

GAY PRIDE MESSAGE NOT ACCOMMODATED IN CITY PARADE  
ORGANIZED BY PRIVATE ASSOCIATION

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State action is required to trigger free speech protection under the First Amendment. Under such circumstances, any governmental regulation which imposes a prior restraint on expressive conduct must be content neutral and limited to reasonable time, place, and manner restrictions. State action exists when a city issues a permit for a private group to conduct a parade or similar demonstration on public streets and parks. As a result, governmental regulation of the parade pursuant to the permit must not regulate the content of the message communicated by parade participants. Further, as illustrated by the "Hurley" decision described herein, state laws or regulations may not require private individuals to dilute their message by accommodating opposing views in their free speech activities.

IS FIRST AMENDMENT POLITICALLY CORRECT?

On June 19, 1995, the Supreme Court of the United States issued its opinion in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, \_\_\_ U.S. \_\_\_ (1995). Justice Souter delivered the opinion of the Court which considered "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. " The facts of the case were as follows:

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston" - the password used in the colonial lines on evacuation day.

Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, see Mass. Gen. Laws 6:12K (1992), the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display.

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day Evacuation Day Parade to the South Boston Allied War Veterans

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Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn up to 1 million watchers. No other applicant has ever applied for that permit.

Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding. 1992 was the year that a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form an organization, the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade.

The Council denied GLIB's application to take part in the 1992 parade. GLIB obtained a state court order to include its contingent, which marched in the parade. When the Council refused to admit GLIB to the upcoming parade, GLIB filed another suit in state court against the Council and the City of Boston. In its complaint, GLIB alleged violations of the State and Federal Constitutions and of the state public accommodations law. The Massachusetts public accommodations law prohibited "any distinction, discrimination or restriction on account of sexual orientation relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." (Mass. Gen. Laws 272:98).

As noted by the trial court, "for at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike." Accordingly, the state trial court ruled that "the parade fell within the statutory definition of a public accommodation" which included, in pertinent part, the following:

[A]ny place which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be a boardwalk or other public highway, or a place of public amusement, recreation, sport, exercise or entertainment. Mass. Gen. Laws 272:92A.

Further, the trial court rejected the Council's assertion that "the exclusion of groups with sexual themes merely formalized the fact that the Parade expresses traditional religious and social values." On the contrary, the trial court found the Council had excluded GLIB from the Parade "because of its values and its message, i.e., its members' sexual orientation." In addition, the trial court found "the Council had no written criteria and employed no particular procedures for admission. Rather, the trial court found the Council "voted on new applications in batches;" had "occasionally admitted groups who simply showed up at the parade without having submitted an application", and "did not generally inquire into the specific messages or views of each applicant." As a result, held that "the lack of genuine selectivity in

choosing participants and sponsors demonstrates that the Parade is a public event."

#### DIVERSITY & INCLUSIVENESS REQUIRED?

The trial court, therefore, concluded that the Council's view "was not only violative of the public accommodations law but paradoxical as well, since a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." In so doing, the trial court further rejected the Council's contention that "GLIB's admission would trample on the Council's First Amendment rights." Specifically, the trial court found it could not choose constitutional protection of any interest in expressive association, such as that asserted by the Council, over similar rights asserted by GLIB. To do so, in the opinion of the trial court would require an unconstitutional "focus on a specific message, theme, or group absent from the parade."

Given the Council's lack of selectivity in choosing participants and failure to circumscribe the marchers' message... [it is] impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment... [T]he parade is not an exercise of the Council's constitutionally protected right of expressive association, but instead an open recreational event that is subject to the public on sexual orientation, any infringement on the Council's right to expressive association was only incidental and no greater than necessary to accomplish the statute's legitimate purpose of eradicating discrimination.

The state trial court, therefore, ruled that GLIB is "entitled to participate in the Parade on the same terms and conditions as other participants." On appeal, the Massachusetts state supreme court affirmed the trial court's judgment. In the opinion of the state supreme court, there was sufficient evidence to support the trial judge's findings that: (1) GLIB was excluded from the parade based on the sexual orientation of its members; (2) that it was impossible to detect an expressive purpose in the parade; (3) that there was no state action, and; (4) that the parade was a public accommodation within the meaning of 272:92A (the state public accommodations law).

The United States Supreme Court granted the Council's petition to review this determination by the state courts "to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment." As noted by the Court, "the guarantees of free speech and equal protection guard against encroachment by the government and erect no shield against merely private conduct."

In this particular instance, the Court found that GLIB did not challenge "the conclusion by the Massachusetts' courts that no state action is involved in the parade." As a result, the Court held GLIB's "claim for inclusion in the parade rests solely on the Massachusetts public accommodations law." On the other hand, the Court found the Council challenged "the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment."

## ARE PARADES PROTECTED SPEECH ACTIVITIES?

According to the Court, parades are "a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches."

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that symbolism is a primitive but effective way of communicating ideas, our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an arm band to protest a war, displaying a red flag, and even marching, walking or parading in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection...

Further, the Court noted that speech protection under the First Amendment is intended to "shield just those choices of content that in someone's eyes are misguided, or even hurtful."

[I]f the government were freely able to compel speakers to propound political messages with which they disagree, protection of speaker's freedom would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

In this particular instance, the Court agreed with the state courts that "in spite of excluding some applicants, the Council is rather lenient in admitting participants." The Court, however, found the Council was still entitled to First Amendment protection in its "selection of contingents to make a parade."

[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication...

## SPEAKER'S FREEDOM TO CHOOSE & DISCRIMINATE?

Applying these principles to the facts of the case, the Court held that "the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." Specifically, the Court found that "the state courts' application of the

statute produced an order essentially requiring the Council to alter the expressive content of their parade."

[E]very participating unit affects the message conveyed by the private organizers... Since all speech inherently involves choices of what to say and what to leave unsaid... [O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say, outside that context it may not compel affirmance of a belief with which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject, perhaps, to the permissive law of defamation...

[L]ike 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 actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

In this case, the Council disclaimed "any intent to exclude homosexuals as such." Further, the Court found that "no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march." Rather, the Court found the Council's disagreement with GLIB "goes to the admission of GLIB as its own parade unit carrying its own banner."

The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.

The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of

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view, and that choice is presumed to lie beyond the government's power to control...

In addition, the Court found no indication that "some speakers will be destroyed in the absence of the challenged law."

GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own... True, the size and success of the Council's parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact, without more, would fall far short of supporting a claim that the Council enjoys an abiding monopoly of access to spectators. Considering that GLIB presumably would have had a fair shot (under neutral criteria developed by the city) at obtaining a parade permit of its own, GLIB has not shown that the Council enjoys the capacity to silence the voice of competing speakers...

### SOCIALLY ACCEPTABLE MESSAGE?

As a result, the Court held that "our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference" by the State." Specifically, the Court found that "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."

The statute, Mass. Gen. Laws 272:98, is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation...

When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.

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The Court, therefore, reversed the judgment of the Massachusetts supreme court and remanded (i.e., sent back) this case to the state court "for proceedings not inconsistent with this opinion." In so doing, the Court stated its holding was based "not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. "

The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.