What Was the Skokie Case All About?
An Advocate Looks Back

David Goldberger

"Many opponents became so enraged that they suggested the First Amendment ought to be changed..."

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Nearly six years have passed since I served as an ACLU attorney representing a small band of self-styled Nazis who called themselves the National Socialist Party of America (NSPA). They wished to hold a public assembly on the sidewalk in front of the village hall in Skokie, Illinois to protest the denial of a permit to assemble in another forum. However, Skokie contains a substantial number of Jewish residents, some of whom survived Nazi concentration camps. As a result of their adamant opposition to the demonstration, Skokie officials made every effort to find a legal means to bar the demonstration. The controversy became extremely tense when a number of people, within and without Skokie, organized efforts to block the demonstration with violence, if legal means failed.

The history of the case in the courts is fairly well known. A state trial judge issued an injunction barring the demonstration unless NSPA demonstrators appeared without their Nazi-style uniforms and swastika emblems. The Illinois Supreme Court ruled the injunction was a prior restraint and therefore violated the First Amendment. In the meantime, Skokie officials passed group libel and permit ordinances that would make it impossible for the would-be demonstrators to get a permit to assemble. The Court of Appeals for the Seventh Circuit reviewed a challenge to the constitutionality of the ordinances and concluded that the ordinances were inconsistent with the precepts of the First Amendment. Subsequent to the court rulings, officials of the Community Relations Service of the Justice Department held meetings with the key participants in the controversy and, after the meetings, the NSPA moved its demonstration to the Federal Plaza in downtown Chicago. There the demonstration took place in the presence of approximately 2000 hostile onlookers restrained by Chicago Police.

In retrospect, the legal aspects of the controversy look to me very much as they did at the time it occurred. It represented another familiar clash over the degree to which the First Amendment ought to protect the right of political pariahs to hold demonstrations in public forums in spite of the objections of a hostile citizenry. Many opponents of the Skokie demonstration, including some extremely thoughtful constitutional scholars, saw the controversy very differently. They argued that the Skokie case raised the unique question of whether the government had power to suppress political expression if it could be shown that the expression...
was false, anti-democratic, and extremely offensive to particular religious or racial groups. Their argument, while appealing, seemed inconsistent with the First Amendment traditions that treat ideas as viewpoints and not as facts. The Supreme Court consistently has refused to measure political advocacy according to the judiciary's or public's view by standards of the value of its content. Moreover, the question about the degree of protection to which discredited and morally offensive political ideologies were entitled was not actually before the courts. The demonstrators were not planning to harangue about Nazi ideology. On the contrary, the demonstration was to be silent. The demonstrators' communication was to be confined to signs complaining that NSPA constitutional rights were being denied by the refusal of permits to assemble elsewhere.

The familiarity of the legal questions was offset by the unexpectedly intense emotional reaction against the demonstration. Many opponents became so enraged that they suggested the First Amendment ought to be changed if it allowed demonstrations by Nazis. Others argued the often repeated, but not generally accepted, theory that First Amendment doctrines should not be construed to apply to speakers espousing anti-democratic ideologies. Yet others wanted to extend the tort law to create a private cause of action against any speaker whose message was so offensive that it inflicted psychic trauma. Indeed, some opponents of the demonstration concluded that if the courts would not prevent it, then they would do so by violent means directed at either the demonstrators or their attorneys. For example, several weeks before the demonstration, a bomb was planted near NSPA headquarters on the south side of Chicago. The lawyers representing the NSPA were threatened with assault and assassination. The anger became so intense that it persists today. In a recent interview, one of the leaders of the opposition to the demonstration stated that because I provided legal counsel to the NSPA, I "should have been quartered."

At the time the controversy began, I thought the intensity of the rage among opponents of the demonstration was peculiar to the circumstances. I assumed that the rage came from Skokie's close link to the horrors of the Holocaust. After all, the planned demonstration would have been the first in which American Jewish survivors of the Holocaust would be confronted directly in a dominantly Jewish residential community by the symbols of Nazi genocidal policies.

Now, in retrospect, I am beginning to think other factors were at work as well. Recent events elsewhere in the country indicate a parallel between the feelings of rage experienced by opponents of the Skokie demonstration and feelings of anger emerging among other segments of American society. It is as though, over the last ten years, an ever-intensifying sense of frustration has arisen out of a widespread perception that the American legal system has gone too far in protecting the rights of political pariahs, criminals, and racial minorities. The provocative, unpopular, and sometimes illegal conduct of some persons and groups operating outside of the nation's mainstream is being met with the increasingly widespread feeling that the legal system is not serving a majority of Americans. Because of this frustration, significant numbers of people feel justified in resorting to radical self-help rather than abiding by the rules created by the legal system.

One of the most dramatic examples of this phenomenon to emerge during the last year has been the increasingly violent response of segments of the "Right to Life" movement to the growing availability of abortions authorized by the Supreme Court decision in Roe v. Wade. During the last twelve months, anti-abortion activists have bombed more than twenty abortion clinics. A fear of further bombings led officials of the federal government to warn operators of abortion clinics to be prepared for additional bombings at the time of
the presidential inauguration and the anniversary of the *Roe v. Wade* decision. Also, during the last year, Supreme Court Justice Harry Blackmun, author of *Roe v. Wade*, received a letter threatening his life.

The emergence of unrestrained rage in response to *Roe v. Wade* bears a resemblance to the quality of the public reaction in the Skokie controversy. Opponents of each of the constitutionally protected activities are implacable. Instead of treating each controversy as one in which radically different views must be accommodated if democracy is to work effectively, those who disagree with judicially formulated rules protecting individual rights find such rules intolerable. Many are angry enough to try to impose their views and suppress conflicting views by violence, if all else fails. More moderate objectors prefer to redefine the constitutional safeguards or amend the Constitution itself rather than accept judicial precedent that allows room for all viewpoints.

Another example of this phenomenon emerged from the recent arrest of Bernhard Goetz, the New York subway rider who shot four youths who verbally tried to bully him into giving them five dollars. He fired all of the bullets of his pistol into his antagonists, hitting two of them in the back. He is alleged to have asserted that he would have kept shooting had he not run out of bullets. Mr. Goetz's rage was probably predictable since he previously had been a robbery victim who was badly shaken by the experience. What is important for present purposes, however, is the outpouring of public support for Goetz's vigilantism. Notwithstanding evidence that the shooting was unnecessary and excessive many Americans, enraged by what they believe is an ineffective criminal justice system, feel sympathy for this man who took the law into his own hands. One New Yorker wrote to the *New York Times* to say, "Thank God for that Vigilante. Bernhard Goetz for Mayor."

The Reagan Administration has amplified widespread frustration with the American legal system by publicly siding with the segments of the American public who feel aggrieved. If the Administration's landslide victories are to be taken
as a measure, then its apparent goal of reducing judicial decision making that is protective of unpopular political, religious, and racial groups is meeting with general public approval. Its efforts have included aggressive attempts to make the federal courts mirror popular sentiment by appointing judges who openly reject past Supreme Court decisions protective of individual rights to freedom of choice in abortions and protective of defendants in criminal cases. Some members of the Administration have stated during news interviews that they hope by selection of new judges to obtain a reversal of the Supreme Court doctrines that incorporate many of the provisions of the Bill of Rights into the Fourteenth Amendment, making them applicable to the states. Justice Rehnquist's public assurance that "court-packing" does not usually work has only served to highlight the Administration's efforts at ideological screening of judges. The President himself has expressed unrestrained contempt for the work of the judiciary by combining his call for a constitutional amendment to prohibit abortions with a public characterization of abortion as "murder." Similarly, in sympathy with public hostility towards legal doctrines protective of the rights of criminal defendants, members of the Administration have said that liberal advocates of these principles are a "criminal lobby."

Thus, my look backwards at the Skokie controversy leaves me with the impression that beyond the intense feelings rooted in the holocaust the rage was an echo of a more generalized sense of frustration with judicial decisions that expansively interpret the Bill of Rights at the expense of the strong contrary preferences of powerful constituencies. My initial view that the Skokie controversy was completely distinct from other superficially unrelated controversies was an oversimplification. It seems much more accurate now to view Skokie as one of a series of controversies touching off intense and widespread anger with the consequences of legal doctrines that seem insensitive to the preferences and needs of significant numbers of American citizens who were unwilling to be bound by them.

What this suggests about the future is not altogether clear. The combination of widespread rage and the enthusiasm of political leaders to try to incorporate that rage into their political agendas suggests America may be in the process of becoming a country in which judicial protection of individual rights will cease to play a particularly important role in national life. On the other hand, the intense frustration with the efforts of the legal system to protect those with small or quiet constituencies may be no more than a temporary feature of the normal ebb and flow of current events. We will all have to wait a good many more years before we know whether intolerance of extreme differences will reshape the contours of judicial protection of individual rights. In the meantime, I will not again make the mistake of seeing any public controversy in isolation from superficially distinct events and undercurrents happening elsewhere in the country.