NAT HENTOFF

More First Amendment snapshots

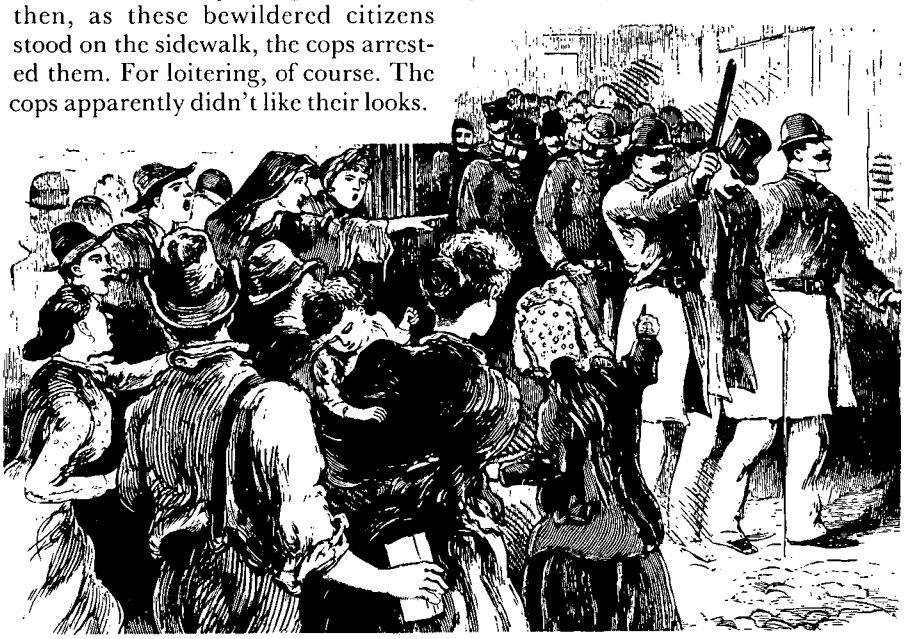
THE FIRST AMENDMENT says we have a "right peaceably to assemble." Followed by a comma, the amendment spells out the additional right "to petition the Government for a redress of grievances." But we can assemble even if we have no grievances against the government. Or, as the Supreme Court said in 1972 in striking down a vague vagrancy ordinance, the right to stand on street corners is "historically part of the amenities of life as we have known them . . . unwritten amenities . . . in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity."

Nonetheless, state legislatures and city councils feel compelled, from time to time, to clear the streets of suspicious citizens. These persons are suspicious because they do not stride along purposefully; instead, they stand idly by, planning who knows what mischief.

A customary weapon against such immobile eyesores in public places is the loitering statute. Its implementation is part of the ordinary abuse of the Bill of Rights that I began to explore in my last report on the psychopathology of everyday civil liberties ["First Amendment snapshots," Feb. 28]. These are cases given little notice outside their own communities, but in the aggregate they help explain why most citizens regard the Constitution, if they regard it at all, as an ancient document under glass somewhere. Maybe in a museum in Washington, but certainly not in City Hall.

And certainly not in Baltimore. In that upscale city (as the admen say), the police swept up dozens of people in a twenty-block downtown area during March and April of 1981. Their offense? Well, most of them were standing on street corners. Therefore, the police reasoned, these persons must be either prostitutes or homosexuals looking for companionship.

The Baltimore police were a dedicated lot. One woman, having been busted for standing on a street corner, emerged from the police station, and crossed the street to wait for a bus. There she was picked up once more—for loitering. And some particularly ingenious officers stopped cars, demanded the occupants get out, and then, as these bewildered citizens stood on the sidewalk, the cops arrested them. For loitering, of course. The cops apparently didn't like their looks.



No evidence was offered that any of those arrested were "soliciting," or were doing anything at all, except breathing. However, the police brandished Baltimore City Ordinance No. 1195, which proclaims: "It shall be unlawful for any person to loiter at, on, or in a public place or place open to the public in such manner . . . that by words, acts, or other conduct, it is clear that there is a reasonable likelihood [that] a breach of the peace or disorderly conduct shall result."

Reasonable likelihood to *whom*?

That's one of the questions the American Civil Liberties Union of Maryland is asking in a court challenge to the constitutionality of this ordinance. There is not only a First Amendment violation here, says the ACLU, but how is the Fourteenth Amendment guarantee of due process possible when the language of the ordinance is so vague?

"A person of average intelligence," says the ACLU, "could not reasonably understand what is prohibited by an enactment that forbids standing or remaining in a public place if 'it is clear' [to someone] that his words, acts, or other conduct is reasonably likely to result in a breach of the peace. The person who wishes to obey the law is left to guess at his peril what words, what acts, or what other conduct, coupled with standing or remaining in a public place, may result in his arrest or conviction."

What this does, the ACLU adds in a burst of understatement, is to place "unfettered discretion in the hands of police and prosecutors." Or, as the Supreme Court said of an ordinance in a similar case in 1972 (*Papachristou* v. *City of Jacksonville*): "It [the ordinance] results in a regime in which the poor and unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.' "

Unless the courts eventually decide that the First Amendment has standing in the city of Baltimore, prudent visitors there will walk briskly and on

NAT HENTOFF writes a monthly column on civil liberties for INQUIRY. His books include The First Freedom: A Tumultuous History of Free Speech in America.

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no account stand on a street corner—even if they have to cross against a red light.

ANOTHER COMMONPLACE abuse of the Bill of Rights in towns and cities throughout the nation is the strip-search. This abuse may be taken at face value. A law-enforcement person strips you of all your clothes and then searches inside all of your natural openings. Most folks find this a memorably humiliating experience, particularly if they've been dragged in for a traffic violation. Civil-liberties lawyers claim the only possible justification for a strip-search, under any circumstances, is a strong reason to believe the body before them may be concealing contraband or a weapon. Police don't disagree, but they point out that these days, you never know who's hiding what where. So the egalitarian thing for police to do is strip-search everybody they can get their hands on.

Among the usual abundance of strip-search cases in recent months—and many, many more never become cases because the victims would rather forget the whole thing—there is Julie Giles. A substitute teacher in Bonneville County, Idaho, this criminal was hauled to jail for a traffic violation. There she was stripped and poked about. The county and the local sheriff are being sued by Giles with the aid of the Southeast Idaho chapter of the ACLU. The sheriff is puzzled by all the fuss. After all, he says, everybody who goes to jail here gets strip-searched. It wasn't anything personal.

In Rhode Island, a five-year-old girl, part of a group of visitors to an inmate at the Adult Correctional Institution in Cranston, was strip-searched before being allowed to see a prisoner. So were the others with her. The prison authorities say, of course, that it is imperative to prevent visitors from smuggling in weapons. However, since each prisoner is himself strip-searched *after* each visit, why is it necessary to force every visitor to spread his or her cheeks, as the guards command? We may or may not find out through the federal suit that the ACLU of Rhode Island has brought on behalf of the five-year-old and her companions.

Schools are not exactly the same as prisons, despite some of the 1960s rhetoric to the contrary, but an increasing number of strip-searched kids may disagree. In a Jefferson County, Kentucky, elementary school last November, it was discovered that $4 was missing from a teacher's drawer in a third-grade classroom. The teacher and some of her colleagues, determined to get at the thieving root of the matter, strip-searched ten of the pupils. Their parents are now suing.

One such court action has ended, with rather dismaying results. In junior and senior high schools in Highland and Crown Point, Indiana, a drug sweep took place a couple of years ago. Without warning, without search warrants, and without probable cause to suspect any student of any violation, all the students in those schools were locked into their classrooms for two and a half hours one memorable day. They were then searched by teams of police dogs, supposedly trained to identify marijuana. As some police guarded the doors, other law-enforcement figures and the canines—accompanied by school officials—went from room to room and desk to desk.

Fourth Amendment considerations aside, a problem with four-legged cops is that dogs paw suspects not only when they smell marijuana but also when they get a whiff of candy or the scent of the kids' own pets. Nonetheless, with total, touching faith in the dogs, the cops acted on each signal by an accusatory snout and forced the suspects to empty their pockets or purses. If no contraband were found, clothes—particularly underclothing—was searched. And, reports the Indiana Civil Liberties Union, "Some students were required to disrobe completely and undergo a full strip-search by police officers."

In federal district court, the judge found that all the adults involved had acted within the Constitution, except for the strip-searching of one young woman. (She had been the only student thus violated to decide to endure further publicity by filing suit.)

The Seventh Circuit Court of Appeals also agreed that none of the liberties and rights of the students had been abused, except for that girl who, the court said, could recover damages from the body search. It did "not require a constitutional scholar," the opinion noted, "to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude."

A common abuse is the strip-search. A policeman removes your clothes and inspects all natural openings. Cops claim this is necessary. So they strip-search everybody they can get their hands on.

But the other warrantless searches, including strip-searches, the placing of kids under arrest in the classrooms without probable cause, and the unleashing of the dogs, were okay.

Finally, the Supreme Court was asked to review the case. It declined. Justice William Brennan dissented, and in one of his most passionate dissents, he wrote:

> We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey.
>
> I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms.

That last line echoed a 1960 opinion by the Court that apparently only Justice Brennan now adheres to: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

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THE COURT HAS MADE similarly bold and liberating proclamations in the past. Like Justice Abe Fortas's unequivocal assurance in the 1969 *Tinker* case that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech and expression at the schoolhouse gate." Yet, when students try to apply these High Court guarantees to their First Amendment rights as school journalists, they find that many, many principals are exceedingly reluctant to allow the Constitution into their buildings. There have been hundreds, maybe thousands, of fights on these grounds since 1969. The principals win some, and the kids win some.

In one recent confrontation, James Douglas DeCamp—son of Cincinnati newspaperman Graydon DeCamp—scored a victory for the First Amendment rights of student photographers. The eighteen-year-old had been freely taking pictures inside Mariemont's high school—some of which had been published in the *Cincinnati Enquirer*—until the teachers went on strike.

The principal of the school thereupon ordered DeCamp to no longer release any photographs to the media without official approval. The student considered this an abridgment of his First Amendment rights, and went on taking pictures. His photographs showed scenes inside the school contradicting the principal's public assurances that despite the strike, everything was perking along normally in the classrooms. One DeCamp photograph, for instance, showed one student fast asleep while another fought boredom with a yo-yo.

Enough, said the principal to DeCamp. If the boy took any more photographs inside the school without prior approval, he would be in danger of suspension and arrest, and he might also not be allowed to graduate. At a later point, the high-school journalist was given a formal warning of suspension because he had photographed substitute teachers leaving the school. DeCamp thought he was taking these shots from a vantage point that was not on school property. The principal disagreed, and once more threatened him with arrest.

In federal district court, Judge S. Arthur Spiegel pointed out that "the policy before the strike with regard to students taking photographs was open and unrestricted." With that precedent, the school had opened up a forum, protected by the First Amendment, for this form of student expression. The principal couldn't close down the forum just because he disapproved of the pictures now being taken by DeCamp unless the actual photographing disrupted class work. There was no such evidence. Therefore, there could be no prior restraint.

What about the possibility that this kid's photographs might stir up the parents or otherwise cause a ruckus? Said Judge Spiegel, "Fear or apprehension of disturbance is not enough to overcome the right to freedom of speech and expression." Good Lord, if adult newspapers were to be subject to censorship on the likelihood that their stories and pictures might rile up the populace from time to time, only *People* magazine would be safe.

In sum, said the judge, Douglas DeCamp has the same First Amendment rights in this context as he would if he were working for a grown-up sheet. Presumably, then, if cops and dogs had invaded *his* high-school classroom in a dragnet marijuana search, DeCamp could have snapped away. But can you strip-search a journalist while he's doing his job? I expect you can, so long as you leave his hands free.

If this survey of the daily rhythms of civil liberties seems imbalanced on behalf of civilians, it is worth noting that one of the newest in the ACLU series of handbooks is *The Rights of Police Officers*, published by Avon. Provocatively, the cover asks: "What Are Your Responsibilities? What Are Your Rights? Do They Ever Conflict?" And among the thoroughly researched chapters are discussions of cops' First Amendment rights, the extent to which their private lives are no business of their employers, and the legal limitations on their use of force.

Recently, the entire Billings, Montana, police department placed an order with the Mountain States Office of the ACLU for fifty copies of the new book. This may have something to do with the increasing activities of the Mountain States ACLU office, like the establishment in Omaha, Nebraska, of a center to screen and act on complaints of police brutality. The new center has already filed its first federal case on behalf of several residents of a public housing project who charge abuse by cops responding to a call.

Next time, they may come with an underlined copy of *The Rights of Police Officers*. But that's okay. It only comes in a softcover edition.

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POLITICS

JACK SHAFER

Free enterprise for the favored

*WHEN THE BRITISH ECON-*omist Stuart M. Butler floated the urban-enterprise-zone concept across the Atlantic, an unlikely pack of politicians stepped forward to welcome it. Ronald Reagan stumped for it during his 1980 campaign when he visited the photogenic blight of the South Bronx. Big-city mayors from both parties endorsed the idea; a coalition of the National Urban League, the NAACP, and segments of organized labor rallied around it. A pair of New York congressmen—Republican supply-sider Jack Kemp, and Democrat Robert Garcia of the South Bronx—stitched a version of the enterprise-zone idea into a bill that Reagan praised as a solution for urban areas stung by the cutback of his New Federalism.

The enterprise-zone idea had its earliest incarnation in the work of Fabian socialist Professor Peter Hall of the University of Reading in England. Hall, having visited tax-free trade zones in Asia, was impressed by their economic vitality. In 1977 Hall proposed "freeports" in depressed areas of the United Kingdom where across-the-board elimination of regulations and taxes would spur incentive and rebuild the inner cities. The Thatcher government latched onto the idea, but for the sake of political expedience repackaged Hall's radical proposal into a much more modest reform of tax write-offs and relief from red tape. The British enterprise zones were designed as an experiment to boost private-sector development of vacant areas in cities. The first of them were set up in the summer of 1981, and it is still too early to judge their success.

An assortment of American think-tank scholars and congressmen weighed in with enterprise-zone proposals of their own here. Stuart Butler's paper, published by the Heritage Foundation, a conservative think tank with close ties to the Reagan administration and other supply-siders, got the most attention. Butler's zones differed from the British ones in that his were designed as urban-renewal schemes for populated neighborhoods, not vacant industrial sites. The bills of other legislators faded as Jack Kemp and Bob Garcia translated Butler's ideas into legislation and built strong support for it in Congress. The Reagan administration is working closely with Kemp and Garcia, offering its own modifications, and the bill has a good chance of passing this session. The idea is spreading to statehouses and city halls across the country, and many of them are fashioning legislation that will complement any enterprise-zone bill that comes out of Washington.

The significance of the rise of the enterprise-zone idea in America was that it signaled the end of over four decades of wrongheaded urban policy. Nearly every single urban-policy initiative by the government had been discredited in both parties. Massive urban-renewal schemes razed entire blocks, destroying whatever social cohesion that existed in the first place, and in many cases, like Benton Harbor, Michigan, built nothing at all after the wrecking ball finished its job. Welfare programs drew unskilled rural populations into the cities. Zoning restrictions prevented the rapid adaptation of deteriorating neighborhoods to new productive uses. Grant programs from HUD and other agencies squandered valuable resources on upper-income housing and fancy downtown hotels. Jimmy Carter's exhortations to rebuild the South Bronx "brick by brick and block by block" suddenly began to fall on deaf ears. Even the most ardent of the 1960s urban planners conceded that their schemes to rebuild the inner cities hadn't worked. Something new was called for. That something new became the enterprise zone.

In championing the enterprise-zone idea, even liberal Democrats were finally surrendering the conventional wisdom that the government could create wealth, industry, and stable neighborhoods by bombing the cities with tax dollars. Suddenly, they were calling for a reduction in bureaucratic red tape, red tape which liberal Democrats had raveled in the first place. Now Republicans *and* Democrats were willing to reduce taxes in zones to test their suspicions that taxes hobble incentive. (It was strangely, but conveniently, forgotten who had originally increased the taxes.) In their new wisdom the lawmakers called for a reduction in regulations in their new-fangled zones because they now suspected that regulations kept businesses more occupied with pleasing government inspectors than customers. Even licensing laws and zoning provisions came under attack. The most daring enterprise-zone advocates called for repeal of minimum-wage laws—laws which say, in effect, that it is better to be unemployed at $3.35 an hour than be employed at $2.50 an hour.

But in the end the enterprise-zone designers failed. They believed too little in their new wisdom. Instead of eliminating regulations, they shuffled regulations; instead of slashing taxes, they trimmed a few of them.

The original Kemp-Garcia enterprise-zone bill was introduced in 1980 and didn't make it out of committee. One reason was that it said enterprise zones would be established only in areas where state and local taxes were cut. The states and cities fought back; they needed every single tax dollar, they said—and besides, many state constitutions forbid the establishment of preferential tax districts.

So the 1981 version of Kemp-Garcia took another tack. The federal government would go ahead and establish enterprise zones, and then it would be nice, but not compulsory, for states to figure out a way to cut taxes in them. The new bill also contains a set of "suggestions" on what building codes, zoning restrictions, and other regulations should be repealed or modified. Most of these are outside the scope of federal authority.

The new Kemp-Garcia bill contains some other alterations, most of them in response to political pressure. The 1980 bill had included a reduction in social-security taxes, but in the 1981 version the goring of this sacred cow is not attempted; instead a refundable tax credit of up to $1500 per worker for both employers and employees has been written in. The newer bill cuts the number of zones that could be created from an unlimited number to

JACK SHAFER is the managing editor of INQUIRY.

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