty lonely.

Freedom needs breathing room. As long as there are lawyers like Anthony Griffin around, it will be safe. ■

ILLUSTRATION BY TIM TEEBKEN; ABAJ PHOTO BY THAINE MANSKE