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Post-Katrina Suppression of Black Working-Class Political Expression

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New Orleans politicians, with the aid of the federal government, used the destruction and displacement caused by Hurricane Katrina in 2005 to implement policies that discouraged low-income and working class black residents from returning to New Orleans. Impacted communities felt the need to revitalize street parades (second-line parades), a traditional communal neighborhood activity, as an instrument of political protest. In response the City used minor municipal ordinances to more vigorously regulate these parades, doubling the fees imposed for street parades and effectively shutting them down. The City's response raised important constitutional questions about government suppression of speech and freedom of association. This article is an examination of how the racially biased use of city permitting structures impacted working-class blacks in New Orleans post-Katrina. It is a cautionary tale about how cities can enforce social control by manipulating tiny details in municipal laws. It is a lesson for other diverse communities about what can happen to minority subcultures in the wake of recovery efforts after a natural disaster.

The devastation caused by Hurricane Katrina in 2005 and its aftermath dramatically impacted the City's black working-class, almost half of whose residents were spread across the country (McKernan and Mulcahy 2008). The collapse of the levee walls flooding eighty percent of the city "not only caused immense damage to homes and public institutions . . . [it] also destabilized the culture of New Orleans, perhaps irrevocably" (McKernan and Mulcahy 2008, 218). Thus one black New Orleans resident characterized the first second-line parade after Katrina as a reunion, "'an act of defiance against the Storm,' an act of affirmation regarding 'what they had been through'" (Dinerstein 2009, 615).

Second-line parades are essentially communal street parades. The term, second-line, originally described the gaggle of people who follow traditional jazz funeral parades in New Orleans, but subsequently came to mean people who join into the "main line" of any organized street parade¹ (McKinney 2006, 102). One scholar described a second line parade as "a mobile block party that lasts four hours—by police permit—and travels five miles into and through the streets of black New Orleans. . . . Music is provided by a hired brass band, the engine of the second line. . . . When parading, *everyone* is supposed to dance or, at the very least, *roll wid it* . . . Participation is the rule—not spectating or just walking, although often that is what people do" (Dinerstein 2009, 618). Second-line parades are interactive expressions of community for those who participate in them. In other words, these neighborhood street parades are "part of [a] communal life with substantial popular participation" (Dinerstein 2009, 618).

Second-line parades are not only expressions of New Orleans black working-class culture, they are associational activities. For generations, social aid and pleasure clubs in working-class black City neighborhoods organized second-line parades (Breunlin and Regis 2006, 758; O'Reilly and Cutcher 2006). These parades were more than merely social activities. The clubs argue that there is a political aspect to many of these parades; they expressively "articulate 'the grassroots governance, social action and economy that are essential to organization in the black and Creole neighborhoods. . . . [These parades constitute] the public artistic statement of the neighborhood—the largest organic social unit of community and of political life in the city'" (Irazábal and Neville 2007, 137). Before Hurricane

¹ Examples of second-line parades can be found on YouTube, Dinerstein recommends these examples from YouTube: *Treme Side Steppers, 2009*, <http://www.youtube.com/watch?v=TviGgyEGDFs>; *The Revolution Social Aid and Pleasure Club 2009 Second Line Parade featuring Rebirth Brass Band*, http://www.youtube.com/watch?v=57X3PqZ_UOQ. Dinerstein, at 615.

Katrina city and state laws regulating street parades were not strictly enforced for many neighborhood street parades, especially spontaneous parades. Admittedly, enforcement of the parade permit requirement is inconsistent. According to the Times Picayune “sometimes a squad car arrives and quietly follows the parade. Other times, an officer will emerge and ask for the bandleader, then discuss the reason for the parade and the planned route. In those cases, the two parties may negotiate a different route or ending point, but the parade typically is allowed to continue” (Reckdahl 2007).

Post-Katrina displaced working class black New Orleans residents used second-line parades to rebuild community and reconnect with displaced neighbors and friends. In addition, there was a “general feeling” among impacted community members that the federal and local governments hoped that low-income blacks would not return to New Orleans, and believed that shutting down the parades would prevent people from returning (Dinerstein 2009, 630). Their fears seemed confirmed when in early 2006 the permit fee for these parades was raised dramatically from \$1,200 to \$4,445² (Reckdahl 2006).

City officials justified the change saying that the increased fee was designed “to create a safer environment before, during and after Second Line Parades” (Reckdahl 2006). In response the Social Aid and Pleasure Club Task Force (“Task Force”), fearful that their “cultural tradition will cease to exist,” sued the City in federal court claiming that the new fee schedule infringed on their right to free speech and equal protection of the laws (United States District Court Eastern District of Louisiana 2007, 2). When the City subsequently agreed to a major reduction in the permit fees for a second-line parade being organized for Easter 2007, the suit was dropped, but problems continue (United States District Court Eastern District of Louisiana 2007).

This article argues that the post-Katrina regulation of second line parades is a continuation of long-standing practices that regulate and suppress the expressive social, cultural and political activities of working class black New Orleans residents by limiting their access to public spaces and restricting their ability to associate with other black working class residents. But several things distinguish the current regulation and enforcement from earlier attempts. First, the expressive activity, street parades, being regulated includes political speech. Many post-Katrina second-line parades have political overtones. The participants are protesting government policies designed to discourage of the return of black working class New Orleans residents. Second, the more rigorous regulation of second-line parades post-Katrina has strong class overtones. The more rigorous regulation of these parades has the tacit approval of black political elites and middle class residents of all races. Thus post-Katrina attempts by the City to use municipal laws to suppress community-based second-line parades threatened the continued existence of working class black communities in New Orleans.

Although this discussion focuses on a specific community, New Orleans, the damage, displacement and disruption caused by Hurricane Katrina could happen to any community that experiences a natural disaster. Often these disasters provide impacted communities with an opportunity to remake themselves. What is happening in post-Katrina New Orleans provides a useful lesson about how natural disasters can be used to destroy or suppress politically less powerful outsider groups and their cultural practices.

II. Hostility toward Low-Income Black Residents

A. History of Suppressive Regulations Targeting Black Residents

The City’s use of local laws to as a means of social control is not new. Glaring inequalities reinforced by law existed in New Orleans long before Hurricane Katrina. The prohibition of blacks from public spaces in New Orleans dates back to the slave era³ (Leovy 1857; Quigley and Zaki 1997). The entry of enslaved black Americans

² After the first shooting the fee was raised to \$4,445 then reduced to \$3,760 and after meeting with social aid and pleasure clubs reduced again to \$2,200, but when a second shooting occurred in the crowd during another parade the police raised the fee back to \$3760. Complaint at 14-15, Social Aid and Pleasure Club Task Force et al. v. City of New Orleans, No. 06-10057 (E.D. La. Nov. 16, 2006); Katy Reckdahl, *The Price of Parading*, OFFBEAT, Nov. 2006, <http://offbeat.com/2006/11/01/the-price-of-parading/>.

³ Section 753 of the 1857 New Orleans General Ordinance reads: “It shall not be lawful for slaves to assemble in any of the streets, roads, public squares, meat markets or in any house, cabaret, grocery or coffee house, or on the levee, or any other place whatsoever in this city; and it shall be the duty of all policeman and watchmen to arrest and conduct to the police jail all slaves found assembled in contravention hereto; and the slaves so found assembled shall receive not less than ten nor more than twenty-five lashes, unless such slave shall be the bearer of a special permit from his master so to assemble, in which case the said master shall be fined not less than twenty-five dollars nor more than one hundred dollars.” HENRY JEFFERSON LEOVY, *THE LAWS AND GENERAL ORDINANCES OF THE CITY OF NEW ORLEANS* 259 (1857). Section No. 757 reads: “That all slaves are forbidden to quarrel, yell, curse, or sing obscene songs, or in

onto public spaces always was conditioned on the consent of dominant elites. Early statutes often contained exceptions to the general prohibition allowing blacks residents on certain days, and with the permission of the government, to “assemble on the commons for the purpose of dancing”⁴ (Leovy 1857, 17).

After the Civil War blacks continued to be excluded from public spaces as New Orleans rebranded itself. “The new Louisiana legislature promptly adopted a resolution [reaffirming] ‘that this is a Government of white people, made and to be perpetuated for the exclusive benefit of the white race,’ and quickly began passing laws to ensure that blacks were returned to a condition strongly reminiscent of slavery” (Gill 1997, 76). To accomplish this end, laws were enacted “that incorporated many provisions of the antebellum *code noir* restricting black people’s freedom of movement” (Gill 1997, 76). Even New Orleans’ most well-known and lucrative tourist cultural event, Mardi Gras, until very recently reflected the racial and class divisions of the city (Gill 1997, 93). Not only were black organizations from all socio-economic classes excluded from the Mardi Gras parades, membership in the Mardi Gras Krewes was limited to white New Orleans elites (Gill 1997, 93-94; Gotham 2007).

During this period second-line parades were a way to foster community among the powerless, impoverished and geographically isolated black working-class who lived in New Orleans neighborhoods created and maintained by *de jure* and *de facto* racial discrimination (Breunlin and Regis 2006). Historically these parades were a “back o’ town phenomenon” rarely reaching the main streets of racially segregated New Orleans (Kunian 2007). Anthropologists Rachel Breunlin and Helen A. Regis documented the importance of second-line parades in maintaining community for the neighborhood of Desire whose residents were evicted from low-income housing projects in the area because of redevelopment efforts (Breunlin and Regis 2006, 746). Later they were displaced from their new locations because of Hurricane Katrina. Breunlin and Regis posit that for these individuals forced from their old neighborhood, the tradition of second-line parading is a way of keeping Desire alive in the spirit of former residents (Breunlin and Regis 2006). Post-Katrina second-line parades served a similar function for other displaced predominately black working class communities.

B. Post-Katrina Regulation of Second-Line Parades to Suppress Political Activism

Under Louisiana State law parades of any sort are prohibited unless approved by the municipality in which they will be held⁵ (L.A.R.S. 2006). The state law specifically exempts public activities by certain groups including parades and marches “directly held or sponsored by a bona fide organization specifically for the celebration of Mardi Gras and/or directly related to pre-lenten or carnival festivities . . .”⁶ (L.A.R.S. 2006). While social aid and pleasure clubs may seek to hold parades during Mardi Gras season, they are not considered Krewes,⁷ and thus not treated as a

anywise disturb the public peace, or to gamble in the streets, roads or other places, or on the levee. Any slave found contravening hereto shall receive twenty-five lashes.” *Id.* Bill Quigley and Maha Zaki mention an 1830 slave statute that made it a crime to “produce discontent among the free colored population of the state, or insubordination among the slaves.” Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803-1865*, 24 S.U. L. REV. 145, 164 (1997). They go on to explain: “Merely using such language in any public discourse, from the bar, the bench, the stage, or the pulpit, or in any place whatsoever; or whoever shall make use of language in private discourses or conversations, or shall make use of signs or actions having a tendency to produce discontent among slaves or free persons of color, or whoever shall knowingly be instrumental in bringing into this state, any paper, pamphlet, or book, having such tendency as aforesaid was to be punished by imprisonment at hard labor for three to twenty-one years. *Id.* at 164-65 (internal quotations omitted).

⁴ See, for example, a portion of sec. 753 of the 1857 New Orleans Code that reads: “Provided, that nothing herein contained shall be so construed as to prohibit slaves from assembling (with their owner’s consent) in a church during the hours consecrated to divine service, nor from attending funerals: Provided, moreover, that they may assemble on the commons for the purpose of dancing, or playing ball, or cricket, permission to that effect being first obtained from the mayor, but such permission shall be granted by the mayor for no other day than Sunday, and shall expire at sunset.” LEOVY, *supra* note 17, at 259.

⁵ L.A.R.S. 14:326 a.: “Any procession, march, parade or public demonstration of any kind or for whatever purpose is prohibited . . . on any public sidewalk, street, highway, bridge, alley, road or other public passageway of any municipality . . . unless there first has been obtained a permit. . .”

⁶ *Id.* at 14:326 c.: Also exempt are activities by “bona fide legitimate labor organization or professional firefighter or police association. . . or any procession or parade directly held or sponsored by the governing authority . . . school parades . . . or other functions, state, parish, or municipal fairs or other such related activities.”

⁷ According to mardigrasdigest.com, a krewa is “Any of several groups with often hereditary membership whose members organize and participate as costumed participants in the float parades, and balls, in the annual Mardi Gras carnival.” The website goes on to say that an organization that does not do all four of these activities -- “(a) holds a

bona fide organization subject to the statutory exemption (Mardi Gras Digest 2014). Thus the exceptions in these laws privileging mainstream dominant culture organizations have a disparate impact on working-class black residents by depriving them of an equal right to cultural expression.

Post-Katrina the value of local second-line parades has been contested. According to New Orleans Deputy Police Superintendent John Bryson “[s]econd lines are noted for the violence of the crowd afterwards—shootings, stabbings and fights” (Nossiter 2006, 26). In 2006 the NOPD argued that two instances of violence at second-line parades, within three months of each other, warranted a dramatic increase in the number of police escorts from six to twenty and thus the significant increase in permit fees (Nossiter 2006). New Orleans Police Superintendent Warren Riley justified the increase in permit fees saying that a greater police presence at the parades was needed to prevent violence (Reckdahl 2006).

Admittedly, second-parades can become unruly. Alcohol is consumed publicly as participants stop at local bars on the route for refreshment, and exuberant observers sometimes dance on top of cars and rooftops, and climb up street signs (Dinerstein 2009). But these are the hazards that occur with all large outdoor events (Associated Press 2008; Le Menestral and Henry 2010). People are having a good time, enjoying the music and dancing with friends and neighbors. Further, concerns about gun violence at second-line parades pre-dates Hurricane Katrina, but “[n]one of the incidents . . . involved members of the clubs” (Kunian 2007). Thus the purported connection between violence and second-line parades is disputed by the social aid and pleasure clubs (Kunian 2007).

Despite the 2007 the reduction of permit fees, the City of New Orleans continued to thwart community-based second-line parades. When the City threatened to revoke a parade permit it had previously granted for February 4, 2008 (Lundi Gras), the Task Force plaintiffs filed a Motion for a Temporary Restraining Order (United States District Court Eastern District of Louisiana 2008a). They alleged that they were asked to change their parade date because two Mardi Gras krewes (organizations), “Zulu” (a historically black organization) and “Rex” (a historically white group), were “applying pressure upon the NOPD to cancel Plaintiffs’ event” (United States District Court Eastern District of Louisiana 2008a, 5). After the plaintiffs refused to move their parade, citing the large effort and expense that had already gone into organizing it, the NOPD began to apply “improper pressure” by making veiled assertions that the Department would “deny permits to the second line organizations in the future for each organization’s upcoming annual parade” (United States District Court Eastern District of Louisiana 2008a, 5). Subsequently, some organizations, succumbing to the pressure, pulled out of the Lundi Gras parade (United States District Court Eastern District of Louisiana 2008a, 5).

The perception of several social aid and pleasure clubs that they would receive more favorable treatment from the NOPD for future permit requests if they cancelled their planned Lundi Gras parade underscores the arbitrary and capricious nature of the permitting scheme, essentially the same concern contained in their 2006 complaint (United States District Court Eastern District of Louisiana 2008a, 10-11). The federal district court agreed with the plaintiffs and ordered the City to allow the parade on the route as previously planned (United States District Court Eastern District of Louisiana 2008b, 10-11). Nevertheless, this resolution leaves unchanged the state and local laws that appear to grant the Superintendent of Police⁸ wide latitude in determining the award of parade permits, creating opportunities to trample the constitutionally protected expressive rights of the social aid and pleasure clubs (Carr 2010). Thus race *and* class biases explain the City’s resistance to local second-line parades.

III. Other Post Katrina Policies

The City’s hostility toward street parades post-Katrina was part of an overall policy designed to discourage the return of working class black residents. Before floodwaters of Hurricane Katrina receded, prominent New Orleans political and business leaders expressed their desire to see the city rebuilt “bigger and better” (Gardner, Irwin, and Peterson 2009). For the wealthier elements of the city, a better New Orleans meant a city without the pre-Katrina levels of poor black residents (Browne-Dianis and Sinha 2008, 483).

Following Hurricane Katrina, the Housing Authority of New Orleans (HANO) instituted policies that discouraged displaced low-income black residents from returning to the city. For example, HANO sought to demolish still-viable housing projects, and in 2007 the New Orleans City Council approved the demolition of four large housing projects: the Lafitte, B.W. Cooper, C.J. Peete, and St. Bernard (Reckdahl 2008; Filosa 2007a; Filosa 2007b). City

parade which, (b) utilizes floats and/or bands (c) has the celebration of Carnival as it's [sic] main purpose. (d) holds a ball” – is not a krewe. http://www.mardigrasdigest.com/html/What_is_a_Krewe.htm

⁸ In May 2010, Superintendent Riley retired and was replaced by Ronal Serpas. Martha Carr, *Ronal Serpas Sworn in as New Orleans Police Chief*, TIMES-PICAYUNE, May 11, 2010, http://www.nola.com/crime/index.ssf/2010/05/serpas_sworn_in_as_new_orleans.html

Council members, and some community members, argued that these complexes were dangerous to public safety because they contained lead paint and asbestos and were conducive to crime (Editorial 2007). HANO replaced only 1,000 of the 3,077 public housing units occupied before Katrina severely reducing the number of low-income housing units in the City (Reckdahl 2008; Reckdahl and Filosa 2007). Federal authorities supported these measures under the guise of “good social planning” (Ouroussoff 2007). HANO and HUD policies that closed affordable public housing also had the secondary effect of raising rental rates 40% in comparison to pre-Katrina levels, making a return for many low-income residents financially unfeasible (Browne-Dianis and Sinha 2008, 486).

In addition, HANO and HUD instituted extremely strict lifestyle regulations on public housing residents. HANO, for example, instituted repressive “zero-tolerance” regulations on returning resident’s behavior (Gardner, Irwin, and Peterson 2009, 104). Public housing recipients could lose housing assistance if they engage in a verbal dispute with a HANO employee (Gardner, Irwin, and Peterson 2009). Displaced residents of public housing, pursuant to HANO policy, were given little voice in the redevelopment plans (Gardner, Irwin, and Peterson 2009).

HUD’s complicity with HANO’s actions is consistent with President George Walker Bush’s “Katrina Address” in which he stated that his administration would “take the side of entrepreneurs as they lead the economic revival of the Gulf Zone” (Busu 2005, 1407). Thus redevelopment plans such as the “Road Home Program” were geared towards aiding homeowners rather than the majority of displaced low-income residents who previously rented apartments (Browne-Dianis and Sinha 2008). Other institutional barriers such as a lack of social services, hospitals and public education also discouraged displaced low-income black residents from returning to New Orleans (Browne-Dianis and Sinha 2008, 483).

Judith Browne-Dianis and Anita Sinha, legal activists from the Advancement Project, argue that the post-Katrina redevelopment plans illustrate continuing institutional racism perpetuated by New Orleans elites (Browne-Dianis and Sinha 2008). The authors do not, however, mention the complicity of the City’s politically powerful black elites who also seem to prefer that only employed, educated, and wealthy residents return. Oliver Thomas the black former New Orleans City Council President, stated that low-income black communities had been “pampered” by government programs before Katrina, and now need to be “motivate[d]” (Walker 2011; Berger 2006). Thomas explained that under new regulations, as a condition of eligibility for public housing, “his people” must be motivated to obtain employment (Berger 2006).

In 2006, the “Bring New Orleans Back” commission, under then Mayor Ray Nagin, recommended a four-month moratorium on the redevelopment of largely black areas of the city in order to determine which areas should be left unrepaired (Dao 2006). Nagin, who is black, won election in 2002 with the support of white voters and business leaders and had little connection to the old black political elites, such as former Mayor Marc Morial (Donze and Russell 2002; Hancock 2005). Thus the black mayor who approved these policies discouraging the return of working-class and low-income black residents was not politically beholden to these constituents.

The perception that working class black former residents were unwelcome in New Orleans post-Katrina was reinforced in Spike Lee’s 2010 documentary, *If God’s Willing and Da Creek Don’t Rise*, when one black resident remarks that the Katrina crisis provided New Orleans with the opportunity to change the social dynamics and geography of the City (Lee 2010). Two examples offered in the film were the closing of public housing and Charity Hospital, the public hospital along with the medical corridor (Associated Press 2011a; Associated Press 2011b). The documentary also shows black politicians actively participating in decisions they know will disrupt low-income black communities and their culture. Thus working-class and low-income black New Orleanians were seemingly betrayed by black elected officials working in concert with dominant white economic power brokers. As one black resident in Lee’s documentary remarks, the primary beneficiaries of policies that effectively remove low-income black people from their communities are the descendants of the Confederate elites.⁹

But affluent and powerful black residents also oppose the return of low-income blacks. Because, at that moment, blacks still constituted a substantial portion of the electorate, class interests, rather than race, often dictated policy decisions with economic dimensions. Thus affluent black residents and powerful black politicians, acting in concert with the remnants of the old dominant cultural elites and contemporary business interests, repeated past betrayals of black working-class communities.

IV. Reflections on the Legal Aspects of the Problem

⁹ There is a cynical explanation for the apparent complicity of black politicians in preventing the return of displaced low-income black residents, and the seeming hostility of black political elites to the interests of their less affluent black constituents. These politicians realize that the City’s population post-Katrina will be less black and less poor. Thus to retain power they must curry favor with politically powerful more affluent voters of all races and business leaders.

The communal nature of second-line parades is under emphasized. As one local remarked: Second Lines are a form of speech and communication. . . . They reflect society as a whole, either as a personal issue as in the death of a loved one, or a societal issue. There were second lines to protest the invasion of Iraq. After Katrina, there were comments in second lines about housing. They're an expression of what's going on (Kunian 2007).

Thus the seemingly harsh regulation of second-line parades post-Katrina interferes with this associational interest which is protected by the Constitution. As the United States Supreme Court said in *Directors of Rotary Int'l v. Rotary Club of Duarte*: “[i]mpediments to the exercise of one’s right to choose one’s associates can violate the right of association protected by the First Amendment. . . .” (1987, 548).

In *Roberts v. Jaycees* (1984), Justice Brennan, writing for the Court’s majority, recognized the right to “associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”¹⁰ Justice Brennan’s words are guided by the theory of “expressive association” (Farber 2000). According to Justice Brennan, the First Amendment protects associations that are a “collective effort on behalf of shared goals [which are] especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority” (*Roberts v. U.S. Jaycees* 1984, 622). Second-lines parades could be aptly described as collective efforts that preserve cultural diversity and shield working class and low-income blacks from oppressive measure instituted by New Orleans elites. Thus the City’s attempt to regulate and contain second-line parades can be seen as an attempt to discourage or suppress the associational and political activities of working-class black organizations.

A highly publicized 2007 confrontation between police and street paraders in New Orleans illustrates this point. Around 8 p.m. on Monday October 1st two dozen musicians started playing spontaneously, triggering a peaceful parade tribute to a recently deceased tuba player (Reckdahl 2007). The Times-Picayune, a local newspaper, reported: “nearly 20 police cars swarmed to a Treme [sic] corner, breaking up a memorial process and taking away two well-known neighborhood musicians in handcuffs. . . . The confrontation spurred cries . . . about the over-reaction and disproportionate enforcement by police, who had often turned a blind eye to the traditional memorial ceremonies” (Reckdahl 2007). Tremé is undergoing gentrification by affluent whites and some long-time residents attribute the police confrontation to complaints by these newcomers who object to neighborhood traditions grounded in working-class black culture (Reckdahl 2007).

The musicians, charged with misdemeanors for disturbing the peace and parading without a permit, returned the next evening, with a permit and a police escort, for a peaceful parade (Reckdahl 2007). “Some neighbors said buying a permit was a cop-out, arguing that traditional parades should be unencumbered by the bureaucratic formalities” (Reckdahl 2007). Others argued that the arrests were not only heavy-handed, but “culturally insensitive” (Reckdahl 2007).

Admittedly, enforcement of the parade permit requirement is inconsistent. According to the Times Picayune: Sometimes a squad car arrives and quietly follows the parade. Other times, an officer will emerge and ask for the bandleader, then discuss the reason for the parade and the planned route. In those cases, the two parties may negotiate a different route or ending point, but the parade typically is allowed to continue (Reckdahl 2007).

Ultimately the charges against the two Tremé musicians were dropped (DeBerry 2008).

Inconsistent policing in these circumstances turns into police harassment of musicians who never know what to expect when the NOPD approaches a parade. Police respond that people need to obey the law and secure permits before they parade, to which a long-time resident responds: “Perhaps they should—if they know exactly when they’re going to parade—but even if they don’t, police officers ought to exhibit some judgment” (DeBerry 2008). Thus there is an aspect of spontaneity to some parades that current laws do not take into account.

As early as 1939 the United State Supreme Court affirmed that streets and parks are generally guaranteed First Amendment protection for expressive speech, like parades (*Hague v. CIO* 1939). In *Hague v. CIO*, Justice Owen Roberts writes, in dicta, that streets and parks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicated thought between citizens, and discussing public questions” (*Hague v. CIO* 1939). This language continues to be used in subsequent Supreme Court opinions (*Pleasant Grove City v. Sumnum* 2009). More directly, the United States Supreme Court recognizes that “[p]arades

¹⁰ According to the Court: An individual’s freedom to speak. . . and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving . . . cultural diversity and in shielding dissident expression from suppression by the majority. *Id* at 622.

are... a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches” (Hurley v. Irish-American Gay 1995, 568). Justice Souter writing for a unanimous Court in *Hurley v. Irish-American Gay* uses the term “‘parade’ to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way (1995, 568).

As with most constitutional rights there are limitations. The Constitution allows state and local governments, pursuant to their inherent police power, to regulate protected speech by enacting reasonable time, place and manner restrictions, including parade permits (*Watchtower Bible v. Stratton* 2002; *City of Ladue v. Gilleo* 1994; *Madsen v. Women’s Health Center* 1994; *Ward v. Rock Against Racism* 1989; *City Council v. Taxpayers for Vincent* 1984; *Feiner v. New York* 1951). But these regulations must not discriminate on the basis of the speaker or the speech’s content

The ACLU memorandum filed in the Task Force’s 2006 lawsuit argued that the Louisiana statute was unconstitutional because it restricts speech based on its content. According to the memorandum, “[the Louisiana Statute] is a content based burden on speech. . . . [because i]t only applies to Plaintiffs because the *content* of Plaintiff’s speech does not fall into any exempted category” (Memorandum of Law in Support of Plaintiffs’ Motion for a Preliminary Injunction at 16, *Social Aid and Pleasure Club Task Force v. City of New Orleans* 2006). More specifically, the statute giving cities the authority to regulate street parades exempts other groups that engage in the same conduct as the second-liners (i.e. Mardi Gras parades and parades by mainstream organization) and this distinction constitute a restriction based on the content of the speech. In support the ACLU cited a 1981 federal appellate court decision, *Beckerman v. City of Tupelo*, which concluded that a statute exempting groups who created the same traffic disruption as non-exempt groups was unconstitutional because the distinction between the groups was based on the content of their respective expressive speech (1981).

Courts must strictly scrutinize content-based government restrictions on speech, and government restrictions must be narrowly tailored to fulfill legitimate government goals, like reasonable regulation of time and place. The ACLU argued that the State could not show that its regulation of parade permits was sufficiently narrowly tailored. But these issues remained unaddressed when the lawsuit was dropped.

What is involved in second-line parades is a wide range of expressive freedoms including associational freedom. Therefore, from a legal academic perspective, the best approach would be to challenge the constitutionality of the parade permit laws in the courts and resist settlement offers that do not include revising the laws. There is strong support for the unconstitutionality of the state and city parade permit laws as applied to second-line parades. Specifically, a review of United States Supreme Court and lower federal court decisions suggest that the New Orleans parade permit fee scheme is constitutionally infirm as an unreasonable time, place and manner regulation (*Watchtower Bible & Tract Soc’y v. Stratton* 2002).

In *Forsyth County v. The Nationalist Movement*, a 1992 decision, the Supreme Court struck down an ordinance that allowed Georgia county officials to set permit fees for rallies and parades based their estimation of the amount of police protection required.¹¹ This is the same mechanism used to determine permit fees post-Katrina in New Orleans. In *Forsyth* the Court said that the permit system disproportionately burdened unpopular speech (*Forsyth County v. The Nationalist Movement* 1992).

More recently the Supreme Court in *Thomas v. Chicago Park District* upheld a fee permit system imposed by Chicago (2002). In *Thomas* the city permit scheme enumerated specific factors for use in determining whether a permit for a public demonstration by a pro-marijuana legalization group should be granted. The scheme upheld in *Thomas* used content-neutral factors to determine fees and was not a regulation designed to exclude a group based on its message.

Under *City of New Orleans Municipal Code*, §154-1659, the City considers eight factors in deciding whether to issue a parade permit,¹² but these criteria differ somewhat from the Chicago permit factors upheld by the Court in

¹¹ *Forsyth Cnty. v. The Nationalist Movement*, 505 U.S. 123 (1992).

¹²The factors are: (1) The conduct of such parade will not substantially interrupt the safe and orderly movement of other traffic contiguous to its route; (2) The conduct of such parade will not require the diversion of so great a number of police officers to properly police the line of movement and the areas contiguous thereto as to prevent normal police protection to the rest of the city; (3) The concentration of persons, animals and vehicles at the assembly areas of the parade will not unduly interfere with proper fire and police protection of or ambulance service to areas contiguous to such assembly areas; (4) The conduct of such parade will not interfere with the movement of firefighting equipment en route to a fire; (5) The conduct of such parade is not reasonably likely to cause injury to persons or property; (6) Such parade will move from its point of termination in four hours or less; the superintendent of police may establish a specific time limitation in excess of four hours for an organization holding a convention of 10,000 or more participants in the city on the proposed permit date; (7) The conduct of such parade will not obstruct any construction

Thomas. They seem less “specific and objective” than those upheld in *Thomas* (*Thomas v. Chicago Park District* 2002). Under NOLA 154-1659, the police may decide to issue the permit after considering eight factors and “such other information as the superintendent of police may otherwise obtain.” The New Orleans factors focus on the likelihood of the parade causing injury to persons or property,¹³ a factor called into question by the Court in *Forsyth*. Looking at all these factors taken together the New Orleans permit criteria seems inconsistent with the *Forsyth* decision which requires that issuance of a parade permit be based on more than the “whim of the administrator” (*Forsyth County v. The Nationalist Movement* 1992).

Perhaps more significantly, the Chicago fee permit scheme upheld in *Thomas* requires the city to process applications with a reasonable time (28 days) and provide a written explanation of the reason for denial (*Thomas v. Chicago Park District* 2002). If the permit is denied there is an appeals process, and the appeal must be filed within seven days of denial (*Thomas v. Chicago Park District* 2002, 319). If the denial is on the basis of a conflict with another event, the city may work out an alternative time for the event and grant the permit (*Thomas v. Chicago Park District* 2002).

The New Orleans code does not include an appeals process, and only requires that any written denial contain a statement “in general terms” of the reasons for denial. Further, the New Orleans ordinance “contains no instructions directing the Chief in the formulation of his opinion” giving the police chief the ability to deny a permit “merely because, in his opinion, unlawful conduct on the part of others will result from the parade” (*Beckerman v. City of Tupelo* 1981, 514). In 1981 the Court of Appeals for the Fifth Circuit in *Beckerman v. City of Tupelo* concluded that a similar ordinance as a whole “clearly trench[ed] upon First Amendment rights because it was designed to prevent potential misconduct by others in response to the parade and thus constituted a prior restraint upon prospective paraders” (*Beckerman v. City of Tupelo* 1981). The same reasoning would apply to the New Orleans permitting scheme.

But even if the courts upheld the City’s permitting scheme, the question still remains as to whether the permit fee is constitutional because there is no fee-waiver provision for indigent groups. The lower federal courts are split on whether a licensing scheme must contain an indigency exception to be valid (O’Neil 1999). Although the Supreme Court has never directly addressed the constitutionality of permit fees imposed on indigent groups, in a 1943 case, *Murdock v. Commonwealth of Pennsylvania*, it expressed concern for preserving the ability of indigent parties to exercise free speech saying that “freedom of speech, . . . press [and] . . . religion are available to all, not merely to those who can pay their own way” (*Murdock v. Commonwealth of Pennsylvania* 1943, 111). Arguably there is little difference between banning speech and making the exercise of speech financially impossible. Both are impermissible restraints on the free exercise of speech. Unfortunately, the social aid and pleasure clubs affected by these laws are more concerned about their continued ability to sponsor community-focused second-line parades at specific times than with the underlying First Amendment issues.

The constitutionality of the state statute and the New Orleans parade ordinance has never been addressed directly by the Louisiana Supreme Court¹⁴ (*Iranian Students Association v. Edwards* 1979). From the perspective of the City, and its residents, however, challenging the state and local laws directly would be potentially disruptive to tourism because a successful challenge has the potential to impact Mardi Gras, the single most lucrative tourist activity in the State of Louisiana. Thus harassment by government officials likely will continue until the constitutionality of the state and local laws that unreasonably restrict these activities is effectively challenged.

VI. Conclusion

In the end perhaps a case can be made that all permit fees have little justification and should be invalid. Legal scholar Eric Neisser argues that permit fees for police services are inherently inequitable, as it is economically unfeasible if all police services were equally billed by user fee (Neisser 1985). He reasons that any calculation of the

or maintenance work scheduled to take place upon the public streets; (8) The applicant meets with all the requirements of this section. New Orleans Municipal Code, §154-1659.

¹³ “(5) The conduct of such parade is not reasonably likely to cause injury to persons or property.” *Id.*

¹⁴ In 1979 the Iranian Student Association at Southern University in Baton Rouge challenged the \$10,000 bond provision in the statute for non-exempt paraders, the case was resolved without reaching this issue by the district court and the plaintiffs were awarded attorney fees by the Court of Appeals for the Fifth Circuit. *Iranian Students Association v. Edwards*, 604 F. 2d 352 (C.A. 5 1979). In 2007 the state supreme court issued upholding the Judiciary Commission of Louisiana’s sanctioning of a Justice of the Peace who arrested pursuant to La. R.S. 14:326 individuals who attempted to enter a float in the local Mardi Gras parade that disparaged the mayor, without ruling on the constitutionality of the statute, *In Re: Justice of the Peace Roger Adams, Sr.*, 959 So. 2d 474 (S.C. La 2007). Nevertheless, the clear implication was that the statute could not be used to punish unpopular public speech.

estimated cost of police services relies on a number of unpredictable factors, resulting in a vague and often subjective permit fee schedule (Neisser 1985, 337). This point was raised by the Task Force plaintiffs who argued that the post-Katrina parade permit fee scheme does not reflect the actual cost of increased policing. Rather, the fee is based on compensating police escorting parades at the overtime rate when the City is paying the officers at regular rates (Social Aid and Pleasure Club Task Force et al. v. City of New Orleans 2006, 18). Thus, they argued, the permit fee scheme is a pretext for restricting legitimate First Amendment speech, one that unjustly and impermissibly enriches the City at the expense of working class and low-income black New Orleans residents (Social Aid and Pleasure Club Task Force et al. v. City of New Orleans 2006).

Unfortunately, the case law is inconsistent on this point (Emerson 1970). Then again, perhaps, as one legal scholar, David Goldberger suggests, the cost of policing parades should be distributed to society as a whole (Goldberger 1983, 413-432). This solution would address the concerns of the social aid and pleasure clubs, assuming the granting of the parade permit was made less arbitrary.

Ironically the suppression of second-line community parades is occurring at a time with New Orleans is promoting the cultural traditions of black working class New Orleans. There is some commodification of black New Orleans culture, including second-line parades. Anthropologists McKernan and Mulcahy argue that it is possible to maintain “the authenticity and vitality of the community-based culture” while simultaneously promoting the culture for tourism purposes “[w]hen there are strong links between communities and economic development, a tourism strategy can realize economic benefits while preserving aesthetic integrity” (McKernan and Mulcahy 2008,228). Currently that is not the case in New Orleans. City and business interests continue reap the economic benefits of ethnic cultural tourism, while working hard to expel those communities from which this culture arose. But second-line parades are not static activities, they developed out of adversity and are “continuously being refashioned and re-appropriated for devotional, commercial, and political purposes” (Regis 2001, 752). So it is possible that they will survive in both their community and commercial forms, at least in the short-term.

What is troubling is that nine years after Katrina New Orleans looks dramatically different. Not only is the City population a third smaller, it also is less black¹⁵ (Saenz 2011). A portion of the black population has been washed away with the help of state and local regulations. The long-term impact on second-line parades and the communities where they thrived is uncertain.

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¹⁵ “The U.S. Census Bureau released local 2010 Census data, which revealed New Orleans's population stood at 343,829 people in 2010. Ten years earlier, the city's population sat at 484,674 people, reflecting a 29.1 percent change in the population. . . . Before Katrina hit, the city's racial composition was overwhelmingly black with over 67 percent of the population identifying themselves as black or African American in the 2000 census. In 2010, this percentage dropped to 60, with the city losing 119,000 people who identified themselves as black or African American in 2010 while New Orleans saw an influx in its Hispanic population.” Arlette Saenz, *New Orleans Population Shrinks by 1/2 in 10 Years*, Feb. 7, 2011 available at: <http://abcnews.go.com/Politics/orleans-population-shrinks-10-years/story?id=12856256> (last visited 8-15-14).

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