

# South Carolina Law Review

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Volume 46 | Issue 2

Article 7

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Winter 1995

## The UFO

William S. McAninch  
*University of South Carolina*

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### Recommended Citation

William S. McAnich, *The UFO*, 46 S. C. L. Rev. 363 (1995).

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# The UFO

*William Shepard McAninch\**

Twenty-five years ago, April 27, 1970, three young men were convicted of the common-law misdemeanor of maintaining a public nuisance for their roles in operating an anti-war coffee house in Columbia, South Carolina, which is the home of Fort Jackson, a major army recruit training depot. They were sentenced to six years in prison. What follows is the story of that prosecution.

The UFO<sup>1</sup> operated for nearly two years at the end of the 1960s at 1732 Main Street in Columbia, immediately next door to the Elite Epicurean Restaurant. As an anti-war coffee house in the deep South, it was an uncommon institution, although some local observers might have used other adjectives. It served coffee, tea, soft drinks, fresh fruit, music, and anti-establishment propaganda, much of which was pointedly anti-military.<sup>2</sup>

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\* Solomon Blatt Professor of Law, University of South Carolina. The author thanks Don Wedlock and the members of the Loblolly Society for helpful comments on earlier drafts. Thanks to Jerry McAninch and to Jenifer Detrick for research assistance.

1. The name was chosen as a catchy reference to the U.S.O., the United States Service Organization, which operated a center for service personnel a block away.

2. This description of the UFO, and of some of the surrounding events, is based in part on the recollections of the author, who, at the time of the prosecution, was a first-year, untenured, assistant professor of law at the University of South Carolina. The author's objectivity might be questioned in that he, along with Don Wedlock, another first-year, untenured, assistant professor, actively, albeit surreptitiously, assisted the defense in preparation of various documents.

Research sources include in-person or telephone interviews with a number of individuals on both sides of the case. For the defense these include one of the original defendants, Merle Ferre; two of the defense attorneys, Thomas Broadwater and Laughlin McDonald; one of the first volunteer workers at the UFO, Lois Levitan; two who were actively involved with the UFO but who were not charged as defendants, Brett Bursey and Merle Trusdale; and Seldon K. Smith, a Columbia College professor who testified for the defense and who subsequently faced tenure termination proceedings because of his testimony.

Interviewees on the State's side include two of the police officers who testified at the trial, John "Dude" Keef and Harry T. Snipes; a then-Captain on the police force, William "Bill" Cauthen; Chris Manos, one of the present owners of the Elite Epicurean Restaurant, who worked there as the teenage son of the then-owner; the accountant for the restaurant who testified at trial, Paul C. Tsalapatas; and J.C. Coleman, the former law partner of the now-deceased solicitor, John Foard.

Newspaper accounts in the CHARLOTTE OBSERVER (Charlotte, N.C.) and THE STATE (Columbia, S.C.) provided background information as well as commentary on the trial.

No trial transcript could be located in the Richland County Courthouse, the South Carolina Supreme Court or the South Carolina State Archives. The author finally located one at the Southern Regional Office of the ACLU in Atlanta, Georgia along with other documents relating

The space, formerly occupied by a succession of failed restaurants and a pool hall, was modestly furnished with wooden tables and folding chairs, an area for a band, and displays of reading material featuring underground newspapers, such as the *Berkeley Barb*, *Short Times*, *The Great Speckled Bird*, and numerous pamphlets, as well as mainstream newspapers and periodicals. The decor consisted largely of plants and posters, many with a civil rights orientation—Martin Luther King, Jr., Thoreau, and Malcolm X, and some rather less mainstream.

Its location next door to the Elite was unfortunate. The Elite, opened in 1939, and itself located immediately across the street from city hall, had long been, and still is, a prime gathering spot for local politicians and other persons of influence. In the words of one of the owners of the Elite, “[w]e catered to the establishment, and they [the UFO] were anti-establishment.”<sup>3</sup>

They were, and that fact was a thorn in the side of the folks who gathered at the Elite. They complained about loud music, blocked sidewalks, and marijuana use. Following a petition reportedly signed by a dozen local merchants, including the owner of the Elite, Solicitor John Foard secured a court order padlocking the UFO and an indictment charging its operators with the common-law misdemeanor of maintaining a public nuisance.

At the conclusion of a lengthy, contentious, and occasionally humorous trial, the three individual defendants and the UFO itself were convicted.

The defendants claimed that the case against them was the successful manifestation of a massive conspiracy against free speech. The State contended that it was a necessary prosecution of a cesspool of drugs and filth that was corrupting the youth of the area.

These were troubled times. Recall the riots at the Democratic National Convention in Chicago in 1968 and the subsequent trial of the Chicago Seven, pitting Mayor Daly’s finest and Judge Julius Hoffman against Abbie Hoffman, Tom Hayden, and others; the cries of black power, and the militancy of the Black Panthers, the trial of Bobby Seal in New Haven; the My Lai Massacre, the bombing and armored raids by United States forces into Cambodia from the quagmire of Vietnam and then the massive protests that those raids engendered; the nationwide moratorium, the take-overs of college

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to the case. Amazingly, these included some of the dead solicitor’s files, the files having been sent there after his death by someone cleaning out the deceased’s office.

3. Interview with Chris Manos, in Columbia, S.C. (Dec. 2, 1993).

campuses; the Kent State Massacre, which took place less than a week after the UFO trial was over; and the less well-known but equally tragic killing of college students at South Carolina State College in Orangeburg, South Carolina two years before.<sup>4</sup>

For much of society there was a “we/they” mentality. President Nixon waged a successful campaign in 1968 by emphasizing the twin themes of victory in Southeast Asia and law and order at home. Crew cuts and American flags on one side, long hair and peace symbols on the other. While most of us were in fact somewhere in between, it often appeared that our world was split into two camps, and nowhere was this division more apparent than in the 1700 block of Main Street in Columbia, South Carolina.

According to the indictment, “detrimental to the peace, happiness, lives, safety and good morals of the people of South Carolina,” the defendants at 1732 Main Street,

(1) . . . a certain public, common, disorderly, ill-governed place did willfully and unlawfully keep and maintain . . .; and

(2) . . . fighting, cursing, the making of loud and disturbing noises, the making of loud music, did willfully and unlawfully do; and

(3) . . . rowdy persons, persons of evil name, fame and conversation, men as well as women, to come together, did willfully and unlawfully permit, cause and procure; and

(4) . . . persons did possess, sell or use marijuana, and other narcotic drugs, did willfully and unlawfully permit, cause and procure . . . .<sup>5</sup>

The indictment also charged them with displaying “pictures and other printed material being obscene and offensive to persons using the sidewalk”; with “possessing and displaying pictures, magazines, newspapers, pamphlets and posters which were obscene”; and with

entic[ing], allow[ing], and permit[ting] minors under the age of 21 to become incorrigible and ungovernable, or habitually disobedient beyond the control of his or her parents . . . or become habitually truant, associate with immoral and vicious persons, or habitually use obscene and profane language, or so deport

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4. The killings at South Carolina State College are described in JACK BASS & JACK NELSON, *THE ORANGEBURG MASSACRE* (2d ed. 1984).

5. Indictment No. 240, *State v. Hannafan*, Court of General Sessions, Fifth Judicial Circuit of South Carolina (Jan. 2, 1970) [hereinafter *Indictment*].

himself or herself as to willfully injure and endanger his or her morals and health . . . .<sup>6</sup>

What is this common-law misdemeanor of maintaining a public nuisance and where did the grand jury find the colorful language with which to describe it? First, South Carolina continues to rely on common-law crimes to a greater degree than does any other state. During the recodification movement of the last several decades, while many other jurisdictions abolished common-law crimes,<sup>7</sup> South Carolina managed for the first time to codify some of the more serious offenses, such as rape and burglary, but did so without disturbing the common law. So, for many offenses there are statutory and common-law versions existing side by side. Unless explicitly repealed by statute, every single common-law offense that ever existed here or in England continues to be valid in South Carolina. For example, in 1980 the South Carolina Supreme Court affirmed a conviction of misprision of felony, a common-law offense about which there had never been a reported case in South Carolina, but which was a common-law crime in England.<sup>8</sup>

Common-law crimes, of course, compound the problems caused by the necessary, but often fallacious, axiom that “everyone is presumed to know the law.” It is fiction enough to say that each person has fair notice of what the law requires so long as she can turn to a set of statutes if she has a question about whether anticipated behavior might transgress the law’s commands. To say she also must research the ancient common law of another country or proceed at her peril seems a bit much, particularly when what actually got her in trouble may have been speech, which she thought to be protected by the First Amendment, a safeguard of course unknown in early eighteenth century England.

There is a separate problem of determining the punishment for common-law offenses. Fortunately, we are long past the day when most common-law felonies were capital.<sup>9</sup> A South Carolina statute provides for a sentence of from three months to ten years for any felony that lacks a specifically authorized penalty.<sup>10</sup> A companion statute authorizes for any misdemeanor lacking a specific penalty “such sentence as is conformable to the common

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6. *Id.*

7. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 66 (2d ed. 1986).

8. *State v. Carson*, 274 S.C. 316, 318-20, 262 S.E.2d 918, 920 (1980) (relying on South Carolina’s reception statute, S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1976), originally enacted in 1712 at 2 S.C. Stat. 413-14 (1712)).

9. 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 458 (London, MacMillan 1883).

10. S.C. CODE ANN. § 17-25-20 (Law. Co-op. 1976).

usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.”<sup>11</sup>

At any rate, there is a common-law misdemeanor of maintaining a public nuisance. It had been used on several occasions to prosecute the operation of what were typically referred to as “disorderly houses.” Much of the language in the UFO indictment was taken verbatim from the indictment in one such case.<sup>12</sup>

### *Cast of Characters*

The indictment charged five individual defendants and the UFO, Inc. itself (actually misidentified as the “UFA” in the indictment).<sup>13</sup> The individuals included four New Yorkers, Duane Ferre, the son of a Baptist minister, his wife Merle Ferre, Lenny Cohen, and Christopher Hannafan. Duane was a former Air Force officer who did time for refusing to go to Vietnam. Will Balk, a high school French teacher, the lone southerner, grew up in rural Barnwell County, South Carolina. All were in their twenties.

Solicitor<sup>14</sup> John Foard, a decorated veteran of World War II, was a fiery litigator of the old school. Solicitor for eighteen years at the time of the UFO prosecution, Foard was known to sing hymns and even fall to his knees, praying for justice, while imploring a jury to return a guilty verdict.

Defense counsel were provided by the American Civil Liberties Union. Tom Broadwater, an African-American then four years out of law school, donated his services as a cooperating attorney with the fledgling South Carolina ACLU Chapter, founded just two years before the UFO trial. Initially, Jack McGuinn, another local cooperating attorney, assisted with some of the federal litigation involved in the case. Before the criminal prosecution actually began, solicitor Foard, a longtime friend of McGuinn, said to him in the judge’s chambers, “Jack I hate to see you get involved in a case, [sic] you know you could get hurt.”<sup>15</sup> McGuinn elected to have nothing further to do with any of the UFO litigation. Broadwater described the pressure and

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11. S.C. CODE ANN. § 17-25-30 (Law. Co-op. 1976).

12. *State v. Turner*, 198 S.C. 487, 493, 18 S.E.2d 372, 373-74 (1942).

13. Indictment, *supra* note 5.

14. In South Carolina “solicitor” is the title of the locally elected prosecuting attorney.

15. Transcript of Testimony at 125, *State v. Hannafan*, Court of General Sessions, Indictment No. 240, Fifth Judicial Circuit of South Carolina (Apr. 15, 1970 through Apr. 28, 1970) (copy on file with author) [hereinafter Transcript]. The only extant original copy of the transcript is on file in the Southern Regional Office of the American Civil Liberties Union, Atlanta, Georgia; the author’s is a copy of that copy.

McGuinn testified that he declined further participation because he did not want to take orders from a younger, less experienced attorney and because his name had been placed on a pleading in the related federal litigation without his knowledge. *Id.* at 125-30.

intimidation directed at himself and McGuinn as tremendous.<sup>16</sup> Rounding out the defense team were Reber Boulton, a young, long-haired, staff attorney from the ACLU's Southern Regional Office in Atlanta and Laughlin McDonald, a young attorney who was then doing graduate work in English literature at the University of North Carolina.

The judge was Harry T. Agnew, an experienced trial judge from Anderson, South Carolina.

### *Pre-Trial Events*

Four defendants, Duane and Merle Ferre, Will Balk, and Larry Cohen, were arrested on January 13, 1970, the day the indictment was issued by the grand jury. The next day bail was set by Judge Agnew at \$7,500 for each of the men and \$6,000 for Ms. Ferre. While these figures perhaps seem unremarkable in the mid-nineties, they were shocking in Columbia, South Carolina in 1970. For these defendants charged with a common-law misdemeanor, with no prior records except for Duane Ferre's military conviction, and no particular evidence of a risk of flight other than their out-of-state backgrounds, bail was more than twice that set in two murder cases in the same county the week before and three times the then-going rate of \$2,500 for assault and battery with intent to kill, a crime with a penalty of 20 years in prison.<sup>17</sup> Less than a year before, the South Carolina Legislature had enacted the Bail Reform Act of 1968, which appears to require release on one's own recognizance unless there is particular reason to believe that more stringent conditions are required to preclude flight or to protect the community.<sup>18</sup>

Pretrial release can be financially painless for one released on her own recognizance or almost impossible for one with high monetary bail and insufficient assets to meet it. Going to a bail bondsman costs a non-returnable ten percent of the total bail. To avoid the bail bondsman, cash or property of value equal to the amount of bail must be posted with the court.

Raising the money proved difficult for these defendants. Will Balk was released on a bond two days after arrest on the fifteenth, the same day the UFO itself was padlocked pursuant to an order by Judge Agnew in a separate civil action initiated by Solicitor Foard. Merle Ferre was released the next day. Lenny Cohen and Duane Ferre were unable to raise bail until the twenty-seventh, after spending two full weeks in jail. Two days later Chris Hannafan surrendered himself to authorities in New York at a press conference at which

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16. Interview with Thomas Broadwater, in Columbia, S.C. (Nov. 30, 1993) [hereinafter Broadwater Interview].

17. Petitioners' Memorandum in Support of Petition for Writ of Habeas Corpus at 12, filed in original jurisdiction of South Carolina Supreme Court (June 29, 1970).

18. S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1976).

former New York City Mayor, and then candidate for the United States Senate, Paul O'Dwyer called the indictment "a conspiracy between Army brass and state authorities" and urged Gov. Nelson Rockefeller to resist any requests from South Carolina for extradition.<sup>19</sup> Hannafan was never prosecuted. Nor was Ms. Ferre, who was eight months pregnant when the trial began in April. In spite of explicit defense requests that she be prosecuted with the others, Foard declined, apparently to avoid a sympathy factor.<sup>20</sup>

The defendants also unsuccessfully sought an injunction from the federal district court against the prosecution on the ground that it was brought primarily to stifle their unpopular political speech and because the common-law misdemeanor charge of maintaining a public nuisance was unconstitutionally vague.<sup>21</sup> Denying the injunction, Judge Robert Hemphill enigmatically quipped, "Everybody's seeking rights now, especially if they are charged with a crime. Some are seeking rights for the first time in their lives."<sup>22</sup> On an appeal to the Fourth Circuit, the UFO defendants requested that Hemphill be removed from any subsequent proceedings because of his bias, quoting his statement in one of the proceedings below: "I think they [the UFO defendants] are lying through their teeth [concerning their indigency]."<sup>23</sup> The federal courts denied all relief.<sup>24</sup>

On January 16, the day after the UFO was padlocked, one hundred persons, led by Reverend Gonzalo Leon,<sup>25</sup> and addressed by University of South Carolina, untenured instructor Jon Kraus, president of ACLU of South Carolina, paraded in front of City Hall, promoting a rally to be held two days later at the university student center. That rally was subsequently moved to Valley Park (now Martin Luther King, Jr. Park) when USC announced it would not allow non-students to attend a rally on campus. At the park some three hundred or so heard talks by Dr. Howard Levy and Lee Weiner. Weiner was one of the Chicago Seven. Levy, who had just been released after twenty-eight months in federal prison for refusing as an Army captain/doctor to train Vietnam bound troops at Fort Jackson, claimed that the charge against the UFO was part of a national conspiracy to suppress speech critical of the

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19. *5th UFO Officer Arrested in N.Y.*, THE STATE (Columbia, S.C.), Jan. 30, 1970, at 1-C.

20. Transcript, *supra* note 15, at 4-6.

21. This action predated *Younger v. Harris*, 401 U.S. 37 (1971), which requires federal court abstention for the preservation of "our federalism."

22. Ginny Carroll, *Hemphill Remands UFO Case to General Sessions Court*, THE STATE (Columbia, S.C.), Mar. 3, 1970, at 1-B, 7-B.

23. Ginny Carroll, *UFO Asks Court of Appeals Dismiss Hemphill from Case*, THE STATE (Columbia, S.C.), Mar. 20, 1970, at 24-B.

24. See *infra* note 90.

25. Reverend Leon was a minister in the Universal Life Church whose flowing hair and bare feet, among other characteristics, set him apart from mainstream Columbia.



war in Southeast Asia. After the rally some USC students continued to pursue the issue. One student group, billed as the “UFO in Exile,” sought a permanent meeting space for a coffeehouse-type establishment in the student center.

In early February there was a rally in Charlotte and then a larger one at USC to protest the closing of the UFO and also to mark the second anniversary of the killing of the students at South Carolina State College. University security personnel checked ID cards to ensure that the crowd of five hundred contained no more than the previously approved total of fifty non-students.

The day before the trial began, sixty USC students staged a sit-in, occupying the office of then-USC President Tom Jones, to protest USC drug enforcement policies. Jones and South Carolina Attorney General Dan McLeod met with about three hundred students to discuss their grievances. Speaker of the South Carolina House of Representatives, Sol Blatt, said that the students “should be run off campus by sundown” and that USC should not be judged by “the handful of misfits whose parents allow them to dress and act as they do.”<sup>26</sup>

Editorials in *The State*, the local newspaper, indicated the local tenor of the times. They described the planned national moratorium against the war as “peaceniks, pacifists, and pinkos lash[ing] out against American policy”;<sup>27</sup> they railed against inclusion of beards in the upcoming South Carolina tricentennial celebration because “the 17th century Englishmen who sponsored or participated in the colonization of South Carolina were a clean-shaven lot”;<sup>28</sup> they opined that “All this yap about suppression of dissent in Columbia is so much hogwash”;<sup>29</sup> they complained about moratorium “crazies” complaining of “poverty, injustice, the usual leftist litany of ills,”<sup>30</sup> and lauded the judicial philosophy of Judge G. Harold Carswell, nominee to the United States Supreme Court.<sup>31</sup> Meanwhile USC President Jones was being briefed on the activities of radical student groups by the South Carolina Senate’s Committee to Investigate Communist Activities, a local counterpart

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26. Ginny Carroll, *USC Students Stage Sit-In*, THE STATE (Columbia, S.C.), Apr. 16, 1970, at 1-B.

27. *Reaction to Moratorium Brings Patriots Together*, THE STATE (Columbia, S.C.), Nov. 11, 1969, at 14-A.

28. *No Beards in the Script*, THE STATE (Columbia, S.C.), Jan. 14, 1970, at 14-A.

29. *Vocal But Not Persuasive*, THE STATE (Columbia, S.C.), Feb. 13, 1970, at 18-A.

30. *More Moratoria Ahead*, THE STATE (Columbia, S.C.) Mar. 2, 1970, at 12-A.

31. *Non-Judicial Function*, THE STATE (Columbia, S.C.) Mar. 2, 1970, at 12-A. Judge Carswell, whose nomination to the Supreme Court was rejected by the Senate, is often remembered via the words of one of his supporters, Sen. Roman Hruska of Nebraska: “Even the mediocre are entitled to a little representation.” OXFORD COMPANION TO THE SUPREME COURT 128 (Kermit L. Hall ed., 1992).

of the United States House of Representatives Committee on Unamerican Activities.<sup>32</sup>

### *The Trial*

It took about three hours to impanel the jury, which consisted of four white women, four black women, and four white men. It would have taken considerably longer, but Judge Agnew elected to ask only three of the 290 voir dire questions submitted by the defense.<sup>33</sup> The defense complained that because of the limited nature of the voir dire, it was unable to establish prejudice on the part of individual jurors and therefore could not challenge them for cause. The defense exhausted its ten peremptory challenges well before the jury was selected. The State used four of its five peremptories.<sup>34</sup>

### *The State's Case*

The first day of the actual trial ended up resembling a rather risque legislative filibuster. Solicitor Foard began the State's case by introducing a copy of the *Berkeley Barb*, an underground California newspaper, that had been taken from the UFO. He read selected excerpts containing profanity and described the publication as obscene. Defense attorney Broadwater responded that the jury could not make a determination of obscenity on the basis of selected excerpts and proceeded to read the sixteen page paper cover-to-cover, advertisements and all, while, according to a newspaper account, "jurors and spectators nodded and napped."<sup>35</sup>

The court later rejected an offer of proof of contemporary community standards that local author and professor James Dickey's novel, *Deliverance*, contained the same language as the *Berkeley Barb* and that a copy of the book had been sold in Columbia to a fifteen year old boy shortly before the trial.<sup>36</sup>

The State's first witness of significance was Frank Perna, a former USC student who testified that he had sold drugs, including LSD, amphetamines, and marijuana, for several months inside the UFO. He also testified that the publications on display there offended him "morally with regard to sex, with regard to respect for constituted authority, . . . [and] with regard to discipline within the armed forces."<sup>37</sup> A SLED (State Law Enforcement Division) agent testified that he purchased from a sixteen-year-old boy in the UFO a

32. *USC's Jones Briefed*, THE STATE (Columbia, S.C.), Apr. 13, 1969, at 1-A.

33. Transcript, *supra* note 15, at 7-10.

34. *Id.* at 7-87.

35. Ginny Carroll, *Readings Open UFO Trial*, THE STATE (Columbia, S.C.), Apr. 17, 1970, at 1-B.

36. Transcript, *supra* note 15, at 1097-1105.

37. *Id.* at 363.

substance that another SLED agent testified to be LSD, according to laboratory tests he conducted.<sup>38</sup> Two other witnesses testified that they bought and sold drugs inside the UFO.<sup>39</sup>

The manager of the Elite Restaurant testified that patrons of the UFO blocked the sidewalk and that the music from the UFO was disturbing.<sup>40</sup> A police officer stated that he had responded to numerous complaints of loud music, blocked sidewalks, and obscene pictures, one of which was a poster featuring grinning American soldiers admiring severed human heads and captioned, in part, “the Army can really fuck over your mind if you let it.”<sup>41</sup>

The accountant for the Elite testified that gross night time sales had declined during the period of the UFO’s existence.<sup>42</sup> On cross examination Broadwater pronounced gross as though it rhymed with moss, prompting Foard to interrupt to inquire what “gross” sales were. Broadwater responded: “Your Honor, I am a product of a separate but equal school system,” resulting in applause and cheers from one side of the courtroom that Judge Agnew quickly gaveled down.<sup>43</sup>

Judge Agnew ran a tight ship. He ejected UFO supporters from the courtroom, including Reverend Gonzalo Leon, for not wearing shoes.<sup>44</sup> He had all entrances to the courtroom locked, with spectators admitted one at a time under the scrutiny of the bailiff. At one point the trial was stopped to search for a button containing profanity reportedly worn by a spectator.<sup>45</sup> The judge denied numerous defense motions contesting the prosecution itself and the manner in which it was being conducted and “emphatically denied” a defense request to remove the confederate battle flag that hung over the bench.<sup>46</sup>

### *The Case for the Defense*

The defendants acknowledged that there had been drugs on occasion in the UFO, but insisted that they, well aware that the police were looking for an excuse to shut them down, made substantial efforts to keep drugs out. Indeed, two of the state’s witnesses who testified that they had sold drugs there admitted on cross-examination that they had been thrown out of the UFO by

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38. *Id.* at 768-70.

39. *Id.* at 492-93, 602.

40. *Id.* at 569-74.

41. *Id.* at 694.

42. *Id.* at 862-64.

43. *Id.* at 866.

44. *Id.* at 634-35.

45. *Id.* at 1042.

46. *Id.* at 598.

the defendants because of their drug activities.<sup>47</sup> There was not an iota of evidence by any witness connecting the individual defendants to any of the drug activity. Furthermore, the credibility of the state's witnesses was suspect in that all three of the state's non-police witnesses who testified to drug sales admitted that they had been granted immunity from prosecution for all outstanding drug sales charges wherever committed, or other preferential treatment, in return for their testimony against the UFO.<sup>48</sup> One defense witness testified that the State's main witness, Frank Perna, had blamed his initial drug arrest on the UFO proprietors and had sworn to get even.<sup>49</sup> Others testified about Perna's reputation for exaggeration and general lack of credibility.<sup>50</sup>

Stanley Goldberg, a chemistry professor at USC, testified that the SLED test for LSD was virtually meaningless because a large number of substances would produce the same result.<sup>51</sup>

A soldier testified that he had been given money by the Richland County Sheriff's department to buy drugs at the UFO and went there four or five times a week for several months but never found anyone with drugs.<sup>52</sup>

The original founders of the UFO (one of whom was an editor of *Scientific American*,<sup>53</sup> and another of whom was a nursery school teacher and an artist) testified about their goals. They wanted to provide for local servicemen an alternative to the USO, which was just down Main Street, and to the honky tonk beer halls, diners, and pawn shops that seemed the only other places to welcome their patronage.<sup>54</sup> These witnesses, both at the time of their testimony residents of California, testified about police harassment, quoting one police officer who had told them that "it was unprecedented in Columbia for white and black young people to be seen talking together across tables the way they were constantly doing at the UFO."<sup>55</sup> They also testified about posters and announcements in the UFO urging patrons to keep drugs out.<sup>56</sup>

The chaplain/advisor to the YMCA/YWCA and to foreign students at USC testified that he had accompanied his son to the UFO and had not been offended.<sup>57</sup> An attorney from New York, Florynce Kennedy, testified about

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47. *Id.* at 378, 617.

48. *Id.* at 385-87, 520, 556.

49. *Id.* at 1445.

50. *Id.* at 1210-11, 1443-44.

51. *Id.* at 1513-20.

52. *Id.* at 1282.

53. *Id.* at 960.

54. *Id.* at 962-63.

55. *Id.* at 972-73.

56. *Id.* at 968.

57. *Id.* at 1065-68.

a visit to the UFO while on a speaking engagement in Columbia. She said that it seemed like a high school-type place because of the absence of liquor, which absence she found refreshing in a place that attracted servicemen. She testified having overheard some debate about the war among the soldiers, but not a consensus that the Vietnam War was a bad thing.<sup>58</sup>

Stanley Gutman, a Benedict College (a local, predominately African-American college) English professor, testified that the articles in the underground publications were not obscene even though they were open about sex and used profanity, in contrast to mainstream publications.<sup>59</sup> He acknowledged that he had been offered marijuana in the UFO but no more frequently than at USC or on the streets of Columbia.<sup>60</sup>

Two Methodist ministers testified about their multiple visits to the UFO and their not being offended by what they found there. During cross-examination of one of them, Ray Moore, who was also an English instructor at Columbia College (a local women's college), Solicitor Foard remarked that if Moore were a Methodist minister, then Foard, himself a Methodist, was ashamed.<sup>61</sup>

Dr. Seldon Smith, a history professor at Columbia College, testified about his visits to the UFO and noted that some prominent people, including Norman Mailer, had spoken there. Smith observed that the UFO was unusual in that persons of different generations could go there and not be uncomfortable.<sup>62</sup>

One soldier testified that he had been assigned by military intelligence to serve as an undercover agent at the UFO. The court sustained Foard's objection to this response and to any defense questions that might reveal a relationship between military intelligence or federal law enforcement and the local police investigation of the UFO.<sup>63</sup>

Lenny Cohen's mother testified that he was active in civil rights work and had worked on an Israeli kibbutz.<sup>64</sup> Will Balk's mother testified that as a TAR, a Teenage Republican, he had actively supported Sen. Barry Goldwater's 1964 presidential campaign.<sup>65</sup>

In his closing argument, Solicitor Foard sang a few verses of the hymn, "The Old Rugged Cross."<sup>66</sup> His tactics apparently were successful, because

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58. *Id.* at 1298-1300.

59. *Id.* at 1092-94.

60. *Id.* at 1119-20.

61. *Id.* at 1464.

62. *Id.* at 1152-53.

63. *Id.* at 1498-1506.

64. *Id.* at 1482-85.

65. *Id.* at 1490-91.

66. Broadwater Interview, *supra* note 16. The trial transcript does not include closing arguments. Copies of the words to the hymn were among the documents in the solicitor's files. See *supra* note 2.

after ten and a half days of trial it took the jury only an hour and fifteen minutes to convict the three individual defendants and the UFO itself. Judge Agnew revoked bail and placed the defendants in jail pending sentencing, even though, as observed by defense counsel, ordinarily one who had been free on bail pending trial was allowed to remain on bail pending sentencing.<sup>67</sup>

The following day Judge Agnew fined the UFO, Inc. \$10,000 and sentenced each of the three individual defendants to six years in prison.<sup>68</sup>

### *An Assessment*

Whose assessment of the prosecution was correct? Was it simply an effort to rid the community of a cesspool of drugs and filth that was corrupting our youth, as Solicitor Foard argued to the jury? Or, as maintained by the defense, was the UFO targeted by civilian and military authorities in an effort to throttle unpopular political speech?

Judge Agnew may have shed some light on this at sentencing when he observed:

As I understand it, two of the defendants came from great distances to this community. I have wondered where we are headed in this Country, and what the future holds for my own children. It concerns me. I certainly hope that they won't come under the influence of persons who will guide them in the direction that I feel individuals who frequented the UFO would guide them. . . . I don't know that there is anything that will change the thinking of the small number of individuals who feel that they have a right to be critical and demanding of the other ninety-five percent of the people that have to work for a living . . . .<sup>69</sup>

He was even more candid in a television interview two days later. He justified the six-year sentences by emphasizing that the defendants, with one exception,

were not citizens of South Carolina . . . [and] had come to South Carolina . . . for the sole purpose of causing trouble. . . . [A] great number of young people from all over South Carolina were exposed to the teachings of the defendants and the people of South Carolina are not accustomed to teachings of people from New York and San Francisco, who rebel against our form of life.<sup>70</sup>

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67. Transcript, *supra* note 15, at 1598-99.

68. *Id.* at 44a.

69. *Id.* at 43a.

70. *UFO Judge: Trial Fair, Impartial*, THE STATE (Columbia, S.C.), May 2, 1970, at 1-B.

Responding to Agnew's remarks, the *Wall Street Journal* in an editorial that left no doubt about its low regard for persons such as the defendants, noted that there was nothing in the case that could have remotely justified such a sentence. The editorial observed that the sentence "could erode respect for the [judicial process] far more effectively than any radical onslaught could hope to."<sup>71</sup>

Two years of intensive investigation and infiltration of the UFO produced not a single shred of evidence that the defendants had any connection whatsoever with marijuana or other drugs except for their efforts to keep them out of the UFO. There appears no reason not to accept Agnew's statement at face value: the six years imprisonment was given solely because of their unpopular political speech.

Judge Agnew explained his sentence fairly well. There is still the question of why the prosecution was brought in the first place. While no one in the executive branch of government has been as forthcoming as the judge, three separate inquiries shed some light on the issue. What was the government doing in relation to the UFO prior to the charges being brought? What actually precipitated the charges? And finally, what did the government do after the case was over?

First, police and other governmental presence in the UFO, both overt and covert, had been massive. One officer testified that he had been in the UFO more than three hundred times.<sup>72</sup> Another officer, who did not testify, subsequently stated that he had visited the UFO in plain clothes nearly every day and that there were a number of undercover agents there as well.<sup>73</sup> This fact was also well known by the UFO operators. One who was very involved in UFO activities but not a defendant recently noted, "They [the undercover infiltrators] were so eager to be useful and accepted that whenever we had a really nasty chore, we'd just give it to one of them."<sup>74</sup> He also quipped, "I used to think I was really popular. It was only later that I learned all those guys were being paid to be my friends."<sup>75</sup>

The fact that there was reason to suspect that drugs were in the UFO might justify the police undercover presence there. But the occasional joint or lid of acid could hardly explain the interest of the F.B.I. That interest was intense. F.B.I. documents subsequently obtained under the Freedom of Information Act reveal extensive and in-depth undercover activities. The documents contain detailed profiles of all of the principal UFO operators

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71. *A Demeaning Disproportion*, WALL ST. J., May 11, 1970, at 14.

72. Transcript, *supra* note 15, at 719-20.

73. Interview with John "Dude" Keef, now retired from the Columbia police department, in Columbia, S.C. (Dec. 7, 1993) [hereinafter Keef Interview].

74. Interview with Brett Bursey, in Columbia, S.C. (Nov. 23, 1993).

75. *Id.*

including their backgrounds, political beliefs, sexual preferences, and even travel plans.<sup>76</sup> Also, the Army acknowledged that one of the leaders of a group of anti-war enlisted men at Fort Jackson was in fact an Army plant.<sup>77</sup>

Sonny Clark, the deputy sheriff who actually arrested the defendants, acknowledged years later that the military assisted the county in its investigation.<sup>78</sup> Additionally, the copy of a pretrial letter from Foard to the chief investigator of the Internal Security subcommittee of the United States Senate Judiciary Committee suggests on-going mutual assistance and exchange of information between the subcommittee and the solicitor.<sup>79</sup>

The indictment of the UFO was precipitated by the merchants' petition to close the place because of loud music and congested sidewalks. The sidewalks were at times quite crowded. The Elite's accountant recently stated that there were "hippies sitting on the curbs whom patrons of the Elite would have to sometimes step over."<sup>80</sup> And the music at times was loud, although certainly not by today's standards, according to one of the principal police investigators.<sup>81</sup> Nonetheless, Ms. Manos, the widowed owner of the Elite, was very reluctant to sign the petition, allegedly because she was scared of the hippies and possible retaliation.<sup>82</sup> It was only after repeated pressure from the minister of a church a block away, from one or two of her fellow merchants, and especially from City Hall that she finally signed. The Chief of Police and police captains regularly had their coffee at the Elite, and their urgings were persuasive.<sup>83</sup> The petition was then presented to the grand jury, which issued the indictment, and to Judge Agnew, who issued the injunction padlocking the UFO. Incidentally, there never was any retaliation by the hippies.<sup>84</sup>

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76. Document from F.B.I. Office, Columbia, S.C., *Summer of Support, UFO Club, Columbia, S.C.* (Jan. 21, 1970) (including an "Agent Report" (Nov. 10, 1969)) (copy on file with author). This document was acquired by an FOIA request and is on file at the office of Harbinger Publications, Columbia, S.C.

77. *G.I. War 'Dissident' Is Army Informer*, N.Y. TIMES, Apr. 10, 1969, at 1.

78. Claudia S. Brinson, *UFO Coffeehouse Typified Clash of Wills in the 1960s*, THE STATE (Columbia, S.C.), Sept. 28, 1988 at 1-A, 11-A.

79. Letter from John Foard, Richland County Solicitor, to the Honorable A.L. Tarabockia, Chief Investigator, Subcomm. on Internal Security of the Senate Judiciary Comm. (Jan. 19, 1970) (on file with author). The copy of Foard's letter is one of the documents in Foard's files regarding the UFO that were sent to the ACLU's Southern Regional Office after the solicitor's death. See *supra* note 2.

80. Interview with Paul C. Tsalapatas, in Columbia, S.C. (Dec. 16, 1993) [hereinafter Tsalapatas Interview].

81. Keef Interview, *supra* note 73.

82. Tsalapatas Interview, *supra* note 80.

83. Interview with William "Bill" Cauthen, former captain in the Columbia Police Dept., in Columbia, S.C. (Dec. 6, 1993).

84. Tsalapatas Interview, *supra* note 80.



Finally, after the guilty verdict and sentence, Solicitor Foard went on a vendetta against all the professors who testified for the defense. Claiming that, based on their testimony at the trial, “there are professors who don’t belong at the university,”<sup>85</sup> he offered to turn over a copy of the transcript to USC, as well as to Benedict and Columbia Colleges, so that appropriate personnel decisions could be made. Columbia College responded by not renewing the contract of Ray Moore, who lacked tenure, and by conducting an extensive fitness hearing as to Prof. Seldon Smith at which the UFO transcript figured prominently.<sup>86</sup> Smith, who had tenure, was retained. Foard also railed against the “UFO in Exile,” organized by USC students, and against the *Gamecock*, the student newspaper, which had been pro-UFO and anti-Foard. Professors speaking for the USC Chapter of the American Associate of University Professors made a strong statement for academic freedom and urged the university to resist Foard’s pressure.<sup>87</sup>

### *The Aftermath*

At a rally on behalf of the UFO defendants shortly after the trial, Merle Ferre, then nearly nine months pregnant, went into labor and was taken to the hospital where her child was stillborn. Some months later the criminal appeal was aborted. While it was pending in the South Carolina Supreme Court, a deal was struck. In return for the defendants’ dropping the appeal and related litigation in federal court, they would be resentenced to two years, suspended on probation for one year on condition that they leave the state immediately.<sup>88</sup> (Banishment had been requested as a sentence by one of the defendants.<sup>89</sup>) The defendants, who proved to be no more popular with the run of the prison inmate population than they had been with the run of residents and police in Columbia, accepted. The charges against the two untried

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85. John D. Spade, *USC Group Says Foard ‘Threatens Freedom’*, THE STATE (Columbia, S.C.), May 1, 1970, at 1-B.

86. Interview with Prof. Seldon K. Smith, in Columbia, S.C. (Nov. 29, 1993). Prof. Smith still has the bound copy of this UFO testimony that Solicitor Foard presented to the college and was used at Smith’s fitness hearing.

87. See *supra* note 85.

88. A motion for resentencing, joined by the solicitor, was filed in the South Carolina Supreme Court on April 8, 1971. The South Carolina State Archives contain no explicit response by the Court but do contain the subsequent sentencing order by the trial court, now with Judge Francis B. Nicholson presiding. The “Conditions of Probation” make no explicit reference to banishment, but the standard condition requiring the probationer to remain within the state was deleted. Added under “Special Conditions As Ordered By the Court” is the following: “Defendant allowed to leave the State without posting bond and mail [sic] monthly reports.” *State v. Balk*, No. 28781 (Ct. Gen. Sess. Richland County, S.C. Apr. 15, 1971).

89. Transcript, *supra* note 15, at 37a.

defendants were nolle prossed, and the defendants agreed to dismissal of the litigation in federal court challenging the prosecution.<sup>90</sup>

### *A Final Comment*

Foard achieved most of what he wanted. The UFO was shut down, and the defendants were banned from the state. One of the professors from Columbia College who testified in their behalf was terminated from his position, as was Jon Kraus, the president of South Carolina chapter of the ACLU and an untenured instructor in international studies at USC. Foard's goal was to stifle dissent, and in large part he succeeded.<sup>91</sup> The dismissal of the appeal and related federal litigation necessarily precluded vindication of all First Amendment claims.<sup>92</sup>

Today Merle Ferre runs a small business out of her home in upstate New York where she lives with her teenage daughter and has another in college. Duane Ferre was seen about half a dozen years ago selling jewelry on the streets of Austin, Texas. Both Will Balk and Lenny Cohen live and work in Washington, D.C. Chris Hannafan could not be located. Solicitor Foard and Judge Agnew are both dead. Tom Broadwater has a successful law practice in Columbia. Reber Boulton is in private practice in New Mexico. Laughlin McDonald is the director of the ACLU's Southern Regional Office in Atlanta. There is no remaining trace of the UFO.

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90. The initial request for injunctive relief was argued in the Fourth Circuit Court on December 10, 1970 in advance of the criminal prosecution. In an unpublished decision two years later that court, noting the resolution of the criminal prosecution, remanded the case to the district court for a determination of continuing justiciability. *U.F.O., Inc. v. Agnew*, No. 14,608 (4th Cir. Nov. 8, 1972). The district court noted that the criminal defendants had agreed to dismiss all related federal litigations in return for their resentencing and dismissed the case with prejudice. *U.F.O., Inc. v. Agnew*, No. 70-112 (D.S.C. Dec. 7, 1972).

91. In a newspaper interview many years later Foard claimed that his only concerns had been with drugs and loud noise and not with political viewpoints. Claudia S. Brinson, *UFO Coffeehouse Typified Clash of Wills in the 1960s*, THE STATE (Columbia, S.C.), Sept. 28, 1988, at 1-A, 11-A. He also denied involvement with federal investigation of the UFO: "I refused to talk to federal agents about the matter. They never tried to approach me." *Id.*

92. The decision to drop the appeal and get out of prison was properly one for the defendants and not their attorneys. Not all concerned were necessarily pleased with the abandonment of the free speech claims. Thereafter, some local ACLU attorneys were heard to quip: "If you want to open an anti-war coffeehouse, probably we'll be able to get you off with probation."

