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Freedom of Speech in North Carolina Prior to Gitlow v. New York, with a Forward Glance Thereafter

The Hon. Harry C. Martin

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FREEDOM OF SPEECH IN NORTH CAROLINA PRIOR TO GITLOW v. NEW YORK, WITH A FORWARD GLANCE THEREAFTER

THE HON. HARRY C. MARTIN*

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The primary purpose of this article is to review the concept of freedom of speech in North Carolina prior to Gitlow v. New York.\(^1\) Gitlow, of course, held the first amendment right of freedom of speech in the United States Constitution was applicable to the states through the vehicle of the fourteenth amendment. Prior to 1 July 1971, neither the fundamental laws of North Carolina nor any provision in its constitution guaranteed freedom of speech. Therefore, to some extent the question is whether freedom of speech was recognized by the courts of North Carolina prior to Gitlow and, if so, how it was manifested and protected.

A brief review of the fundamental laws of North Carolina is necessary to provide a foundation for this study. Thereafter, decisional law will be examined, beginning with a discussion of post-Gitlow cases. Reference to decisions after 1925 and prior to the 1 July 1971 constitution will be made, as well as those following the adoption of the 1971 North Carolina Constitution. Against the background of present day law, the paper will then trace the evolution of first amendment speech rights in North Carolina through an examination of the decisional law prior to Gitlow. After consideration of these sources, an effort will be made to arrive at some conclusions concerning the growth of the law surrounding freedom of speech in North Carolina.

II. THE FUNDAMENTAL DOCUMENTS

In June, 1578, Queen Elizabeth I granted a large territory in North America to Sir Humphrey Gilbert.\(^2\) The territory included

1. 268 U.S. 652 (1925).
2. NORTH CAROLINA GOVERNMENT 1585-1974 3 (J. Cheney, Jr. ed. 1975) (issued by Thad Eure, Secretary of State) [hereinafter cited as N.C. GOVERNMENT].
what is now North Carolina. In 1584, Gilbert’s grant was issued to his half-brother, Sir Walter Raleigh, by letters patent. Raleigh’s letters patent contained no reference to rights of freedom of speech for the inhabitants of the area granted. Although Raleigh’s efforts to colonize the area failed, a small but continuous stream of settlers moved into the area south of the present Virginia-North Carolina boundary line. The area is known as the Albemarle region. As a result of this development, Charles II granted the area to eight lords proprietors in 1663 and 1665.

The charters of 1663 and 1665 do not directly grant a right of freedom of speech to inhabitants of the territory. They contain, however, provisions that the inhabitants of the area shall be Denizens and lieges of us... and be in all things held, treated, and reputed as the liege, faithful people of us... and may inherit... all liberties, Franchises, and Privileges of this our Kingdom of England... may freely and quietly have, possess, and enjoy as our liege people... without the let, molestation... or grievance of us, our heirs and Successors; any Statute... to the contrary not-withstanding.

This provision will prove important in considering the concept of freedom of speech as a part of the rights of Englishmen, and as a part of the common law of North Carolina.

On 21 July 1669, the lords proprietors proclaimed the Fundamental Constitutions for the government of Carolina. The proprietors and their agents of government in the colony continued their control through the vehicle of this document. It effectively eliminated participation by the people in the exercise of the government, but provided certain safeguards for the benefit of the people. These protections were: a prohibition against double jeopardy,

A copy of this grant was not discovered by this research.


4. N.C. Government, supra note 2, at 102-03. This provision was evidently included in an effort to encourage migration into the area. Other provisions in the charter, and in the Concessions and Agreement between the Lords Proprietors and Major William Yeamans and Others in 1665, gave the people certain participation in the government of the area, particularly with respect to the legislative process. These rights were effectively eliminated in the Fundamental Constitutions of 1669, discussed infra.

5. See J. Locke, supra note 3. It is claimed, although not without dispute, that the 1669 constitution was written by John Locke upon the request of the Earl of Shaftesbury, one of the proprietors.
right to trial by jury of twelve and a majority verdict, right of freeholders to vote for representation in the parliament, and freedom of religion. The constitution, however, included neither a guaranty of nor reference to freedom of speech. To “avoid erecting a numerous Democracy” is one of the stated purposes of the constitution. As it is understood in the western world, freedom of speech is an integral basis of democracy. Thus, one may speculate that perhaps the lords proprietors deliberately failed to include such provision in the constitution. At any rate, the right of free speech did not exist in documented form at this time in the Carolina colony.

This early constitution was never fully implemented. It was suspended in the 1690’s, at which time the Assembly regained its former power of initiating legislation. In 1729, the lords proprietors (except Carteret, the Earl of Granville) sold and conveyed their interests in the grant to the Crown. From 1729 until the Revolution of 1776, Carolina was a Crown Colony. Needless to say, freedom of speech was not recognized by the government during this period.

The Halifax Resolves of 12 April 1776, which authorized delegates from the colony of North Carolina to concur with other delegates in declaring the independence of the colonies, made no reference to freedom of speech. Nor was reference made in the Halifax Declaration of Rights of 17 December 1776. On 18 December 1776, the Fifth Provincial Congress promulgated the constitution, including the Declaration of Rights which contained a provision that “freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained.” The documents became effective upon promulgation by the Congress and were not submitted for adoption by a vote of the people.

Although the constitution of 1776, contained a provision guar-

6. Of interest to lawyers is the provision that “it shall be a base and vile thing to Plead for money or Reward” (in court) and counsel could not represent another in court, except a close kinsman, without taking an oath before the judge that he did not plead the cause for money or reward. How times have changed!
8. Id.
10. Id. at 809-811.
12. 11-2 F. Nash, The North Carolina Constitution of 1776 and Its Makers 17-19 (1912). (This work is part of the James Sprunt Studies in History and Political Science).
anteeing freedom of the press, it contained no reference to freedom of speech.\textsuperscript{13} Three other states of the thirteen original states, Rhode Island, Delaware, and New Jersey, did not have a guaranty of freedom of speech in their original constitutions.\textsuperscript{14} Section 21 of the Declaration of Rights, however, provides “that a frequent re-
course to fundamental principles is absolutely necessary to pre-
serve the blessings of liberty.”\textsuperscript{15} The logical question is whether freedom of speech was considered such a “fundamental principle” that the drafters saw no need, in view of Section 21, to expressly state it in the constitution. The Declaration of Rights was incorpo-
rated as a part of the constitution.\textsuperscript{16}

It is important to note that in federal decisions, freedom of speech and freedom of press have seldom been sharply differenti-
ated. This may result from the fact that both rights are protected by one clause of the first amendment. The North Carolina Constit-
tution had no guaranty of freedom of speech until 1971,\textsuperscript{17} and as we shall see, the Supreme Court of North Carolina analyzed and decided speech cases and press cases differently.

The Legislature had ample opportunity to include a freedom of speech article. In 1835, substantial amendments to the constitu-
tion were made without reference to freedom of speech.\textsuperscript{18} By act of the General Assembly, the Convention of 1861-62 was called, and by resolution adopted the Ordinance of Secession, taking the state out of the Union. The convention ratified the Constitution of the Confederate States of America and further amended the state con-
stitution\textsuperscript{19} without reference to freedom of speech.

In April of 1868, the people ratified a new constitution drafted by the Convention of 1868.\textsuperscript{20} The convention had been called upon the initiative of Congress, but with a popular vote of approval.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{13} N.C. Const. of 1776.
\item \textsuperscript{14} See Del. Const. of 1776, N.J. Const. of 1776, and R.I. Const. of 1845.
\item \textsuperscript{15} 23 W. Clark, The State Records of North Carolina, 1715-1776, 977-84
(1904), contains the text of the constitution and Declaration of Rights.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} N.C. Const. art. I, Declaration of Rights § 14 (1776).
\item \textsuperscript{18} N.C. Government, supra note 2, at 817-23.
\item \textsuperscript{19} The Constitution of the Confederate States of America contained a guar-
anty of freedom of speech. N.C. Government, supra note 2, at 407-19. The people of North Carolina did not have an opportunity to ratify or disaffirm the work of the Convention of 1861-62. By terms of the legislative act, the convention had authority to promulgate its resolutions without a vote of the people.
\item \textsuperscript{20} Id. at 796.
\item \textsuperscript{21} Id. An earlier revised constitution had been defeated by a vote of the
\end{itemize}
This constitution remained in effect for one hundred and three years, with amendments from time to time. The 1776 Declaration of Rights was incorporated into the 1868 document as its article I, still without any reference to freedom of speech, but with the original protection of freedom of the press continued. 22

Finally, after a fifteen-year effort, the Constitution of 1971 was adopted by vote of the people. During this interim period, the 1963 session of the Legislature adopted the infamous "speaker ban law." 23 We shall return to this statute later in considering what effect, if any, it had upon the adoption of the freedom of speech provision in the 1971 Constitution. Meanwhile, for the first time in the history of the state, its Constitution contained a guaranty of freedom of speech, providing: "Freedom of Speech and Press. Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." 24 This provision of the North Carolina Constitution remains unchanged today.

III. THE COMMON LAW

Freedom of speech is a fundamental doctrine and is indispensable to the continued growth and well-being of our free society. 25 It has been cherished in North Carolina "since long before the adoption of the Fourteenth Amendment to the United States Constitution." 26 This assertion by Justice Lake of the Supreme Court of North Carolina reinforces the fact that freedom of speech was a common law right in North Carolina before it was established as a documented right in 1971.

The common law embraces that great body of unwritten law founded upon general custom, usage or common consent, and based upon natural justice or reason. It is the system of rules and declarations of principles from which our judicial ideas and legal definitions are derived. "It is manifest that the laws of England are the laws of this Government, so far as they are compatible with our

people in August, 1866, although the people approved resolutions of the Convention of 1886 nullifying secession and abolishing slavery.

22. Id.
way of living and trade."

The Constitution does not create the right of freedom of speech, but merely guarantees that an existing right may remain unimpaired. Thus, we must look to the development and the scope of freedom of speech in North Carolina in 1776.

Freedom of speech during the years preceding the Revolution was a restricted freedom. Free speech was denied papists and religious heretics. Freedom of speech was in England and, by extension, in North Carolina, "little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written." One could say what he pleased if he was willing to assume the risk of the consequences. This is consistent with the views expressed by the United States Supreme Court. In Robertson v. Baldwin, the Court stated that the Bill of Rights did not set forth any novel principles of government, but only guaranteed the rights we had inherited from England. These rights had always been subject to well-recognized exceptions, and these exceptions continued to be recognized. For example, the Court stated that free speech did not allow publication of libelous, blasphemous, or indecent articles or other publications injurious to public morals or private reputation.

It appears that freedom of speech was not one of the fundamental rights of Englishmen. These rights are declared in the Magna Carta, obtained from King John in 1215, the Petition of Right, the Habeas Corpus Act passed under Charles II, the Bill of Rights enacted in parliament, and the Act of Settlement. These rights were viewed by Blackstone as natural rights, and consisted of three primary articles: the right of personal security in one's life, limbs, body, health and reputation; the personal liberty

27. N.C. Laws 1715, Ch. 31, § 5.
29. Id. at 242.
30. 165 U.S. 275, 281 (1897).
31. Id.
32. A. DICEY, supra note 28, at 236.
34. I W. BLACKSTONE, COMMENTARIES *128 (1783).
35. Id.
36. Id.
37. Id.
of persons to locomotion and freedom from imprisonment, unless by due course of law; and the right to the free use, enjoyment and disposal of all property, without control, except by the law of the land. 38 English judges and officials have long spoken of freedom of speech as the "palladium of the constitution," but such is not the case. 39 We find no mention of such right in the Petition of Right or the Bill of Rights, 40 two of the great constitutional documents providing the fountainhead for our federal Bill of Rights and the Declaration of Rights of 1776 in North Carolina. The press was restricted by license in England until 1694, and seditious libel and blasphemy were severely punished by the courts long after that date. 41

The colonists brought freedom of speech to America with the restrictions as they existed in England at the time. The limitations on freedom of expression were used to prevent the common people from involving themselves with the affairs of government prior to the Revolution. As late as 1671, we find Governor Berkeley of Virginia thanking God that there were no free schools or printing. 42

Although absent an express reference to freedom of speech, the North Carolina Declaration of Rights was probably second only to George Mason's Bill of Rights for Virginia in declaring a freedom of the press. North Carolina was a leader in refusing to accept a form of government without a documented statement of individual rights. It was not until 22 December 1789, after Congress had proposed the Bill of Rights, that North Carolina ratified the United States Constitution. 43

It thus appears that at the time of the Revolution freedom of speech was a part of the common law of North Carolina. The freedom was not an absolute one, however, but subject to the controls and vagaries that existed under the common law of the time. This was the view stated by Blackstone some twenty years prior to the adoption of our federal constitution. 44 The provisions of the charters of 1663 and 1665 45 manifest the intention of the crown that

38. Id. at *127-41.
40. I W. BLACKSTONE, supra note 34, at *128.
41. IV W. BLACKSTONE, supra note 34, at *151-52.
44. IV W. BLACKSTONE, supra note 41, at *151-53.
45. See supra text accompanying note 3.
the colonists could enjoy the rights that existed under the common law of England. The right was never guaranteed by the fundamental documents of the state until the Constitution of 1971; nor did the Legislature seek to protect or safeguard freedom of speech by legislative enactment.46

IV. THE DECISIONAL LAW

A. Post-1925

We now turn to examine some of the decisional law to determine how the courts resolved questions which today would appear to involve freedom of speech. In so doing, a brief review of decisions after 1925 will be instructive in our study of the pre-Gitlow cases. Gitlow had little immediate effect upon the state court decisions in North Carolina; there was no explosion of first amendment cases. There was no perceptible change in the number of such cases until after World War II. In deciding post-Gitlow first amendment issues, however, the court recognized and analyzed them as such, contrary to what we shall see was the practice prior to Gitlow.

The following are illustrative decisions in the post-Gitlow era. In Allen v. Southern Railway Co.47 the court analyzed the question of whether mandatory collection of union dues, a portion of the dues being used for political purposes, violated the first amendment rights of workers, and held that it did not.48

State v. Cole,49 a 1959 case involving strife between Lumbee Indians and the Ku Klux Klan, resulted in prosecution of Klan members for inciting a riot. The court rejected defendants' argument that their assembly was constitutionally protected, stating that the right of free assemblage does not sanction assembly by a secret society for the unlawful purpose of intimidating or coercing the populace.50

State v. Avent,51 decided in 1961, was one of the first "sit in"

46. The Assembly did adopt an act granting freedom of speech to members of the General Assembly in session and protecting them from liability therefor. This statute was passed in 1787 and remains, unamended, the law today. N.C. Gen. Stat. § 120-9 (1981).
48. Id. at 505, 107 S.E.2d at 134.
50. Id. at 741, 107 S.E.2d at 739.
51. 253 N.C. 580, 118 S.E.2d 47 (1961), vacated, 373 U.S. 375 (1963), rev'd,
cases in North Carolina. In disposing of defendants' claim that they were exercising free speech by advocating the termination of racial discrimination, the court held they could not trespass on private property for first amendment purposes.\textsuperscript{52} Freedom of speech could not be exercised as a part of a trespass. This reasoning is analogous to the holding in the 1874 case of \textit{State v. Widenhouse},\textsuperscript{53} in which the court, without addressing the free speech issue, held defendant was trespassing while riding up and down the public highway cursing and singing, upon the theory that the prosecuting witness owned the land underlying the highway.

In 1967, the court in \textit{State v. Wiggins}\textsuperscript{54} relied upon the 1878 decision in \textit{State v. Ramsay}\textsuperscript{55} in upholding a statute preventing interruption or disturbance of any school. In so doing, the court held that reasonable restraints in time and place upon freedom of speech were constitutional.\textsuperscript{56} The court also stated that freedom of speech had been cherished in North Carolina long before adoption of the fourteenth amendment.\textsuperscript{57} The later actions of the courts in North Carolina fail to sustain this statement.

Beginning with the 1971 decision in \textit{State v. Leigh},\textsuperscript{58} the court commenced to rely principally upon United States Supreme Court decisions in treating freedom of speech issues. \textit{Leigh} was decided after the effective date of the freedom of speech amendment to the North Carolina Constitution in 1971. Here, the court held that freedom of speech principles did not apply to allow defendant to interfere with an officer in the arrest of another person.\textsuperscript{59}

Applying federal cases, the court in \textit{State v. Summrell},\textsuperscript{60} held unconstitutional a statute proscribing the use of coarse or abusive language so as to alarm another. And in \textit{State v. Felmet},\textsuperscript{61} the court held that defendant's accosting customers in the private parking lot of a privately owned and operated shopping mall was

\begin{itemize}
  \item 262 N.C. 425, 137 S.E.2d 161 (1964).
  \item 52. \textit{Id.} at 593, 118 S.E.2d at 56.
  \item 54. 272 N.C. 147, 158 S.E.2d 37 (1967).
  \item 55. 78 N.C. 448 (1878). In \textit{Ramsay} the court found defendant subject to criminal penalties for disturbing a church service. He spoke out concerning his earlier expulsion from the congregation, an issue foreign to the service.
  \item 56. 272 N.C. at 158, 158 S.E.2d at 45.
  \item 57. \textit{Id.} at 157, 158 S.E.2d at 45.
  \item 58. 278 N.C. 243, 179 S.E.2d 708 (1971).
  \item 59. \textit{Id.} at 251, 179 S.E.2d at 713.
  \item 60. 282 N.C. 157, 192 S.E.2d 569 (1972).
\end{itemize}
not protected as an exercise of freedom of speech. The court recognized that under the doctrine of *Pruneyard Shopping Center v. Robins*, the state could interpret its freedom of speech provision to protect such speech, but refused to do so.

During the 1970's and 1980's, the court relied upon federal court decisions in upholding cases involving statutes and ordinances restricting: obscenity, parade permits, outdoor moving picture screen locations, nighttime activities (curfews), loud speakers, signs, and, in *GASP v. Mecklenburg County*, smoking in public buildings was held not to violate first amendment rights. Our court has held that the application of a public nuisance statute to the business of prostitution does not violate rights of freedom of association as guaranteed by the first amendment. The court here returned to the nineteenth century method of a nuisance doctrine to control the actions and behavior of people.

During this same time period, cases involving freedom of speech increased in the federal courts, a popular forum for instituting first amendment cases. Since 1965, approximately fifty-two cases are reported in the federal courts of North Carolina involving freedom of speech issues, compared to twenty-three reported in the appellate reports of the state courts. These figures may be somewhat misleading since most of the federal cases found are trial court decisions of the district courts, whereas the trial court decisions of the state courts are not reported in North Carolina. With this background, we turn to a review of the pre-*Gitlow* decisions.

63. 302 N.C. at 178, 273 S.E.2d at 712.
72. Tabulations are based on the author's personal research and are accurate as of the date of publication.
B. 1778-1925

1. Federal Cases

Before reviewing the state cases, a brief look at the decisions of the federal courts concerning free speech during this era provides us with additional background on the status of freedom of speech during the early development of this country. Prior to World War I and the legislation on espionage, very few federal cases addressed freedom of speech rights. Late in the nineteenth century, there began some judicial activity; but, prior to the Civil War, few speech cases are found. There was no statutory framework to provide a basis for free speech, except the Sedition Act of 1798. Moreover, after 1812, the federal courts had no jurisdiction over common law crimes. In some of the early reports we find decisions of the federal circuit court for the district of North Carolina printed. One such was the 1826 libel suit of Whitaker v. Freeman,73 with the trial judge being none other than Chief Justice John Marshall. Plaintiff, a Congregational minister, claimed defendant defamed him by a letter stating that he was in the habit of whipping his wife. The Chief Justice wrote for eighteen pages, discussing on a variance between the declaration and the proof, without any mention of freedom of speech principles.74

Pre-World War I litigants espousing freedom of speech rights under the federal constitution found little success. The decisions indicate that the federal courts were wary of, it not hostile to, freedom of speech claims. Evidently, until the first world war, the United States was dedicated to the industrialization of its economy, not to protecting the undeveloped rights of individuals.75

The cases are replete with examples of the United States courts' failure to discuss free speech principles.76 The federal courts did little to recognize or advance freedom of speech during

73. 12 N.C. (1 Dev.) 271 (1826).
74. Id.
this era, and, as will be noted in the discussion of North Carolina decisional law, our state Supreme Court was similarly disposed.

2. Federal-State Relations

The status of federal-state relations during the pre-\textit{Gitlow} period is quite interesting. For the first fifty years of the republic, the United States Supreme Court reviewed very few state decisions. There appeared to be little tension between the two systems. Two cases, however, indicate how the state court regarded the United States Constitution during this period.

In the 1844 decision in \textit{State v. Newsom},\footnote{27 N.C. (5 Ired.) 250 (1844).} the state court construed a statute making it illegal for any free person of color to wear, carry on his person, or keep in his house a firearm, sword, dagger or bowie-knife without a license from the court of pleas and quarter sessions of the county. It was argued that the statute was unconstitutional, being in violation of the second amendment to the United States Constitution, the right of the people to keep and bear arms, and articles 3 and 17 of the Declaration of Rights of the North Carolina Constitution of 1776.\footnote{Id. at 251-54.} Article 3 proscribed exclusive emoluments or privileges to any set of men, and article 17 guaranteed the right of the people to bear arms.\footnote{Id. at 251-53.}

The court correctly stated the law of that time; the United States Constitution and the limitations of power contained in it applied only to the federal government and not to the several states. The second amendment made no reference to the states and was held to restrict only the powers of the federal government. With respect to article 3, the court held that the statute did not violate the article, under the hazy and uneasy theory that if it were void, then all legislation on the subject of free negroes was void.\footnote{Id. at 252.} Other constitutional challenges upon legislation on free negroes had been denied, and this long acquiescence, reasoned the court, supported the interpretation that article 3 was not violated by the statute. The court, in the essence, held that free negroes were a constitutional class for equal protection purposes. In discussing article 17, the court held that the statute did not prohibit the defendant from carrying arms in defense of the state, but only prevented the indiscriminate use of weapons on ordinary occasions by
free persons of color.\textsuperscript{81} In arriving at this conclusion, the court conveniently omitted the comma in the official text of the article between the words "arms" and "for,"\textsuperscript{82} thus, supporting its interpretation that the article only assured the people's right to bear arms for the defense of the state. The court very plainly stated that "free people of color cannot be considered as citizens in the largest sense of the term."\textsuperscript{83}

The second case indicating how the state courts regarded the United States Constitution during this period was decided in 1904, some twenty-one years before \textit{Gitlow}. The Supreme Court of North Carolina adhered to the principle that the first ten amendments restrict only the federal government and are not applicable to the states.\textsuperscript{84} The court quoted and cited United States Supreme Court decisions in support of this principle. Here, the question involved contempt proceedings for failure of respondent Briggs to answer questions concerning his participation in gambling. A statute required such answers and also provided complete immunity from prosecution by reason of the information so elicited. Briggs argued that the statute was in violation of both federal and state constitutions.\textsuperscript{85}

After holding that the federal constitution was not applicable, the court considered the challenge under the state constitution. The court found that the granting of absolute immunity in the statute itself avoided any constitutional defects, and the court sustained the contempt citation.\textsuperscript{86} In reaching this conclusion, the court relied upon decisions by the United States Supreme Court interpreting the fifth amendment to the United States Constitution. One of the United States Supreme Court cases, \textit{Counselman v. Hitchcock},\textsuperscript{87} in turn relied upon the North Carolina case of \textit{La-Fontaine v. Southern Underwriters},\textsuperscript{88} completing the citation circle. Some insight into the Court's reasoning at that time is found in the following quotations from the concurring opinion of Justice Douglas:

\textsuperscript{81} \textit{Id.} at 254.
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{In re Briggs}, 135 N.C. 118, 47 S.E. 403 (1904).
\textsuperscript{85} \textit{Id.} at 120-21, 47 S.E. at 403-404.
\textsuperscript{86} \textit{Id.} at 121-22, 47 S.E. at 404.
\textsuperscript{87} 142 U.S. 547 (1892).
\textsuperscript{88} 83 N.C. 132 (1880).
I am not partial to maxims which tend to abridge the liberty of the citizen or to deprive him of the equal protection of the law.

... The individual has inherent rights as well as the court, and it was primarily for the protection of those rights that courts themselves were instituted. The old idea that the individual is a mere atom of the State, having no rights except those that have been granted to him by the sovereign, has no application in this country. Here the state is the creature of the citizen, who holds his personal rights inherently and inalienably.89

* * * *

I believe there is something dearer to the human heart than the mere money involved in a fine, something more terrible even than going to jail. To compel a man to reveal the innermost secrets of his life that would destroy his reputation, render him infamous in the eyes of his fellow-men, or tend to break up a happy home, might inflict suffering upon the innocent as well as the guilty equal to any punishment known to the law. Tears shed by a faithful wife over a dishonored bed are bitterer than those over an honored grave.90

* * * *

I must confess some hesitation in conceding that the doctrine of statutory substitution can ever apply to constitutional guarantees, and I am induced to do so in this case only upon controlling principles of public policy, and upon assurance that absolute immunity is guaranteed to the witness.91

Thus, we see the 1904 Court expressing the concept that individual rights may indeed be paramount to the interests of the state.

3. North Carolina

The following review of North Carolina decisional law indicates that until 1925 the state courts basically ignored freedom of speech principles in deciding issues that today would require an analysis of such principles, primarily due to the failure of counsel in briefing and arguing freedom of speech issues to the court. Wherever the issue may have arisen, the court used several devices to determine freedom of speech issues without actually discussing them. These included: technical defects in criminal indictments; lack of evidence to constitute a criminal offense; deference to the "authority" of municipalities to make rules for the preservation of

89. 135 N.C. at 126-27, 47 S.E. at 405 (Douglas, J., concurring).
90. Id. at 136, 47 S.E. at 408 (Douglas, J., concurring).
91. Id. at 138, 47 S.E. at 409 (Douglas, J., concurring).
order; refusal to extend all rights to slaves and free blacks; and simple refusal to recognize freedom of speech questions. Research does not disclose a single case prior to 1925 where the result of the trial court was reversed or overturned because of a violation of freedom of speech rights. It is clear that the courts were mainly concerned with protecting and stimulating the economy, protecting property rights *vis-a-vis* personal liberties, maintaining quiet and good order in communities, preserving the status of the slave prior to 1865, and securing economic and political control in the white race.

The earliest North Carolina cases are reported by the Court of Conference, the forerunner of the Supreme Court, for although the constitution of 1776 contained a provision for the establishment of a supreme court, it was not until November, 1818, that one was established by the Legislature. Prior to that time, the Court of Conference, made up of a quorum of at least two of the six superior court (trial) judges, performed the function of appellate review.92

From this era the decisional law in North Carolina respecting first amendment rights can be roughly divided into several groups. These are: individual rights of speech and conduct, rights of assembly, and freedom of the press.

a. Speech

(1) Slander. The earliest cases providing an opportunity for the court to consider the individual rights of speech involved allegations of slander, but the court established early the practice of failing to recognize or discuss the speech issue in such cases. In so doing, the court’s decisions were consistent with those of the United States Supreme Court, which also refused to recognize a first amendment right in defamation cases until the 1960’s. Two representative decisions follow.

The first case in which the court had the opportunity to apply first amendment principles in North Carolina was the 1794 decision in *Hamilton v. Dent*.93 Plaintiff had accused defendant of swearing “false in two particulars in one oath in court.”94 The jury returned a verdict in favor of plaintiff in the amount of sixty

93. 2 N.C. (1 Hayw.) 116 (1794).
94. *Id.* at 116-17.
pounds. Upon appeal, the court was concerned only with the question of whether the words so spoken must impute a crime on the part of the plaintiff in order to state a cause of action. Counsel made no argument based on freedom of speech, nor was it mentioned by the court, but, the court did set forth an example of what it considered to be slanderous words. The example did not involve the imputation of a crime; the defendant was accused of saying to a young lady, "you went to such a place to drop your stink."\(^96\) An action based upon this example today would immediately invoke the defenses of freedom of speech.

In *McGuire v. Blair*,\(^ {96} \) we find the court avoiding freedom of speech issues by the simple expedient of declaring that the words spoken were not slanderous. In so doing, it was obvious that the court was not cognizant of the application of first amendment principles to the language used by the defendant. The language alleged was, "He [meaning the plaintiff], one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomana, in a rookery box, and committed to jail, and remained there until next day 9 or 10 o'clock, and then was turned out and split for the country."\(^ {97} \) Again, such language today would certainly be defended by first amendment principles.

(2) Profane Swearing. When faced with the problems of protecting the peace and tranquility of the state from disruption, the court first utilized the doctrine of common law nuisance. At this early stage of the development of the law in North Carolina, there were no statutory laws or ordinances proscribing profane swearing or other disruptive conduct. Nor had the statutory law of nuisance been developed. It was therefore natural and necessary to use the cumbersome device of common law nuisance to control such activities. Thus, we find a line of cases in which the court utilized the law of nuisance for the purposes of controlling speech in appropriate situations.

The court was first concerned with profane swearing in *State v. Kirby*.\(^ {98} \) Defendant swore several oaths in the courtyard during the sitting of the court. The court held that profane swearing, of itself, was not an indictable offense. But, if it caused a nuisance by great disturbance to citizens necessarily present, it was indicta-

\(^{95}\) *Id.* at 120.
\(^{96}\) 4 N.C. (Car. L. Rep.) 328 (1816).
\(^{97}\) *Id.* at 328.
\(^{98}\) 5 N.C. (1 Mur.) 254 (1809).
No reason was given for the holding that the swearing in and of itself was not indictable. While limiting itself to the framework of a nuisance theory, the court inadvertently protected defendant’s individual rights of speech, a result consistent with our present interpretation of the first amendment.

In *State v. Ellar*, defendant was indicted for being an evilly disposed person who “did, in the public street of Jefferson, profanely curse and swear and take the name of God in vain, to the evil example, etc., and to the common nuisance of the good citizens of the State.” The court held that drunkenness and profane swearing could be similarly analyzed, and that although a single act of either was not indictable, repeated public acts as to “become an annoyance and inconvenience to the citizens at large” are indictable as common nuisances. “A common scold is indictable as a common nuisance . . . a common profane swearer may be so considered.”

The court appeared to be analyzing the question on the basis of whether the act was significant enough to support action by the state to punish it. Individual rights of the defendant were not considered, the question being whether there was an oppressive use of power by the state in punishing the defendant. As illustrated in the case following, however, some judges used more traditional personal liberties reasoning.

The court continued its analysis of nuisance in *State v. Baldwin*. Seventeen defendants were charged with gathering at a meeting house and, by loud and profane swearing, cursing and quarreling, allegedly disturbed a singing school then in session. In considering the validity of the indictment, the court held that to be a nuisance such action must be so inconvenient and troublesome as to annoy the whole community, and not merely particular persons; that is, there must be sufficient facts to support an allegation of annoyance to the community.

Here, the court held there was only one act of profane swearing and cursing, disturbing those present. There was no annoyance to the citizens in general, and no single act of profanity was indict-

99. *Id.*
100. 12 N.C. (1 Dev.) 267 (1827).
101. *Id.*
102. *Id.* at 268.
103. *Id.*
104. 18 N.C. (1 Dev. & Bat.) 195 (1835).
105. *Id.* at 197.
Without using the phrase freedom of speech, Justice Gaston relied upon constitutional doctrines when he wrote:

If we sustain this as an indictment for a common nuisance, we shall be obliged to hold, that whenever two or more persons talk loud or curse or quarrel in the presence of others, it may be charged that this was done to the common nuisance, and if so found, will warrant punishment as for a crime. This would be either to extend the doctrine of common nuisances, far beyond the limits within which they have hitherto been confined, or to allow a vagueness and generality in criminal charges, inconsistent with that precision and certainty on the records so essential as restraints on capricious power, and so salutary as the safeguards of innocent men. 107

The North Carolina court once again reviewed the law of nuisance with respect to profane swearing in State v. Jones. 108 Here, the court seized upon a technical defect in the indictment to sidestep the guilty verdict, although there was ample evidence to convict the defendant. The court held that it was necessary for the indictment to allege that the swearing was repeated, public and in the presence of people. Although the evidence in Jones clearly supported all these elements, it could not cure the defect in the pleading. 109

The court continued to use the device of the defective pleading in determining similar cases. It could be inferred from these cases that the court tacitly recognized the inherent right of an individual to speak his mind and was restricting the use of nuisance in the control of speech. Remembering the almost mechanistic approach of courts in the nineteenth century to the technicalities of pleadings, however, it is perhaps more reasonable to view the cases as simply instances in which the court adopted a formal, technical approach to the pleadings. This is corroborated in that the court also adopted this procedure in cases not involving personal freedom questions.

For example, in State v. Wright, 110 in the indictment for keeping a disorderly house, it was alleged that defendant allowed his five sons and "evil disposed persons, as well men as women, and as

106. Id. at 198.
107. Id. at 199.
108. 31 N.C. (9 Ired.) 38 (1848).
109. Id.
110. 51 N.C. 25 (1858).
well free persons as slaves," to come together at all hours of day and night, creating loud noises and cursing to the common nuisance of all good citizens of the state. On appeal, the court held the evidence did not establish a criminal offense. The court noted that although the neighborhood was thickly settled, defendant lived in the county and not in or near a public road. The good people of the state were not annoyed or inconvenienced by defendant’s actions. Only two families were so disturbed. Because the action did not constitute a common nuisance, as distinguished from a private nuisance, it was not indictable.

In State v. Pepper, the court again used a technical defect in the bill to defeat the State’s case and avoid any discussion of first amendment principles. Relying upon the precedent of Jones, the court held that as the bill did not contain an allegation that the profane swearing was repeated, the conclusion was that it was a single act of swearing, and, therefore, not indictable. This was in face of the allegation that the cursing took place for a long time, to-wit, twelve seconds! The court further noted that the bill failed to allege that anyone heard the swearing; it would appear that someone must have heard it, otherwise the bill would not have been returned. The court went to great and tortuous lengths to avoid considering the case on its merits. The case could have been resolved in an easy straightforward fashion.

Following Pepper, the court held in State v. Powell, that a defect in the indictment defeated the State’s case although there was ample evidence to sustain the charge. The nub of the decision was that profane swearing in public in and of itself was not a crime. No reason was offered except that absent facts to sustain a finding of a common or public nuisance, swearing was not indictable. Here, the court had an excellent opportunity to ground its decision upon freedom of speech, but neither the court nor counsel relied upon these principles.

111. Id. at 25.
112. "[T]here being five families within the distance of a mile" of the defendant. Id. at 27.
113. Id.
114. 68 N.C. 259 (1873).
115. 31 N.C. (9 Ired.) 38 (1848).
116. 68 N.C. at 263.
117. 68 N.C. 259 (1873).
118. 70 N.C. 67 (1874).
119. Id. at 69.
State v. Widenhouse\textsuperscript{120} is illustrative of a trend evident in the era of Reconstruction toward an interpretation of the cases more favorably to the State. The court moved away from its overly technical approach in the previous decisions in an effort to control the black people.

In this case, defendants were convicted of forcible trespass upon testimony that they rode up and down on the public road before the prosecutor's house, all the while singing, dancing, cursing, and swearing, and causing serious disturbance to the prosecutor and his wife.\textsuperscript{121} Obviously, under Wright,\textsuperscript{122} the acts did not constitute a common nuisance as only the prosecutor and his wife were affected. The court, however, sustained the forcible trespass conviction under the theory that although the road was public, the prosecutor owned the land on both sides of it and, therefore, the soil beneath the road. Persons using the road had only the privilege to pass over it, and those who stopped and abused the privilege became trespassers \textit{ab initio}.\textsuperscript{123} Here, we find the court adopting a strained theory of property law to punish defendants for actions clearly defensible within freedom of speech principles.

Thirty-three years after Jones, we find the court again analyzing its decisions on profane swearing in State v. Chrisp.\textsuperscript{124} After reviewing the previous cases, the court spoke on the philosophy behind the profane and drunkenness prosecutions in these terms:

Sir W. Blackstone distinguishes between the absolute duties of men and their relative duties as members of society, and says that it is with respect to the latter only that municipal law assumes to control their conduct. Let a man therefore, says he, be ever so abandoned in his principles or vicious in his habits, he is out of the reach of the law, provided, he keeps his wickedness to himself. But if he makes his views public, though they be such as seem principally to affect himself (as drunkenness or the like) they then become, by the bad example they set, pernicious to society, and it is the business of the law to correct them . . . . [A]ll open lewdness and grossly scandalous conduct is \textit{punishable by indictment at common law}, and that whatever outrages decency, or is injurious to public morals, is a \textit{misdemeanor}.\textsuperscript{125}

\textsuperscript{120} 71 N.C. 279 (1874).
\textsuperscript{121} Id.
\textsuperscript{122} 51 N.C. (6 Jones) 25 (1858).
\textsuperscript{123} 71 N.C. at 280.
\textsuperscript{124} 85 N.C. 528 (1881).
\textsuperscript{125} Id. at 533-34.
Whereupon, the court held that the use of profane and vulgar language in a public place on a single occasion amounts to a public nuisance provided the public at large is offended and annoyed.\textsuperscript{126}

These early prosecutions were founded upon the common law, but in \textit{State v. Cainan}\textsuperscript{127} we find the court considering an ordinance doctrine of public or common nuisance. The trend toward the use of ordinances arose from the difficulty of proceeding under the common law nuisance theory. The court was never faced with a constitutional challenge to an ordinance on grounds of vagueness or freedom of speech principles during this time. Such challenge today would doubtless be successful.\textsuperscript{128} The people and counsel appeared to accept the rationale that such ordinances were within the authority of the governing body. The ordinance in \textit{Cainan} stated:

\begin{quote}
Every person found guilty of loud and boisterous cursing and swearing in any street, house, or elsewhere in the city, and every person found drunk on the streets, alleys, or any public place of the city, disturbing the peace of the city, or violating the rules of decency, shall be fined five dollars for every offence.\textsuperscript{129}
\end{quote}

Whereas the prior common law actions were to punish the causing or creating of nuisances, the acts forbidden under the ordinance were not nuisances because they did not have to be done in the presence or hearing of other persons. The purpose of the ordinance was to promote good morals, the decencies and proprieties of society, and to prevent nuisances and other criminal acts. Under the ordinance, boisterous cursing and swearing, no matter what were the precise words used, constituted the offense.

The use of town ordinances to control speech and conduct spread rapidly. \textit{State v. Debnam}\textsuperscript{130} involved a “boisterous cursing” ordinance. Defendant, a “colored man,” and two women had blocked a sidewalk so that a local white doctor could not pass without touching one of them. In passing, the doctor’s arm gently brushed the arm of one of the women. Defendant began to abuse him in an angry manner, loud enough to attract the attention of

\begin{flushright}
\textsuperscript{126} \textit{Id.} at 534. \\
\textsuperscript{127} 94 N.C. 879 (1886). \\
\textsuperscript{129} 94 N.C. at 880. \\
\textsuperscript{130} 98 N.C. 712, 3 S.E. 742 (1887).
\end{flushright}
people nearby. The doctor did not stop, but walked slowly on. He did not hear defendant curse or swear. Another witness testified he heard defendant say had the woman been his wife, "he would knock the God damned old scoundrel's head off."\(^{131}\) Defendant denied he cursed or talked loudly. The opinion makes note that all of defendant's witnesses were "colored." The court also referred to Dr. Anderson as a "cultivated, refined and spirited witness."\(^{132}\) Based upon *Cainan*, the court upheld the ordinance and affirmed the conviction of defendant.\(^{134}\) Neither the court nor counsel made reference to freedom of speech issues, and the case appears to have had racial overtones.

The defendant in *State v. Warren*\(^{135}\) pled guilty to violating an ordinance making it unlawful to use profane language to the disturbance of the peace on the lands of the Henrietta Cotton Mills in Rutherford County. The question on appeal was whether the facts charged, and admitted by defendant through his plea, constituted an offense punishable under the laws and constitution. The constitutionality of the ordinance was questioned upon two grounds, one being that it was an interference with the freedom of speech. In addressing this issue, the court merely stated:

> The Legislature could have empowered a municipality to make the use of such language punishable by its ordinances, when it falls short of being a nuisance, punishable by State law, from not having been "committed in the presence and hearing of divers persons, to their annoyance," etc. S. v. *Cainan*, 94 N.C., 880; S. v. *Debnam*, 98 N.C., 712. Of course the Legislature could do this directly, if it could do it indirectly, as by authorizing a municipality to make an ordinance to that effect.\(^{138}\)

This is the first opinion in which the words "freedom of speech" are found. Although counsel for the defendant raised the issue and convinced the trial judge that the ordinance was unconstitutional, the Supreme Court reversed.\(^{137}\) The Court, through Justice Clark, did not analyze the freedom of speech question at all, but merely stated that the municipality had been properly del-

131. *Id.* at 714.
132. *Id.* at 716.
133. 94 N.C. 879 (1886).
134. 98 N.C. 712, 717, 3 S.E. 742, 742 (1887).
135. 113 N.C. 683, 18 S.E. 498 (1893).
136. *Id.* at 685, 18 S.E. at 498-99.
137. *Id.* at 686, 18 S.E. at 499.
egated the authority to adopt the ordinance.\textsuperscript{138} It is noted that the ordinance was for the purpose of protecting the Henrietta Cotton Mills, one of the larger industries in Rutherford County, lending credence to the theory that property interests, especially those affecting the state's economy, were paramount to personal rights.

Although not decided on first amendment grounds, the first case holding an anti-swearing ordinance unconstitutional insofar as this research has disclosed was \textit{State v. Horne}.\textsuperscript{139} The ordinance read in part: "No person shall use obscene or profane language in the town."\textsuperscript{140} In addressing the issue, the court held that the lack of a requirement that the conduct be "loud or boisterous" or that it "disturb the peace" rendered the ordinance invalid. The court further held that the town did not have power to enact an ordinance to the "extraordinary extent."\textsuperscript{141}

In \textit{Horne},\textsuperscript{142} we find Justice Clark, one year after \textit{Warren},\textsuperscript{143} again writing for the Court, this time striking down an ordinance. Although the ordinance obviously violated first amendment principles, Justice Clark did not raise the issue in the opinion. Nevertheless, the decision appears to have been responsive to underlying policy concerns that today would be considered first amendment issues. At best, the reasoning of the Court was suggestive of a holding that the ordinance was overly broad, even though not explicitly stated as such. It must be noted that no property or economic rights were at issue. It can be fairly assumed that this affected the result.

During this period we find disorderly conduct ordinances replacing "profane swearing" ordinances in the control of speech and behavior. Evidently this was for the purpose of broadening the net to include actions as well as speech in controlling the behavior of the populace. To illustrate, the case of \textit{State v. Sherrard}\textsuperscript{144} involved a defendant convicted of violating a town ordinance proscribing "all disorderly conduct . . . within the city limits."\textsuperscript{145} The State's evidence showed that defendant entered the restaurant of Agnes Cox, and called the prosecuting witness "a damned highway

\textsuperscript{138} \textit{Id.} at 685, 18 S.E. at 499.
\textsuperscript{139} 115 N.C. 739, 20 S.E. 443 (1894).
\textsuperscript{140} \textit{Id.} at 740, 20 S.E. at 443.
\textsuperscript{141} \textit{Id.} at 741, 20 S.E. at 443.
\textsuperscript{142} 115 N.C. 739, 20 S.E. 443 (1894).
\textsuperscript{143} 113 N.C. 683, 18 S.E. 498 (1893).
\textsuperscript{144} 117 N.C. 717, 23 S.E. 157 (1895).
\textsuperscript{145} \textit{Id.} at 718, 23 S.E. at 157.
robber" in a loud manner that could be heard on the street. Upon a verdict of guilty, the court fined the defendant a penny and he appealed. The appellate court upheld the validity of the ordinance even though the conduct did not amount to an indictable nuisance or other criminal offense. Disorderly conduct per se was not forbidden by general state law. The court relied upon Cainan and Debnam. Because the conduct was not so repeated and public as to be a nuisance to the public, the state law was not applicable. The court reasoned, however, that failure to punish the conduct by the city ordinance would result in permitting loud, boisterous and unseemly language and threats of violence, to the serious annoyance of the public passing along the streets. A close reading of the records does not disclose any threat of violence, and Justice Clark again fails to discuss any freedom of speech issues.

In State v. Moore, defendant was convicted of cursing on the streets in a loud and disorderly manner. As she stepped into her buggy, she told a policeman who had cautioned her about driving, that she would drive "where she damned please[ed]." No one other than the policeman heard the statement. The court declined to enter upon a casuistical discussion of whether "damn" was profanity and decided the case upon the theory that defendant's conduct was not disorderly within the meaning of the ordinance. The conduct did not tend to disturb the peace or good order of the town and had no vicious or injurious tendency. "The defendant expressed her displeasure, or futile indignation, a little too strongly, and should not have used so indecorous an expletive in doing so, but it did not reach beyond the ears of the policeman, and hardly made a ripple on the placid surface of municipal peace." No reference was made to defendant's freedom of speech rights.

Research disclosed that most of the cases involving potential

146. Id. at 720, 23 S.E. at 158.
147. Id. at 718, 23 S.E. at 157.
148. Id. at 718-19, 23 S.E. at 157.
149. 94 N.C. 879 (1886).
150. 98 N.C. 712, 3 S.E. 742 (1887).
151. 117 N.C. at 720, 23 S.E. at 158.
152. 166 N.C. 371, 81 S.E. 693 (1914).
153. Id. at 371, 81 S.E. at 694.
154. Id.
155. Id. at 373, 81 S.E. at 694.
first amendment issues were criminal, but an interesting civil action involving freedom of speech arose in Seawell v. Carolina Central Railroad Co.\textsuperscript{156} The case involved a suit in negligence against the railroad for failing to protect plaintiff, a ticketed passenger waiting at the station for his train. While there, he was assaulted by a mob throwing eggs at him. Plaintiff was the Republican party candidate for Lieutenant-Governor of North Carolina and had spoken that day in Cleveland County, a Democratic stronghold.\textsuperscript{157} In his opinion, Clark, then Chief Justice, said:

The Constitution and laws of this State guarantee freedom of speech, and nothing could be more unmanly than a mob assailing one man in such manner for his difference from them in his political opinion. No right thinking man, here or elsewhere, will express other opinion of the proceeding, and the most that can be said is that it was the act of a mob, for which the community was not responsible.\textsuperscript{158}

This was the extent of the Court's discussion of freedom of speech. Of course, as discussed earlier, the Chief Justice was in error in stating that North Carolina had a constitutional guaranty of freedom of speech at the time. Likewise, this research has failed to disclose any statutory law guaranteeing such freedom. As shown by previous analysis, however, the common law of North Carolina at the time included freedom of speech protection and perhaps Justice Clark based his statement upon this theory. Or, as noted earlier,\textsuperscript{159} the right of freedom of speech may have been so common and ingrained in the life of the people and in the thinking of the judges, that none felt any need or reason for an analysis of the principles or even a statement of the principle. There is no need to state the obvious.

(3) Disturbing Religious Services. Several cases are found in which the right to freedom of religion should have been tested by conflicting freedom of speech principles. Although the court discusses freedom of religion, which has always been guaranteed by the North Carolina Constitution, the doctrine of freedom of speech was not mentioned, discussed or acknowledged. Representative of these decisions are State v. Jasper,\textsuperscript{160} State v. Linkhaw,\textsuperscript{161} and

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156. 133 N.C. 515, 45 S.E. 850 (1903).
157. Id.
158. Id. at 516, 45 S.E. 851.
159. See supra note 5 and accompanying text.
160. 15 N.C. (4 Dev.) 323 (1833).
State v. Ramsay.\textsuperscript{162}

In Jasper,\textsuperscript{163} the defendant was charged with disturbing a congregation, assembled for religious worship, by laughing, talking, and making indecent actions and grimaces. Defendant's conviction was affirmed on appeal.\textsuperscript{164} The court recognized the freedom of all persons to worship according to their own consciences, noting that the North Carolina Constitution guaranteed this preexisting right.\textsuperscript{165} It held that the constitutional guarantee included security from molestation in the act of worship. The state had no statute prohibiting the disturbance of religious assemblies, but the court found that the common law of the state proscribed such conduct, holding that it constituted an injury to the whole community.\textsuperscript{166} This is analogous to the reasoning in the common law nuisance cases which required that the action complained of be to the annoyance of the community.

In Linkhaw,\textsuperscript{167} defendant was charged with disturbing a religious congregation by the manner in which he sang the hymns. His voice was heard after all the other singers had ceased.\textsuperscript{168} The court upheld defendant's rights to sing even though it did disturb the congregation, reasoning that the singing of hymns was a part of worship service and protected under the constitutional guarantee of freedom of religion.\textsuperscript{169} The court in Ramsay\textsuperscript{170} considered a case in which defendant was charged with speaking out in church concerning his expulsion from the congregation two weeks previously.\textsuperscript{171} The evidence was in conflict as to whether the services had actually commenced. Defendant was removed from the church house but returned, and in the confusion the meeting was broken up and those present left the church and returned home. The court held that even if the jury found defendant was still a member of the congregation, his conduct was subject to criminal penalties as he was not participating.

\textsuperscript{161} 69 N.C. 214 (1873).
\textsuperscript{162} 78 N.C. 448 (1878). \textit{See also supra} note 55.
\textsuperscript{163} 15 N.C. (4 Dev.) 323, 324 (1833).
\textsuperscript{164} \textit{Id.} at 323.
\textsuperscript{165} \textit{Id.} at 324.
\textsuperscript{166} \textit{Id.} at 326.
\textsuperscript{167} 60 N.C. (Win.) 214 (1873).
\textsuperscript{168} \textit{Id.} at 214-15.
\textsuperscript{169} \textit{Id.} at 217.
\textsuperscript{170} 78 N.C. 448 (1878).
\textsuperscript{171} \textit{Id.} at 449.
in the worship service as in Linkhaw, but attempting to speak upon an issue foreign to the service. The court further held that it was immaterial whether the services had actually begun.172

(4) Ribald singing. An interesting application of the law of common law nuisance appears in a case involving a female singing a ribald song on the public streets of Charlotte, North Carolina. Defendant Laura Toole173 was charged with singing an obscene song for a period of ten minutes. Not all of the song was vulgar or obscene, but the court held that the use of vulgar stanza as a part of a longer song extending for ten minutes on a public street would be a nuisance, even though the vulgar stanza was not repeated. The singing of the song in the manner charged and in the hearing of diverse persons is what constituted the common nuisance.174 The court relied upon Chrisp.175 Although there were two dissenting opinions as to procedural problems in the case, none of the three opinions recognized any defense Laura Toole may have had by virtue of her rights to freedom of speech. The court made no analysis of what constituted obscenity or vulgarity. The offending language is not set out in the opinion (the court saw no reason to stain the pages of its reports) and we have no way of measuring the correctness of the court's characterization of the song.

b. Conduct

(1) Drunkenness. In the succeeding cases we find the court applying the principles of common law nuisance to public drunkenness. The approach is similar to that used in the profane swearing cases. In State v. Waller,176 defendant was charged with the following indictment:

that Henry Waller, late of the County of Edgecombe, yeoman, on 1 January, 1817, and on divers other days and times, as well before as afterwards, was, and yet is, a common, gross, and notorious drunkard, and that he, on the said first day of January, in the year aforesaid, and on divers other days and times, in the County aforesaid, did then and there get grossly drunk and commit open and notorious drunkenness, contrary to morality, to the great displeasure of Almighty God, and to the evil example of all

172. Id. at 453.
174. Id. at 738, 11 S.E. at 169.
175. 85 N.C. 528 (1881).
176. 7 N.C. (3 Mur.) 229 (1819).
others in like cases offending and against the peace and dignity of the State.\textsuperscript{177}

The court, without reference to first amendment principles, held that private drunkenness was no offense under the law. To be criminal, it must be so open and exposed to public view as to be a public nuisance.\textsuperscript{178}

In \textit{State v. Deberry},\textsuperscript{179} the court solidified the rule requiring a showing that defendant's conduct must operate to the annoyance, detriment or disturbance of the public at large before defendant may be found criminally liable for an act of drunkenness.\textsuperscript{180} The court stated that there are many immoral acts best left to correction by the religious and moral influence of society.\textsuperscript{181} The court here recognized that certain conduct, although perhaps inappropriate, is not controlled by state action.\textsuperscript{182} In so doing, however, the court did not rely upon first amendment concepts to sustain that conclusion.

c. Assembly

\textit{(1) Dancing and Merrymaking}. In cases involving slaves, the court appears to adopt more stringent rules. Although lenient in the treatment of slaves while on their master's property, stern efforts were otherwise made to control blacks. Two cases illustrate this conclusion.

The court in \textit{State v. Boyce}\textsuperscript{183} upheld the right of a master to allow his slaves to meet and dance on his premises on Christmas Eve and other holidays, even though other slaves and some white persons joined in the merrymaking. In determining that defendant was not guilty of maintaining a disorderly house, the court relied upon the customs of the area in treating slaves and on the fact that defendant's home was located some distance from a public road and half a mile from any other house.\textsuperscript{184} The court, without calling it freedom of speech, appeared to allow greater leeway for slaves in assembling, singing and dancing than in the ordinary public nui-

\begin{table}
\begin{tabular}{l}
\textbf{177.} \textit{Id.} at 229-30. \\
\textbf{178.} \textit{Id.} at 230. \\
\textbf{179.} 27 N.C. (5 Ired.) 371 (1845). \\
\textbf{180.} \textit{Id.} at 373. \\
\textbf{181.} \textit{Id.} \\
\textbf{182.} \textit{Id.} \\
\textbf{183.} 32 N.C. (10 Ired.) 536 (1849). \\
\textbf{184.} \textit{Id.} at 540.
\end{tabular}
\end{table}
sance case.

When the law tolerates such merrymakings among these people, it must be expected, in the nature of things, that they will not enter into them with the quiet and composure which distinguish the gaieties of a refined society. One cannot well regard with severity the rude pranks of a laboring race, relaxing itself in frolic, though they may seem to some to be at times somewhat excessive. We may let them make the most of their idle hours, and may well make allowances for the noisy outpourings of glad hearts.

Within the confines of their chains, slaves were granted greater freedom of speech rights than free men!

(2) Disorderly Shouting by Slaves. In contrast to Boyce, Town of Washington v. Frank and John stands for the proposition that once slaves were off the property of their master, harsh rules were applied restricting their attempted exercise of free speech. The Town of Washington charged defendants Frank and John with violating an ordinance forbidding all disorderly shouting and dancing and disorderly assemblies by slaves on the streets, in the market and in other public places in the town. Punishment was not more than thirty-nine lashes. The evidence showed that several slaves, including defendants, were on the public street near the office of the Intendant of Police making a loud noise by laughing and talking. There was no quarreling or fighting, only laughing and talking. The Intendant ordered them to disperse, which they promptly did, only to reassemble a short time later to engage in the same loud talking and laughing.

The court found the ordinance lawful and constitutional. Conceding that the rights, if any, of slaves to freedom of speech are doubtful, the court implied that the ordinance also applied by its terms to white persons. The court made no reference to any defects in the ordinance by reason of freedom of speech. To the contrary, the court held defendants were guilty even though the noise was made in play. Perhaps a true insight into the court's decision is found in the statement that slaves "compose so large a portion of the population . . . that, in passing rules . . . for their government, much must be left to the judgment and discretion of

185. Id. at 541.
186. 46 N.C. (1 Jones) 436 (1854).
187. Id. at 438.
188. Id. at 440.
those who are to enforce them." Although the court had an opportunity to dispose of the case in favor of defendants because of a defect in the indictment (a device we have seen the court often use), it chose to allow the bill to be amended.

(3) Peaceable Assembly. In 1875, we find the court taking a less restrictive approach to the conduct of persons charged with creating a public nuisance and obstructing the streets. In State v. Hughes, the court was faced with group action rather than one person charged with acts constituting a nuisance, although presumably the same law would have been applicable whether one or more persons were involved. This case arose shortly after the close of the Civil War and the termination of martial law. It involved the celebration of an important event from the war years, held in high esteem by the federal government. The defendants were charged with rioting, committing a common nuisance, and obstructing the streets. They had assembled in town to celebrate the Emancipation Proclamation and had paraded through the streets, some on horseback, with drums and fifes for two or three hours. They dismounted upon request, but refused to disperse, going instead to the mayor's house, with drums beating, to make up a case to test the right of the mayor to forbid the procession. No violence in any form was exhibited.

The court held for defendants, finding that the assembly was lawful and, therefore, could not be a riot. The beating of the drums and blowing of the fifes did not create a common nuisance. Only a few persons (and one horse that "broke loose") were disturbed, not the community as a whole. The acts by defendants were not a nuisance. While it was true that at times some of the streets were obstructed, it was only such obstruction as was usually incident to such assemblies and, therefore, was not criminal. In good first amendment argument, the court concluded its opinion with:

In a popular government like ours, the laws allow great latitude to public demonstrations, whether political, social or moral, and it requires but little reflection to foresee, that if such acts as are here found by the jury, are to be construed to be indictable,

189. Id. at 440-41.
190. Id. at 441.
191. 72 N.C. 25 (1875).
192. Id. at 26.
193. Id. at 27.
194. Id. at 28.
that the doctrine of riots and common nuisances, would be extended far beyond the limits heretofore circumscribing them, and would put an end to all public celebrations, however innocent or commendable the purpose. 195

A similar question arose in State v. Hunter, 196 a case which involved a charge of violating an ordinance prohibiting assembling and loitering on the streets in sufficient numbers or in such manner as to cause an obstruction to free passage on the streets or sidewalks. The evidence showed that four or five men were on the sidewalks, and when requested to disperse, all left except one. The officer arrested the defendant after he refused to move on. 197 The court held that one man cannot be guilty of a nuisance by merely standing still on the sidewalk and refusing to move at the command of an officer. Any obstruction present was removed when the others dispersed. The court further recognized that city ordinances were subject to the state and federal constitutions, and that the ordinance was void because it purported to give the officer power to arrest a person and take him to prison without warrant, preliminary hearing, or opportunity for bail. 198 In contrast to its other decisions, the court here applied the United States Constitution to the ordinance, 199 long before the United States Supreme Court took this step.

d. Freedom of the Press

As we have seen, the courts seldom recognized freedom of speech issues and never overturned a conviction based upon those concepts. By way of contrast, we find the court in the following cases acknowledging freedom of the press and applying it as a defense, most commonly in proceedings for contempt. The court freely discussed the principles involved. It may be fairly argued that the court's application of the freedom of press doctrine was based upon the clause of the Declaration of Rights guaranteeing this freedom.

In Biggs, Ex Parte, 200 respondent was both a practicing lawyer and the editor of a newspaper. He published an editorial which

195. Id.
196. 106 N.C. 796, 11 S.E. 366 (1890).
197. Id. at 797, 11 S.E. at 367.
198. Id. at 800, 11 S.E. at 368.
199. Id.
200. 64 N.C. 202 (1870).
could be interpreted as being derogatory of a trial judge. Upon the issuance of an order for contempt, Biggs filed an answer disavowing any intent of committing a contempt of the court and stating that the publication was in his capacity as an editor, not as an attorney, and furthermore, that any comment upon the publicly elected judge was allowed by the freedom of the press as defined in the United States Constitution. Counsel on both sides briefed and argued the issues of freedom of the press, but the court neatly sidestepped these issues by holding that the disavowal filed by Biggs was binding upon the court and entitled him to his discharge; there was no mode of trying the truth or sincerity of the disavowal; it was left to the “Searcher of all hearts.”

Another example of the use of freedom of the press in the defense of contempt proceedings is In re Robinson. Robinson was charged with contempt of court resulting from publication of a news article criticizing the judge in ordering removal of a criminal cause to another county for trial. Robinson relied upon truth as a defense and that freedom of the press provisions in the state and federal constitutions protected the publication. After some discussion of freedom of the press, the court cited Biggs and held the proceeding was barred by the disavowal of intent by respondent, and discharged the order to show cause.

Cowan v. Fairbrother involved the use of freedom of the press arguments to attack an injunction forbidding defendants from participating in the publication of a newspaper within the state of North Carolina. The injunction was based upon a non-competing covenant in a contract whereby plaintiff bought a newspaper from defendants. They contended that the non-competing clause was invalid as being contrary to their rights of freedom of the press. The court affirmed the issuance of the injunction:

When the framers of our Constitution declared that the freedom of the press was one of the bulwarks of liberty, and therefore ought never to be restrained, but that every individual should be held responsible for the abuse of the same, they entertained no purpose to restrict the power of any person to dispose of anything of value, which, as the creature of his own mental or physical ex-

201. Id. at 218.
203. Id. at 540, 23 S.E. at 455.
204. Id.
205. 118 N.C. 406, 24 S.E. 212 (1896).
ertions, had become his property. The right is as much a fundamental one as is that to use the press without violation of reasonable laws intended to protect others from libel and slander. In its broadest sense, freedom of the press includes not only exemption from censorship, but security against laws enacted by the legislative department of the Government or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion. . . . It has never been held anywhere that these provisions could be made engines of oppression by construing them as restrictions upon the right to sell anything of value that is the creature of one's brain, provided society would not be made to suffer by the transaction.206

A case representing an example of censorship of the press with the court's approval is State v. Worth.207 The court here continued to hold contract and property rights paramount to personal individual freedoms. Worth was charged with publishing and circulating a book entitled The Impending Crisis of the South, by Hinton Rowan Helper. The book condemned slavery in inflammatory language and advocated the abolition of slavery by any manner, including force if necessary. The court upheld the statute relied upon, which prevented circulations of written or printed matter designed to cause discontent among slaves or dissatisfaction among free negroes.208 The court made no reference to freedom of the press; however, the case must be considered in its historical setting. It was decided at the June, 1860 Term immediately prior to the commencement of the Civil War. When viewed in that context, it is not surprising that the court withheld freedom of the press defenses from its opinion. It is remarkable that attorneys Morehead and Gorrell, able counsel of their day, did not raise these issues in their defense of Worth.

V. Conclusion

The "rights" contained in the Declaration of Rights were basically safeguards against oppressive governmental action and not declarations of individual rights. The wording of some of the articles, however, is cast in language which could support a contrary conclusion. We find, for example, that "the people have a right to assemble together." Yet the courts made little or no reference to

206. Id. at 417, 418, 24 S.E. at 215.
207. 52 N.C. (7 Jones) 488 (1860).
208. Id. at 490.
the Declaration in deciding "assembly" cases that logically called for an interpretation of the Declaration. Instead, the courts usually contented themselves with terse statements that a city or town had authority to adopt the regulation in question. The inquiry was directed toward whether there had been oppressive governmental action, rather than toward an examination of whether the rights of an individual had been violated. Bearing in mind the historical reason why the Declaration became a part of the constitution, the reasoning is more understandable and acceptable. The impetus for its adoption was a fear of government, engendered by the overreaching actions of the British Crown, not the need to establish and protect individual liberties. While one may seem to be the opposite side of the coin to the other, the important result was that the analysis of the cases proceeded from the point of view of whether the government had acted in excess of its authority and not in an analysis of the constitutional rights of individuals.

The development of the "cotton" economy demanded, above all, the sanctity of property rights both as to land and personal property (slaves). Whenever this collided with individual rights in the court, the interest of the economy usually prevailed. After Reconstruction, the economic interest continued to prevail, with the emphasis shifting from property rights and control of slaves to contracts, transportation and the change of the economy from agricultural to industrial. Rolled into this process was the intense problem of the white race maintaining control of government and, thereby, the economy. In the midst of this proliferation of competing interests, it is perhaps not surprising that individual rights had to await the twentieth century for their full recognition and development.209

209. In this development process, perhaps the most significant event was the passage of N.C. GEN STAT. § 116-199, the so-called "speaker ban law," in 1963 (amended 1965). This act, passed in the heat of student unrest throughout the state, prohibited the use of the facilities of any state-supported college or university for speaking purposes by any person who: (1) is a known member of the Communist Party; (2) is known to advocate the overthrow of the Constitution of the United States or of the state of North Carolina; (3) has pleaded the fifth amendment in refusing to answer questions with respect to Communist or subversive activities. Of course, the passage of the statute immediately attracted many persons eager to test its validity. This led to the decision in Dickson v. Sitterson, 280 F. Supp. 487 (M.D.N.C. 1968), by a three-judge panel. The court held the statute unconstitutional because of vagueness. Although the legislature did not repeal the act, it did adopt a proposed new constitution in 1969, to be effective 1 July 1971 upon ratification by vote of the people. It was so ratified, including for the first
time a guaranty of freedom of speech. The legislative commentary on the 1971 constitution is sparse, but it can be inferred from the close nexus in time, that the speaker ban law and decision spurred, if not spawned, the inclusion of the freedom of speech provision in the 1971 constitution.