CIVIL LIBERTIES IN NEW ZEALAND: DEFENDING OUR ENEMIES

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"For the strength of the Pack is the Wolf, and the strength of the Wolf is the Pack."[1]

Rudyard Kipling thus took hold of the two horns of the civil liberties dilemma. Kipling's lines crystallize the eternal tension between the individual wolf on the one hand and the pack on the other—between the autonomy and integrity of the individual unit on the one hand and a societal need on the other—between individual human conscience on the one hand and a recognised collective good on the other. This paper will examine that tension, construct a model balance mechanism, and conclude that civil liberties practice in New Zealand must embrace the enemies of the current social order as well as its reformers and defenders.

I THE INDIVIDUAL IN SOCIETY

1 *Arguments for Civil Liberties*

Civil libertarians, it is assumed, will have a bias for the individual, and a civil liberties movement should always require the pack, that is, society to meet a burden of proof and a burden of persuasion, before individual liberty in a particular area can be curtailed or proscribed.[2] It may be appropriate, however, to give a brief account of the principal arguments which support maximum individual freedom.

First, there is the utilitarian argument, which posits that an effective democracy, with meaningful citizen participation, depends upon the well-informed, free-speaking individual. If our representative democracy is not to be a mere sham or charade, the electors must be able to choose local councillors, members of Parliament, and party leaders on the basis of their policy vis-à-vis existing or proposed government operations. If elections are not to be mere personal popularity polls, based on advertising campaigns, then the individual must be at liberty to speak and write, to publish and assemble, to protest and parade, and, in sum, to inform and to be informed. Our system of government, to be genuine, requires that maximum freedom repose with the individual; otherwise, we may better surrender the pretence of representative participation in exchange for Plato's Philosopher Kings and Guardians.

Secondly, the philosophical, or liberal argument holds that truth is a discoverable commodity, given a competitive opportunity in the market

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1 Rudyard Kipling, "The Law of the Jungle", *The Second Jungle Book* (1895).

2 It is, of course, a canon of statutory interpretation to interpret "statutes which encroach on the rights of the subject, whether as regards person or property" by strict construction. Maxwell, *On Interpretation of Statutes* (11th ed 1962) 275.

place of ideas, and that the common citizen is capable of rational decision-making, given sufficient freedom.[3] Such individual decisions, taken together, are more trustworthy than party dogma or the arbitrary whim of government official. As Milton said in *Areopagitica,*

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?[4]

Societal wisdom is more likely achieved by not suppressing party or doctrine, and by allowing full scope for the dissemination of political opinion.

A third argument which might be called "economic" is associated with Friedrich A Hayek and the so-called "Chicago School".[5] This approach emphasizes that individual energy, both creative and productive, is best encouraged by maximum freedom, and that the Big Government of the modern welfare state is not only incompatible with freedom and the Rule of Law, but also dysfunctional in achieving the greater good for the greater number. Their principal theorem is that the loss of political freedom follows from the loss of economic freedom.[6]

Finally, there is the "escape valve" which is more cynical. It admits that truth may be a relative commodity, not an absolute, but that the mental health of society and its constituents is better served if the citizen is given maximum civil rights and free speech. The citizens who are politically active, who spend their energies on social protest, meeting, parading, picketing and petitioning, are releasing the pressures of modern society before the revolutionary elements reach critical mass. It is surely better to have the discontented campaigning and litigating, perhaps achieving legal and social reform, than to sow the seeds of a terrorist underground.[7]

Not all of these can be accepted; some are mutually contradictory. They all, however, lead to the conclusion that individual self-fulfilment, and exploration of the human potential are essential prerequisites to societal progress.

2 *Civil Liberties as a Conservative Force*

The civil liberties movement, while radical in the seventeenth century, may be conservative in the twentieth century. A civil liberties movement is the residue of eighteenth century Whiggery and the nineteenth century Liberalism of John Stuart Mill, completely outflanked by the modern, post-war welfare state.

Traditionally the English Whigs, who prevailed in the Glorious Revolution of 1688, and their political descendants, have struggled against all forms of regal and executive discretionary power. On a grand scale,

3 John Stuart Mill, "Of the Liberty of Thought and Discussion", *On Liberty* (1859).

4 *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644). (Everyman's Library ed 1927, 23-38).

5 See eg *The Road to Serfdom* (1944) and *Law, Legislation and Liberty* (1973).

6 A critique of Hayek's position, and citations to other leading critics are found in Jones, "The Rule of Law and the Welfare State" (1958) 58 Columbia LR 143.

7 Followers of recent American political history may recall the trial of the yclept "Chicago Seven", and one defendant about to be manacled, demanding his constitutional rights. Epstein, *The Great Conspiracy Trial* (1972) 239.

they opposed the Stuarts' invocation of the divine right of kings to govern the state. Their legacy is seen at work in New Zealand, with the declaration that the Government cannot lawfully ignore statutes of the realm.[8] Their goals, for three centuries, have been negative assertions, litanies of prohibitions on state authority, a list of declarations which begin "No search warrant shall be issued . . .", or "Congress shall pass no law. . . ." These may be declared in a Bill of Rights as in the Constitutions of Fiji and the United States or in the Canadian statute of that name, or espoused in unwritten conventions and the multi-faceted doctrine known as the Rule of Law, more characteristic of an unwritten constitution. They are always negative rights because they restrain the state, and, in substance, purport to forbid state interference in certain human activities, usually those which relate to religion, communication, privacy, movement, trial and imprisonment. The liberal objective is always a restraint, or prohibition of a governmental activity: the result a minimal state, which governs best by governing least.

The more recent emphasis as articulated in the United Nations Universal Declaration of Human Rights of 1948, and embodied in the welfare state, is to recite positive entitlements as state obligations to provide, inter alia, education, housing, social security and health care. The ideals of a human rights movement in this view are a government department for each human necessity, and a standard of living guaranteed by the government. The new Soviet Constitution, for example, mentions maternity leave, material and moral support for mothers and children, the right to work, rest and leisure, health protection, maintenance in old age, sickness and disability, housing, education, native language instruction, cultural benefits and the freedom of artistic work.[9]

The negative prohibitions of the liberal state do not always complement the positive demands of the welfare state. The revolutionaries who proclaimed "Life, Liberty, and the Pursuit of Happiness" may endorse "Life, Liberty and Property" when their treason doth succeed.[10] Political and civil rights may be raised as a shield, in the name of economic freedom against the government seeking greater social justice. For example, government-imposed discrimination would ordinarily be seen as a violation of basic equality before the law, but if it is a discrimination based on received wealth, as in a progressive income tax, then a civil liberties movement ought not to put it on the agenda. We must be reminded, in the words of William Pitt (the Elder), Earl of Chatham, that "the distinction between legislation and taxation is essential to liberty".[11]

Some would go further and advance the view that the classic civil liberties philosophy is a confidence game imposed on the rest of the world by English-speaking, white, middle-class lawyers. To the peoples of the Third World, struggling to free themselves from starvation and poverty, political and civil rights may be ludicrously irrelevant.[12] They may even be dysfunctional, devised to hinder the government and confuse the people, preventing a focus on the real problems of the country.

8 *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615.
9 The Constitution of the USSR (1977) Articles 39-47.
10 The Declaration of Independence (1776) and the US Constitution, Amendment V (1791) and Amendment XIV (1868).
11 House of Commons, 14 January 1776. *Parliamentary History of England* (1813) Vol 16.
12 See Linton, "World Development, Change and the Challenge of Human Rights" [1978] NZLJ 242.

According to Marxist theory the vaunted British Rule of Law, and equality before the Law is a fraud. Rich men and poor men *are* treated equally when they come before a magistrate, charged with sleeping in the park, or stealing a loaf of bread, but of course landowners are not arrested and charged with petty theft, disorderly behaviour, lacking lawful means of support, or being rogues and vagabonds. The more recent Bolshevik corollary is that law is more than a fraud; it is, in fact, the analogue to religion in feudal society, an adhesive that bonds an unthinking lower class to upper class domination. The leading Marxist-Leninist lawyer, Pashukanis, representing the Soviet view for twenty years, argued that law, like religion in the feudal state, reaches its highest development in capitalist society, and that every manifestation of law is, ultimately, a mechanism for protecting property rights. As Soviet socialism developed, law would be increasingly irrelevant and unnecessary—analytically there was no such thing as socialist law, and legal institutions, from law schools to courts, would wither away, sooner rather than later.[13]

I set out these approaches, not because I agree with them, but because they serve as a useful warning. Civil liberties can well be irrelevant, or worse. As a final sobering note, let us recall that the Bill of Rights in the Constitution of the United States, certainly among the most inspirational documents in the world, establishing bench marks for civil rights even today—those elegant aspirations, so dedicated to human liberty, coincided with and tolerated or ignored the pernicious institution of slavery for a hundred years. We must ask, what pernicious institution, what form of slavery are we, today, tolerating or ignoring?

What then, in conclusion, should be the relationship between human rights and civil-political rights? Should civil liberties councils abandon concern for free speech, and work for a negative income tax? Should civil libertarians work for a more equitable distribution of wealth, as well as income? Should the constant struggle for civil and political rights be relegated to the hypothetical future while we fight for social justice now?

My answer is definitely not. I think there is a symbiotic relationship between civil-political rights on the one hand and social justice on the other. If we surrender the civil and political rights of the legal system in exchange for the untrammelled drive for human rights, we must take our chances on the sovereign, on the man or party entrusted with power. We may get Julius Nyerere but we may be less fortunate and get Emperor Bokassa or Idi Amin. We may put our trust in the collective rule of the seven-man Bolshevik Politburo of 1924, but we may get Stalin. The answer must be to preserve the link between civil rights and groups struggling for social reform. Civil rights must be the procedural umbrella which shelters the rights of reformers and critics, allowing them the freedom and the medium in which to function.

This concern with procedure means that an organisation which is dedicated to the preservation of civil liberties can play only a restricted role in debates which are of broader concern to the welfare of society. I agree wth those who say that the civil liberties movement should not become identified with groups, whether of the left or the right, which

13 Upon his rehabilitation in 1956, it was learned that he had been shot. Hazard, "Pashukanis is no Traitor" (1957) 51 American Journal of International Law 385; Berman, *Justice in the USSR* (1963) 71.

seek to promote social changes which in their view will be of benefit to society as a whole. There is a great danger that, by espousing currently "trendy" views the civil libertarian will be seen to be partisan in his approach to civil liberties themselves. To avoid such a charge, he should confine himself to issues which clearly relate to civil liberties.

II The Balance

How should a civil libertarian proceed in identifying civil liberties issues, and to what criteria should he appeal when trying to correct cases of abuse? Whatever one's a priori assumptions—Rousseau's "Man is born free; and everywhere he is in chains"[14] or Hobbes' "the life of man [in a State of Nature is] solitary, poor, nasty, brutish, and short"[15]—one must deal with what Rousseau called the social contract, what Locke called the compact, and relate the individual to his society. There must be some rational nexus which explicates the rights of the individual against the needs of his society. The metaphor I have chosen to demonstrate and test the relationship is that of an equation, or balance. On one side of the equation, in the balance, stand the needs of society, articulated in particular cases by the threat to society, and the degree, the severity, and the likelihood of that threat. On the other side is the individual, and the extent and nature of the potential restraint or actual injury which the societal need would inflict. A civil libertarian would ask of any particular measure whether it is rationally directed at the end it is designed to achieve, and whether it has an appreciable chance to achieve it. He may also claim that such questions should be answered by a neutral, non-partisan, independent, non-political reviewing authority which would check the executive discretion to ensure that it is being exercised for the purpose granted, and not for some other less justified collective goal. It would also determine whether the desired social protection could be achieved by other means which cause less harm to the individual.

Take, for example, the injuries inflicted on society by those who exercise their privilege to drive after exercising their privilege to consume alcohol in licensed premises. Now the injury inflicted is severe—many hundreds die on New Zealand roads every year in accidents in which alcohol plays a part. The extent of the restraint imposed on the individual is relatively minor; being stopped by a traffic officer and supplying a breath sample. There is adequate opportunity for subsequent judicial review of the constabulary action. The only drawback is that once the power to stop is granted, then officers can exercise it for any or no reason. They can use it to harass drivers whose vehicle, or hair style, or skin colour intrigues them. But most people would agree that the infringement is reasonably slight and the threat to society so severe that the risks of abuse are acceptable.

Another clear example is that of a wartime society, where the danger to the very existence of society justifies greater impositions on individual liberty. In the United Kingdom a series of judgments in 1942, upholding executive privilege and discretion against apparently valid claims,

14 Rousseau, *The Social Contract* (1762) .

15 Hobbes, "Of the Naturall Condition of Mankind as concerning their Felicity, and Misery," *Leviathan* (1651). ". . . [D]uring the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man."

became known as the House of Lords contribution to the war effort.[16] In the United States, the Supreme Court somehow mislaid the Bill of Rights while it was considering and upholding the incarceration of thousands of innocent American citizens of Japanese descent in camps throughout the American West Coast.[17] In New Zealand Callan J upheld wartime censorship regulations, saying:

> Now many of our leaders have said that in this fight to preserve liberty we must be prepared, in the meantime, to surrender temporarily many of our liberties. . . . One of the liberties which we enjoy in peace time and exercise very readily . . . is the liberty of criticizing . . . those persons . . . in positions of power and authority. . . . That is one of the liberties which may have to be curtailed in war time if it is exercised in a manner which conflicts with a true view of the public good.[18]

A peacetime example, not easy to analyze, is the right to commit suicide. Society might say, as does the Soviet Government "The State has invested thousands of dollars in your education and upbringing, and you are not permanently emigrating into the next world until you have repaid that debt and purchased a suicide licence. There will be a seven day wait."

Of course there will be different views about how that balance should be struck, some weighted towards the individual and others weighted towards society. The Soviet Constitution, for instance, embodies an approach which is distinctly of the latter kind. As a condition precedent to the exercise of any civil liberty, Article 39 warns that "Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state. . . ." and Article 59 adds that "Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations".

Even in New Zealand we may sometimes be forgiven for suspecting that certain measures are predicated on a balancing exercise of that kind. Take, for example, the Security Intelligence Service Amendment Act 1977. The threat to society was never clearly articulated, the potential injury to the individual is quite overwhelming, there is no method whatsoever of reviewing the exercise of power to see that it is rationally directed at the desired end, there is no mechanism to check on abuse of the powers granted, and, finally, there are alternative means of preserving the state without putting a secret service above the law.

There are two further aspects of the balance mechanism which deserve mention. The first is the tendency, or the technique, of a pressure group to distort the balancing process by offering a factual premise which precludes any balance. In the termination of pregnancy debate, for example, one does not even begin the process of balancing if one accepts the premise that an embryo is a human being. No amount of inconvenience, psychological stress and ill health of the pregnant woman can then outweigh the so-called "right to life" of another human being. So one can dictate the conclusion by the initial factual formulation.

Secondly, I believe that bodies which are charged with carrying out

16 *Liversidge* v *Anderson* [1942] AC 206 and *Duncan* v *Cammell, Laird & Co Ltd* [1942] AC 624. But see *Ridge* v *Baldwin* [1964] AC 40, and *Conway* v *Rimmer* [1968] AC 910, which effectively reverse the 1942 decisions. See a'so Heuston, "*Liversidge* v *Anderson* in Retrospect" (1970) 86 LQR 33.

17 *Hirabayashi* v *US* (1943) 320 US 81; *Korematsu* v *US* (1944) 323 US 214.

18 *Stevenson* v *Reid* [1942] NZLR 1, 2.

the balancing process are sometimes too ready to avoid it. In my submission, this occurred with measures relating to police powers, which came before the House of Representatives last year. Four statutes increasing police powers of search were passed, rather quickly, through their three readings. The debate on the Amendment to the Police Act 1958 was particularly brief. After explaining that the Amendment which gives the police the power to search and take personal effects from everyone arrested was to remedy a defect in the law, spokesmen from both parties criticised the solitary member who suggested that male officers should not be empowered to body search a female suspect. Then the justification for the Amendment Act was put forward—routine search and confiscation of property was for administrative convenience and necessary as a standard operating procedure to handle large numbers of prisoners in the computer age. So we have the application of cost-accounting efficiency to human liberty.[19]

The result of such neglect is that the task of striking the balance inevitably devolves on others who are less well equipped to carry it out. Unhappily, in this case as in many others, it is the police who must now bear the responsibility for using their new powers in a way which will not unduly interfere with the liberties of the citizen. The police force in New Zealand has a justly high reputation for integrity and, in matters concerned with the handling of demonstrations and civil liberties, its record may be thought to compare favourably with that of its counterparts in other English-speaking countries. These powers, however, are entrusted to individual policemen and it is unrealistic to expect of every police officer, that he is wiser and less bigoted than the society of which he forms a part. Moreover, he is thrust into situations which are not of his own making, such as the visit of the nuclear warship *Long Beach,* the softball matches with a South African team at Papakura, and the arrest of the Ngati Whatua as trespassers on Bastion Point. It is true that, in many respects, the work of the police is open to public scrutiny. Their actions can be investigated both in the criminal prosecutions which they bring and in the civil actions which may be brought against them. Within the Department they are the subject of ministerial responsibility (so that questions may be asked about their conduct in the House of Representatives) and of disciplinary inquiries. It is perhaps time to inquire, however, whether it is in the interests of the police themselves and of society as a whole, that they should be given these increasing powers. Are our means of checking what they do really adequate, in view of the heavy responsibilities thus placed upon them? Or should the responsibility be returned to those to whom it properly belongs?

III Defending Our Enemies

The acid test of the libertarian ideal, in my view, is not whether it can be used as a basis for criticising others; it is whether it can be applied to justify the legality of the actions of those who set out to destroy the

19 1979 NZ Parliamentary Debates 4075-4076, 4355. ". . . [L]ast year more than 50,000 prisoners were received in police watchhouses throughout the country . . . . the number of prisoners alone indicates that a clear, efficient procedure for their processing is necessary." See Hodge, "The Police Amendment Act 1979" (1980) 9 NZULR 89.

libertarian ideal itself. The recent case of *King-Ansell* v *Police,* in which the conviction of the defendant was upheld by the Court of Appeal on 14 December 1979, is a striking illustration.[20]

The defendant, the leader of the barely perceptible New Zealand National Socialist White People's Party, was charged under section 25 of the Race Relations Act 1971. He was responsible for printing and publishing 9000 copies of a single-page political flyer or pamphlet, many of which were distributed by party members to private letter boxes in East Auckland suburbs. No charge was laid under section 46 of the Post Office Act 1959, which outlaws the placing of "noxious" material in letter boxes. A printing press and relevant plates were found in the defendant's home. He was solely responsible for the post office box numbered in the pamphlet.

One side of the page portrayed Jesus Christ flanked by Adolph Hitler and featured a quote from chapter 8, verse 44 of St John (an alleged condemnation by Jesus of the Jews: "Ye are of your father the devil . . . ."), a quote from *Mein Kampf* Part 1 chapter 2 (". . . by defending myself against the Jew, I am fighting for the work of the Lord"), and the words "National Socialist Movement" and "For Race and Nation". On the obverse side was a photo of a dozen or more Nazis with helmets and swastika armbands and language which urged interested people to support the movement: "Study Our Alternative! Help Build A New Order! Our Fight Is Your Fight! Join Us! Write today!" Precise suggestions were not spelled out but it was clearly anti-semitic propaganda.

Complaints were made, by two persons of Jewish ethnic origin, to the Race Relations Conciliator, but the burden of collecting evidence and prosecuting was left to the police. The Attorney-General's consent, required under section 26 of the Race Relations Act 1971, was sought and obtained, and a prosecution was brought in the name of a police constable. The charge, under section 25 (1) (a) was that the defendant published insulting written matter which was likely to incite ill-will against Jewish persons in New Zealand on the ground of their ethnic origins, with intent to incite ill-will against New Zealand Jews on those grounds.

The defendant was convicted in the Magistrate's Court in Auckland on 20 October 1977, and Mitchell SM sentenced King-Ansell to three months' imprisonment. The conviction was upheld by Mills J in the Supreme Court in Auckland, on 27 June 1978, although a $400 fine was substituted for the gaol sentence. The Court of Appeal decision, upholding the conviction, came twenty-six months after the original trial. A further appeal to the Privy Council was possible but now seems unlikely.

A detailed examination of the judgments is beyond the scope of this paper, but the principal question of law, and the defence most vigorously pursued, was the application of the phrase "colour, race, ethnic or national origins" to Jews in New Zealand. The defence contended that they were a religious group, but the Supreme Court and Court of Appeal found that Jews in New Zealand did have "ethnic origins" within the meaning of the Act, even if they were a religious group for other purposes. The Court was not impressed with counsel's suggestion that an

20 *Brookes* v *King-Ansell* (1977) 14 MCD 212; the conviction by Mitchell SM was upheld by Mills J in the Supreme Court, Auckland, 27 June 1978, M 1577/77; [1979] 2 NZLR 531 (CA).

international Jewish conspiracy was responsible for recent dictionary definitions which may have increased the scope of such statutes for the benefit of Jews.

It is my contention that such prosecutions are ill-founded, ill-advised, and a violation of basic political liberty. The proper stance for a civil liberties council, it is submitted, is to oppose the criminal prosecution of those who publish worthless political material. The following paragraphs are organized as a socratic exchange, presenting the reasons for and against the prosecution of the Nazi pamphleteer.

Freedom of speech is not an absolute. Just as we are entitled to punish the man who falsely shouts "Fire!" in a crowded theatre, so we can punish Nazis, who in effect, are shouting "Burn!" in a crowded city.

The cry of "fire" in a crowded theatre is not really speech at all;[21] it is behaviour, which induces other behaviour, but there is no opportunity to debate or challenge the message. Furthermore, it does not matter what you call out in a crowded theatre, you could be ejected for breach of contract, because you are interfering with the purpose of the public gathering. The audience has come for a specific purpose and has no chance to avoid the infliction of the speech. Political speech, a demonstration or a pamphlet, can be ignored, turned out, thrown away, avoided, answered, and/or rejected. In this case, I doubt whether political material in a mailbox is a serious annoyance. The mailbox itself is quite an effective medium for charities, bottle drives, paper drives, and local councils, and I would not want to see it closed to their use, although, presumably, one could erect a sign to notify the pamphleteers that one would treat the intrusion as a civil trespass. But, in sum, political pamphleteering and distribution of political material is not a serious injury. We can ignore it, whereas we cannot ignore the cry of "Fire" in the theatre.

Like the National Front in the United Kingdom, and the Nazi Party in Skokie, Illinois, the New Zealand Nazis are being provocative; they may inspire outraged readers to commit criminal acts against the Nazis and it is a crime to "incite, encourage or procure disorder, violence, or lawlessness": Police Offences Act 1927, section 34.

Assuming that lawlessness will be the work of the anti-Nazis, do we really want to make the first speaker a criminal because someone else threatens to breach the peace? Do we silence political speech because it is unpopular, so unpopular that the listener may attempt to inflict an injury on the speaker? On just that principle was Te Kooti gaoled in 1890 when the people of Opotiki threatened to attack if Te Kooti passed peacefully through the Bay of Plenty.[22] So too was the Reverend Burton gaoled in Wellington in 1940, for three months, for daring to suggest peace to a population bent on war.[23] If we allow the heckler's veto to function, if we allow the anticipated audience to foreclose a political speech, then no unpopular cause will ever be aired. If Nazis cannot speak where there are Jews, then Jews will be silenced where there are

21 The hypothetical situation of the crowded theatre was first used by Justice Holmes in *Schenck* v *US* (1919) 249 US 47, 52. He went on to develop what was called the "clear and present danger" test.

22 *Goodall* v *Te Kooti* (1891) 9 NZLR 26.

23 *Burton* v *Power* [1940] NZLR 305.

Arabs, pacifists where there are soldiers, and communists where there are landlords. Rather than embrace the *Te Kooti* precedent, rather than accept *Burton* v *Power,* civil libertarians should work to have these New Zealand precedents overruled.

It is true that there is a recent English decision, involving Colin Jordan, King-Ansell's British Nazi counterpart, which holds that a speaker takes his audience as he finds them—and if they riot, then he can be held to answer for the anticipated consequences of his speech.[24] I suggest that the United States Supreme Court decision in *Terminiello* v *Chicago* in 1948 is preferable. There the Court reversed the conviction of an anti-communist, anti-semitic, anti-black, de-frocked catholic priest whose speech led to a considerable breach of the peace. As Justice Douglas said in that case:

> . . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.[25]

With a case like that behind it, the Supreme Court could go on, with dignity, integrity and neutral principles and uphold the First Amendment liberties of the civil rights activists in the American South, and the anti-war protesters all over the country.

The point is that great civil liberties precedents are not made in the name of very pleasant people. If we wait until a politically acceptable plaintiff comes along, it will be too late. The great General Warrant cases were rendered in the name of John Wilkes, a sometime pornographer, rakehell, and scoundrel.[26] The great criminal procedure cases in the United States—*Gideon,*[27] *Miranda,*[28] *Escobedo*[29]—were all based on the police treatment of rather undesirable professional criminals. But their protection now extends to everyone.

But aside from the legal technicalities and any likelihood of fighting, this political material is very offensive, and downright intolerable: To imply that Hitler had the right idea is to cause so much pain—so much unnecessary pain, that it is just not worth it. We do not want to subject even a fragment of our community to such a nightmare.

24 *Jordan* v *Burgoyne* [1963] 2 QB 744, 749. But see *Verrall* v *Great Yarmouth Borough Council* [1980] 1 All ER 839, 844, 849. In upholding the National Front's contractual rights to have their 1979 annual conference in a council hall at Yarmouth, Lord Denning said that "Freedom of speech means freedom not only for the views of which you approve, but also freedom for the views of which you most heartily disapprove." Cumming-Bruce LJ added that if the Court did not uphold the rights of the National Front "then, if you look at the other side of the penny, those political enthusiasts described as 'left-wing bodies' who wish to hold meetings, who wish to organize politically, would find themselves faced with the same difficulty because the ferocious mobs who take the opposite view will claim the assistance of the Court to prevent them speaking or holding meetings."

25 (1948) 337 US 1, 4.

26 *Wilkes* v *Wood* (1763) 19 St Tr 1153; *Leach* v *Money* (1765) 19 St Tr 1002; *Entick* v *Carrington* (1765) St Tr 1030.

27 *Gideon* v *Wainwright* (1963) 372 US 335; (right to counsel at trial).

28 *Miranda* v *Arizona* (1966) 384 US 436; (right to remain silent; right to counsel at all stages of custodial interrogation).

29 *Escobedo* v *Illinois* (1964) 378 US 478; (right to counsel at the beginning of the interrogation).

It may be that this pain is the price we have to pay. As Justice Douglas implied, free speech may not be an anaesthetic. On the contrary, it may connote open wounds. But might it not be better to pay that price than to forget? If we did not have a King-Ansell to remind us of the Nazi atrocities perhaps we should invent one, lest we forget. Recurring anguish, it seems, is healthier than pretending that the past never happened.

To hark back to Mill's marketplace of ideas, and to Milton's wrestling match between Truth and Falsehood, surely this Nazi material has been in the marketplace, and been deemed a defective product. Surely the fight between Truth and Falsehood has already ended—we do not need to stage World War II again.

Mill provides the answer to that, in *On Liberty*:[30] "[H]owever true [an opinion] may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth." I suggest that there is evidence of this in the prominent association of Maoris, who proudly bear the name Stormtroopers, and festoon themselves with regalia from Nazi Germany. There would seem to be a lack of understanding somewhere.

But surely the assertion that the Nazis have a right to be in the marketplace of ideas implies, as a logical conclusion, that they have a right to win, to sell their product to a majority? Are you defending their right to form a future government, to prevail in a future parliament?

It must be accepted that an implication of the privilege to contest for men's minds includes the potential success of every competition. But if we are civil libertarians, we must have an aspirational, sanguine, view of individual capacity, and optimism based on the ability of the ordinary New Zealander to sort out worthless political material from more wholesome political doctrine. Without that expectation, all political education is hypocritical self-indulgence.

But just in case this optimism is misplaced, it would be better not to take a chance, and suppress King-Ansell, his party, and their opinions.

This will have, and has had in my opinion, the contrary result. In the *King-Ansell* case there was no attempt to demonstrate that the publication had any illegal results. As far as the court was aware, only two people read the defendant's literature, and they found it offensive. In other words, the only ill-will generated was against the Nazis, not against the target group. I am not suggesting that the reasonable Aucklander on the Tamaki omnibus be summoned as a witness, to testify that he had read the pamphlet and became a raving anti-semite. In fact, no attempt was made to discover the flow of contributions and party subscriptions to the post office box numbered in the pamphlet. I would suggest that the said post office box would have enjoyed greater patronage thanks to the trial, the conviction, the appeals and the attendant publicity than as a direct result of the original distribution of the material.

30 John Stuart Mill, "Of the Liberty of Thought and Discussion", *On Liberty* (1859)

CONCLUSION

In this paper I have explored the arguments which underlie the civil libertarian ideal, and its significance in the conditions of the twentieth century. I have tried to make out the case that the ideal is still relevant in New Zealand and that it requires a continual balancing of the claims of the individual against the interests of society as a whole, society being better off in the long run if the individual's rights are not unthinkingly sacrificed to the needs of society. It is apparent, nevertheless, that an active civil rights movement may face conflicts in the ideals it supports, and I contend that these conflicts should be resolved by giving priority to the procedural, perhaps negative, aspects of civil liberties, leaving improvements in social welfare to the advocacy of other groups in society. Taking this stance, it is possible to deal effectively with cases such as *King-Ansell,* which at first sight place the libertarian on horns of a dilemma. In my view, we should not stand complacently by while our enemies suffer the illiberal effects of the kind of society they themselves are seeking to achieve. If we defend only the rights of those with whom we agree, we are not defending civil liberties at all.