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The Distrust of Freedom: A Democratic Paradox

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A DEMOCRATIC PARADOX

AMERICANS' ATTITUDE TOWARD THE Bill of Rights is paradoxical. On the one hand, we rank it with the American flag and apple pie as a core symbol of national identity and pride. What could be more patriotic, after all, than championing a document that is integral to our government, without which our very Constitution might not have been ratified? Moreover, Americans justifiably are proud of the important world-wide impact that the Bill of Rights recently has been exerting, as an inspiration and model for new movements toward democracy and human rights all over the globe. To celebrate the Bill of Rights bicentennial in 1991, the Philip Morris Company has been taking one of the remaining original copies of this document on a cross-country tour, and it has attracted large and enthusiastic audiences everywhere. Americans throughout the land thus seem eager to pay homage to what they apparently regard as a semi-sacred text.

On the other hand many Americans seem to regard the actual enforcement of the Bill of Rights with some skepticism. More disturbingly, too many Americans have made the startling suggestion that those who seek to enforce the Bill of Rights not only are not patriotic, but, to the contrary, actually unpatriotic. It is particularly distressing that this seemingly astounding assertion has been made by some government leaders, including the current President of the United States. During the 1988 presidential election campaign, then Vice President George Bush repeatedly insinuated that then Massachusetts Governor Michael Dukakis was unpatriotic for actions that reflected Dukakis's respect for the Bill of Rights.

For one thing, candidate Bush attacked Dukakis's veto of a Massachusetts statute that would have required public school teachers to lead classroom salutes of the American flag. Yet Dukakis's veto was based on his upholding the First Amendment. Consistent with the Supreme Court's landmark decision in West Virginia Board of Education v. Barnette, Dukakis recognized that to compel all teachers to profess allegiance would violate their freedom of conscience. In the Barnette case, which upheld the freedom of Jehovah's Witness school children to refuse to salute the flag in light of their religious objections, the Supreme Court endorsed the First Amendment's central guarantee of free thought in these often quoted, stirring words:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

ILLUSTRATION BY TROY THOMAS

These moving words have inspired in generations of Americans a deepened respect for the ideas and ideals of freedom that are symbolized by the flag — in other words, deepened patriotism. Therefore, in insisting that the Massachusetts legislature comply with this Bill of Rights edict, Michael Dukakis was showing himself to be a true patriot.

To the contrary, George Bush revealed a lack of understanding and respect for the values of individual liberty that are symbolized in our nation's icon both in his criticism of Dukakis's veto and in his subsequent efforts to overturn the Supreme Court's decision in Texas v. Johnson. In that case the Court held that the First Amendment protects the right to burn the American flag as an expression of political protest.

George Bush immediately denounced the decision and called for a constitutional amendment to limit the scope of the First Amendment, to make an exception for flag burning. He thus advocated what would have been the first truncation of the Bill of Rights in any respect since its ratification. Moreover, President Bush sought to deal a particularly devastating blow to the Bill of Rights: to limit the expression of political dissent. Such expression long has been viewed as at the heart of the free speech guarantee, which is itself widely considered to be a "preferred freedom," of supreme importance among the Bill of Rights pantheon. Most ironically, President Bush characterized his recommendation as a gesture of patriotism, and many citizens and public officials who supported this effort to curtail the First Amendment sounded the same allegedly patriotic theme. They clearly had forgotten the principle, which is often attributed to Thomas Jefferson, that "Dissent is the highest form of patriotism."

Another respect in which candidate George Bush inverted patriotic values — by suggesting that it is patriotic to undermine the Bill of Rights, and unpatriotic to defend these rights — was in his attacks on Michael Dukakis's membership in the American Civil Liberties Union (ACLU), and thus on the ACLU itself. It is appalling that Bush was able to depict as a liability his opponent's support of an organization dedicated to enforcing the Bill of Rights for all. To the contrary, such support should be viewed as an asset. Indeed, it is useful to recall, Michael Dukakis regarded it as such; he is the one who brought his membership to public attention during the campaign, proudly boasting that he was a "card-carrying member" of the ACLU.

To be sure, as the head of this organization, which prides itself on defending freedom of thought and expression — including for dissenters — I am hardly arguing that all ACLU policies unquestionably set forth the only correct way of interpreting the Bill of Rights. Therefore, I would be no more offended by George Bush's criticism of particular ACLU policies than I am by dissenting opinions from specific Supreme Court constructions of Bill of Rights provisions.

Reasonable people who support the general libertarian philosophy of the Bill of Rights may differ about particular issues concerning the interpretation and application of a certain Bill of Rights provision in a specific context. Indeed, there are spirited debates and disagreements about these issues within the ACLU itself. The ACLU's policies are adopted pursuant to National Board debates, which are always lively and virtually never result in unanimous votes. To the contrary, many ACLU policies result from closely divided votes. Accordingly, even the top leadership of the ACLU itself includes many dissenters from many policies.

What is troubling about George Bush's attack, though, was its broad-gauged nature. Although he criticized particular ACLU policies, he did so in the context of impugning the organization in general, and thus seeking to discredit its overall goal of enforcing the Bill of Rights. Bush would be hard-pressed to deny support for the innumerable uncontroversial policies in the ACLU's Policy Guide which set out conventional understandings of liberties guaranteed in the Bill of Rights. Instead, though, he chose to mention only a few policies (out of approximately 500) with which he disagreed and which were likely to be unpopular or controversial with the public. By his disagreement with these selected policies Bush sought to disparage the ACLU in general. This approach is the equivalent of singling out several of the Supreme Court's most controversial decisions enforcing the Bill of Rights in support of an effort to discredit the Supreme Court and the Bill of Rights in general.

What accounts for the disparity between the two strains in the prevailing American attitude toward the Bill of Rights that I have just described: on the one hand near reverence, but on the other hand, hostility? I think the discrepancy results from the distinction between an abstract view of the Bill of Rights and a specific one, between a conception of the Bill as enunciating some general precepts and the view that it actually guarantees particular freedoms in concrete current contexts. In short, many Americans support the Bill of Rights as an expression of disembodied ideals, but are suspicious of it as a charter for action. In the remainder of this article, I will outline three major aspects of the controversy surrounding the Bill of Rights in its actual application. By showing the misunderstandings that underlie wariness about enforcing the Bill of Rights, I hope to counter this attitude.

The first, most basic, element in the widespread misunderstanding of the Bill of Rights is straightforward ignorance. Public opinion polls consistently show that an alarmingly high percentage of the general population is simply not familiar with the Bill of Rights. When its provisions are read to them, not only do they not recognize the terms as being incorporated in the American Constitution, but, even worse, many assume that these terms come from a very un-American document, such as a Communist tract. For example, an editorial in the San Diego Union noted that in a recent public opinion poll,

> 59 per cent of Americans could not identify the Bill of Rights. Many pundits doubt whether the American people would even ratify those liberties if they were put to a vote today. In fact, some Americans would gladly dispense with many of the liberties contained in the Bill of Rights.

The broad public lack of understanding of the Bill of Rights generally also applies to specific Bill of Rights provisions. For example, to commemorate the 200th anniversary of the First Amendment, the American Society of Newspaper Editors commissioned a survey of public opinions about free speech. Virtually all respondents expressed a generalized belief in free speech, but substantial numbers "understood" free speech as not protecting expression concerning numerous controversial or sensitive subjects. In short, many respondents believed in the abstract idea of free speech but not in actually enforcing it.

For example, when asked if the press should be free to criticize political leaders, 22% said such criticism should never be protected and 41% said it should be only protected sometimes. As another

example, during the Persian Gulf War, 43% said that press opposition to the U.S. position and support for a foreign government's position should never be protected. Yet virtually all the respondents who did not think the First Amendment sheltered these critical views on central public policy issues — which the courts consistently have held to be at the core of First Amendment-protected speech — also described themselves as believing in free speech! Thus, when people say they believe in free speech, they are not referring to the concept of free speech enshrined in the First Amendment and consistently enforced by Supreme Court Justices with widely varying constitutional philosophies.

Even putting aside the fundamental problem that too many Americans are literally unfamiliar with the terms and meanings of the Bill of Rights, there is a second important aspect of the misunderstanding surrounding this document. Many people believe that the Bill of Rights should protect them — and people like them — but not others. This type of misunderstanding is often leveled at the ACLU's efforts to enforce the Bill of Rights. No one ever asks why we defend free speech in general. However, we frequently are asked why we defend free speech for a particular person or group. Why, people inquire, does the ACLU advocate the right to make particular nasty, offensive, wrongheaded, and repugnant statements? The answer is simple: because only those statements are the targets of censorship. Nice, correct, uncontroversial statements are almost never subject to censorship, and hence rarely require express invocations of the First Amendment. As we often explain, in an important sense our real client is not the particular speaker who utters the offensive words that prompt government attempts to stifle them. Rather, in essential respects, our actual client is the Bill of Rights itself, as well as all Americans, since they all benefit from a climate of freedom.

The foregoing ideas are often encapsulated in the notion of the "indivisibility" of rights. In other words, if freedom of speech is denied to any idea, any speaker, or any group, then it is not safe for any idea, any speaker, or any group. Once the government is given power to decide that a particular idea is too extreme or dangerous or offensive to deserve protection, then that power can be unleashed against any other idea.

Just as a decision that particular free speech is unprotected will constitute an adverse precedent, permitting the suppression of other speech, so too, a decision that certain speech is protected constitutes a positive precedent that will shelter other speech. What is viewed as extreme or dangerous or offensive varies enormously from time to time and from place to place. Therefore, a decision protecting speech that conveys a particular message can be used to shield speech that conveys a diametrically opposed message.

For example, in decisions issued during the 1930s and 1940s, the Supreme Court protected speech expressing racial bigotry by speakers whose views were abhorrent to many listeners. For example, in Terminiello v. Chicago, the Court protected attacks on racial and political groups that were well represented in the Chicago neighborhood where the speech occurred, thus profoundly upsetting and angering many listeners. In the 1960s, Terminiello and other similar cases were cited as precedents by judicial decisions that protected the free speech rights of Martin Luther King and other civil rights leaders, who conveyed their anti-bigotry messages in segregated Southern towns, thus profoundly upsetting and angering many listeners.

The Supreme Court repeatedly has reaffirmed the idea of the indivisibility of speech, most recently in the two decisions that upheld the right to burn the U.S. flag to express political protest, in 1989 and 1990. Significantly, those opinions were joined by Justices who spanned the Court's ideological range, from Justice Brennan at the liberal end to Justice Scalia at its conservative end. This unusual alliance underscores that support for a content-neutral enforcement of the Bill of Rights is not peculiar to any particular view of constitutional philosophy, but can fairly be described as inhering in the constitutional philosophy itself. Thus, the ideologically disparate Justices who joined in both rulings declared it "a bedrock principle" that speech may not be censored because of disagreement with or disapproval of the ideas it expresses.

Despite the fact that the Supreme Court so consistently has protected speech that audiences have found to be abhorrent or offensive, many members of the public — perhaps most — believe that some speech with which they disagree should be censored. Conversely, most people become advocates of free speech in the context of seeking to protect certain speech with which they agree. Recently, for example, free speech principles have been actively espoused by many conservatives who have not otherwise been notable free speech champions. Many conservatives view the "politically correct" or "PC" movement on university campuses as threatening the expression of conservative views. Therefore, in order to protect those expressions, they rely on free speech principles.

Perhaps the most prominent example of this phenomenon is President Bush. As described above, he repeatedly has criticized the reliance on free speech guarantees to protect the expression of political and religious dissidents. However, during a commencement address at the University of Michigan last spring, he strongly supported free speech guarantees to protect mainstream conservative views.

Another example is the arch-conservative Congressman Henry Hyde (Republican of Illinois), who was a supporter of the proposed constitutional amendment to prohibit flag burning as a political protest. However, this year, Congressman Hyde sponsored the Collegiate Speech Protection Act, which would have precisely the opposite effect: expanding the scope of the free speech clause, rather than narrowing it. This commendable Act, which the ACLU enthusiastically endorses, would extend free speech protection to students at private colleges and universities. In effect, it would make the First Amendment applicable to those students, although the Amendment itself is directly applicable only to students at state schools, because of the state action doctrine.

Consistent with the ACLU's non-partisan, non-political nature, I want to underscore that I do not single out only conservatives or Republicans to illustrate my point that people are more enthusiastic about protecting free speech for those who share their views. The point is a general one, and I could easily illustrate it through examples drawn from the ranks of liberals or Democrats too. For example, on the very day when I joined Congressman Hyde at a press conference to announce the ACLU's support of his Collegiate Speech Protection Act, I had a meeting with the liberal Democratic Senator, Ted Kennedy, in which Senator Kennedy questioned the ACLU's defense of a type of speech that he found problematical: tobacco advertising. Consistent with his goal of regulating the sale of tobacco products in order to promote public health, Senator Kennedy was considering limitations on the advertising of

such products. The ACLU, in contrast, views such advertising as protected commercial speech, which can be subject only to narrowly drawn regulations.

In using President Bush, Congressman Hyde, and Senator Kennedy to illustrate my point, I must emphasize that they are simply prominent examples of a general — if not universal — attitude. This attitude was vividly captured by the Executive Director of the National Coalition Against Censorship, Leanne Katz, when she said, "Everyone has his or her Skokie." She was referring, of course, to the widely publicized case in the late 1970s, in which the ACLU defended — and the courts upheld — the right of a neo-Nazi group to stage a peaceful demonstration in Skokie, Illinois, a community with many Jews and many Holocaust survivors.

What Ms. Katz meant was that everyone regards one type of speech as uniquely abhorrent, one message as so supremely obnoxious that it should be banned, even though other speech should be protected. In other words, everyone would like to make "just one" exception to the First Amendment. The problem, though, is that for each individual, it may well be a different exception. For example, many of the Holocaust survivors in Skokie would censor anti-Semitic speech; Jesse Helms and many fundamentalist religious leaders would censor immoral speech; George Bush and many other elected government officials would censor flag burning; some feminists would censor sexually explicit speech that is degrading to women; some minority group representatives would censor racist speech.

The foregoing litany should underscore the necessity of the indivisibility principle. For, once we allow speech to be regulated on the ground that there is substantial opposition to the idea it conveys, there is no limiting principle to prevent the aggregated exceptions from swallowing the rule. As Thomas Paine said: "He that would make his own liberty secure must guard even his enemy from oppression, for if he violates this duty, he establishes a precedent that will reach to himself."

I should like to turn now to a third aspect of the controversy and misunderstanding that unfortunately surround the Bill of Rights. Even if people believe that the Bill of Rights generally should be neutrally enforced, including to protect the rights of those with whom they disagree, many believe that we should make exceptions to those rights in light of changes in societal conditions since they were adopted 200 years ago. They argue that society is more complex and dangerous now, and that we face new threats to individual and national security which render Bill of Rights freedoms unaffordable luxuries.

I find it ironic that many people who advance this argument are self-described conservatives who generally take pride in abiding by the Constitution's plain language and original intent. What they are advocating through this argument is a departure not only from the terms of the Bill of Rights, but also from its intent and the circumstances giving rise to it.

The individuals who framed and ratified the Bill of Rights had recently participated in the violent revolution that gave birth to our nation. Moreover, during the very period when the Bill of Rights was proposed, debated, and adopted, our then-new nation was facing serious threats to its ongoing stability. Many members of the founding generation believed that the young, fragile nation's very survival was in jeopardy, both from internal difficulties and strife — including some armed insurrections — and from external assaults. American ships were being fired upon on the high seas, and our land was being attacked from across the Canadian border. Indeed, it was precisely their expressed fear for the nation's survival that led the federalists to call the constitutional convention in Philadelphia in 1787, and ultimately to their proposed Constitution.

Despite the fact that, in 1787-91, national and individual security were at least as severely beleaguered as they were at any subsequent time in American history, the Bill of Rights was then added to the Constitution. Indeed, for many members of the founding generation, the addition of the Bill of Rights was a prerequisite for ratifying the Constitution.

Even those who opposed the initial inclusion of the Bill of Rights in the original Constitution did so not because they did not support libertarian guarantees of the Bill of Rights, but because they believed it was unnecessary to set these forth expressly. They believed that, even under the unamended original Constitution, the government would not be able to deprive individuals of the various freedoms enunciated in the Bill of Rights. That conclusion rested on the fact that the Constitution created a government of limited powers only — namely, those powers that the Constitution specifically enumerated — and the enumerated powers did not include powers to deprive individuals of rights. This argument has substantial force; perhaps the Bill of Rights would not have been necessary as a bulwark against governmental infringement on freedom. Nevertheless, significantly, the founding generation chose to err on the side of caution to ensure that the new government would not infringe on individual rights. Thus, promptly after the original Constitution was ratified, they added the express prohibitions on governmental infringements of liberty that are contained in the Bill of Rights. In light of this history, it is clear that the original intent of those who incorporated the Bill of Rights into our Constitution would not have permitted limitations on freedom in order to preserve security. To the contrary, even in their perilous era, the framers and ratifiers still bent over backwards to make clear beyond peradventure that order and security could not be achieved at the expense of liberty. Rather, consistent with the Enlightenment philosophy that inspired them, they viewed the very *raison d'etre* of organized society and government as the protection of freedom. As Thomas Jefferson wrote to James Madison: "A society that will trade a little liberty for a little order will deserve neither and will lose both."

How different that eloquent statement is from today's rhetoric about the relative importance of liberty and order! Sadly, public opinion surveys reveal that many members of the public would willingly sacrifice their own freedom — not to mention that of others, such as individuals accused or convicted of crime — in order to address such pressing societal problems as crime and drug abuse. More troublingly, government officials also make, and in some cases enforce, similarly inverted views about the hierarchy between order and liberty.

A particularly shocking example of the latter attitude was described in a recent news article in the Chicago Tribune. It reported that the Chicago Police Superintendent, who heads this nation's second largest police department, had advocated policies infringing on basic liberties in order to combat crime. Far from honoring the language or intent of our ancestors who ratified the Bill of Rights, Superintendent Martin acknowledged that his role models came from totalitarian societies: a Communist dictatorship and a fascist

dictatorship. The news story provided the following account:

> Chicago Police Supt. LeRoy Martin has returned from China with a modest proposal for the war on crime: the suspension of certain constitutional rights and emulation of the Chinese prison system.
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> "The sanitary facilities are a bucket. The prisoners are given a bowl of rice and a Thermos bottle of tea. And then they're locked down," said Martin of his recent tour of Chinese prisons. "I know we're a democracy, but you know, I don't think everything the Communists do can't be copied;...And I think there are some things they do that are better than what we do."
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> While visiting China, Martin said, he found much to admire about the country's handling of criminals. He noted that drug dealers were sentenced to execution by firing squad....
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> [T]he police superintendent said he believed his views reflected popular sentiment...."[A] lot of people would be in favor of the kind of things that I am talking about," he said.
>
> Reminded that Adolf Hitler's ideas were also popular in Nazi Germany, the superintendent replied: "And they had a very low crime rate then."

Even though I have read that last statement several times, it still sends a shudder down my spine every time I see it. I think that Jefferson, Madison, and the other Founders of this great nation would turn over in their graves if they heard this statement from an important government official, whose specific responsibility is to maintain law and order consistent with the Bill of Rights. This statement embodies such a dramatic departure from the ideals for which they and others of their generation risked their lives.

Sad as it is, perhaps it is not surprising that executive officials such as police chiefs would view the Bill of Rights as an expendable superfluity when enforcing it makes it more difficult or inconvenient to achieve their administrative objectives. Even more distressing is that this same view is widely shared among the very branch of the federal government that was intended to be the ultimate guardian of the Bill of Rights, the judiciary. The Constitution provided that federal judges would have life-time tenure precisely to afford them shelter from the political pressures and day-to-day efficiency concerns that influence the decisions of executive and legislative officials.

The courts' willingness to sacrifice constitutional rights in the hope of combatting a perceived societal problem is best illustrated, currently, by the "War on Drugs." Many constitutional scholars believe that this campaign would be more aptly titled the "War on the Bill of Rights." In effect, they note, the courts have created a "drug exception" to many otherwise applicable Bill of Rights guarantees.

This strategy is not only unprincipled, but it is also ineffective. Despite the sacrifice of many constitutional protections, the drug problem continues to be viewed as a major national crisis. Even Justice Scalia, a conservative who generally defers to law enforcement concerns and to the elected branches of government, has harshly condemned the Supreme Court's willingness to compromise constitutional values for the sake of ineffectual gestures to counter the drug problem. In one case, dissenting from the majority's upholding of warrantless, suspicionless, random drug tests, notwithstanding the Fourth Amendment's plain warrant and probable cause requirements, Justice Scalia excoriated the resulting "immolation of privacy and human dignity in symbolic opposition to drug use." Tragically, Thomas Jefferson's observation to James Madison, which I quoted above, has proven prophetic. Because it is so powerful and so apt, I should like to repeat it: "A society that would trade a little liberty for a little order will deserve neither and will lose both."

Notwithstanding the misunderstood and controversial nature of the Bill of Rights two centuries after its adoption, I do not think that those of us who champion it should be discouraged. We should recognize that such misunderstanding and controversy probably are inevitably associated with the document, given its countermajoritarian nature. The framers recognized that, despite the democratic virtues of a representative government elected by popular majorities, such a government could deprive individuals and minority groups of rights just as much as an unelected, unrepresentative government. Therefore, the Bill of Rights was designed to protect against what James Madison labeled the "tyranny of the majority." By definition, then, the Bill of Rights will be invoked to protect rights that have been infringed by governmental actions that are deemed to be in the majority's best interests. Accordingly, an individual's or minority group's reliance on the Bill of Rights to overturn the majoritarian preference will probably provoke the community's disfavor.

Although defenders of the Bill of Rights may be destined to be in a minority, they should derive comfort from the fact that they are following a noble, and supremely patriotic, tradition. Let me repeat Thomas Jefferson's important words on this point: "Dissent is the highest form of patriotism." Enforcers of the Bill of Rights should draw inspiration from the fact that they are helping to maintain the vitality of freedoms for which our ancestors put their lives on the line two hundred years ago, and for which people all over the world are risking their lives today.

The Bill of Rights embodies the unsuppressible, powerful idea of freedom, which is kept alive through speech and thought. In closing, I will quote one of my favorite expressions of passionate commitment to this ideal. It was written by E.B. White in an essay entitled, appropriately, "Freedom", first published in Harper's Magazine in July 1940, before the U.S. had entered the war against Nazism and during the period of the Nazi-Soviet pact, when both the right and the left in the U.S. chose to ignore totalitarian threats to democracy. Although White was saddened that so many of his contemporaries seemed to have lost their zeal for freedom, he maintained his own enthusiastic commitment, as well as his faith that such zeal would always be kept alive and passed on through the power of free speech and press.

For those of us who believe that the Bill of Rights is being honored in the breach during its Bicentennial year, when it should be celebrated and reaffirmed, White's impassioned words provide consolatory historical perspective. He wrote:

> I have often noticed on my trips up to the city that people have recut their clothes to follow the fashion. On my last trip, however, it seemed to me that people had remodeled their ideas too — taken in their convictions a little at the waist, shortened the sleeves of their resolve, and fitted themselves out in a new intellectual ensemble copied from a smart design out of the very latest page of history....
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> ....I feel sick when I find anyone adjusting his mind to the new tyranny which is succeeding abroad....I

resent the patronizing air of persons who find in my plain belief in freedom a sign of immaturity. If it is boyish to believe that a human being should live free, then I'll gladly arrest my development and let the rest of the world grow up.

....

I believe in freedom with the same burning delight, the same faith, the same intense abandon which attended its birth on this continent more than a century and a half ago

....

[T]he free spirit of man is persistent in nature; it recurs, and has never successfully been wiped out....I am inordinately proud these days of the quill, for it has shown itself, historically, to be the hypodermic which inoculates men and keeps the germ of freedom always in circulation, so that there are individuals in every time in every land who are the carriers, the Typhoid Marys, capable of infecting others by mere contact and example.

I hope that I have infected some readers of this article with my own passionate enthusiasm for freedom, and for that great American contribution to freedom, the Bill of Rights.

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Photograph by Tom Tyburski