

# The First Amendment and the National Security State

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**W**hat is there left to be said about the freedom of speech, or its American affirmation, the First Amendment? Not much, I think, even considering that old truths need reavowal. Read Milton, read Meiklejohn; they said it, for their times and ours. A modern commentator can report that the old faith currently is endangered; but they knew that it would always be.

One has, of course, one's own positions in today's debates. Mine lead me to views that, in the sense that they fall within no single camp, may be controversial. But as the very essence of free speech is faith in discussion—indeed, a conviction that without it there is no civilization worthy of the name—that is not surprising. Free speech is the natural foe of orthodoxy, even that of liberals. To clear the way for the emphasis I shall put forward in this essay, some of these positions should be briefly set out.

To begin with, I think the language of the First Amendment should never be evaded. "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble." That ought to be obeyed as it stands. No law means *no* law. Consequently, I would reject all balancing tests, whereby other considerations such as—and most especially—"national security" are weighed against the individual's freedom (more on this later).

At least three subsidiary points might be made; many liberals will regard them as weakening ones: I do not agree, for they restrain that litigious stretching of the First Amendment that, it seems to me, can lead only to its thinned strength. A first is that the expression "freedom of speech" is not transparently clear. It needs interpretation and reinterpretation as history moves along. To me, as it has to others, it relates to that kind of speech that enters into democracy's debates about public issues and the governance of the country (on this too, more later). Other kinds of expression are questionable; advertising for example—some like to call it commercial speech—is a part of commerce and should be treated as such.

A second and more important point is that the only kind of balancing that should occur is between rival claims of individual rights; the rights of the press

and the right to a fair and impartial trial may at times seem to conflict, for example, to the parties involved. I do not think any part of the Constitution should be “preferred” over any other, and I can think of no more serious task of any court than that of occasionally having to keep individual rights in balance.

And third, unless we are prepared to say that the police power of the states is nonexistent (the federal government has none), I do not see that we can say that the absolute prohibition of the First Amendment as applied to the federal government has equal force when it is a matter of the states’ prerogatives to act in behalf of their peoples’ health, safety, and morals. Consequently, I have, for examples, a good bit of sympathy for governors who do not see rugby games as forms of speech and the Burger court’s deferral to community standards of pornography.

But, to return to the essential principle, what that same court has done to the First Amendment in sustaining with enthusiasm the federal government’s persecution of Frank Snepp and Philip Agee<sup>1</sup> brings us again in sight of that kind of law we had at the peak of our post-wars’ Red hysteria—and at a far more dangerous juncture in humanity’s affairs.

The First Amendment protects not only “freedom of speech, or of the press” but the right of peaceable assembly as well. The right to assemble is less than absolute, in that it must be peaceable, but is precious nonetheless. Constitutional scholars sometimes sniff at it, and even that great literalist of the Supreme Court, Hugo Black, was decidedly suspicious of it. The press, always zealous in defending its own prerogatives, tends to minimize it—as well as the crowds who turn out in its exercise or the speeches made to them or the effects of it all. Let a police chief in Podunk glower at the local editor and the national press will thunder. Let police anywhere, including Washington, break up a demonstration and the papers will mention it in most cases at the bottom of a back page, if at all.

In fact, free assembly is often an educator of the press. Reporters may typically be skeptical of conferences and demonstrations, and tend to appraise them as if they were stage productions—was it a good show? a sell out?—and not as serious communications. But in time their force gets through. The civil rights demonstrations in the South did educate reporters (and their editors), and give them a more informed sense of the seriousness of black feeling than they were uncovering by their own techniques. On the issue of war and peace, the performance of the American press through the decades has, with few exceptions, been either jingoistic or protective of the government in office; to this day the re-

<sup>1</sup> *Snepp v. United States*, 444 U.S. 507 (1980); *Haig v. Agee*, decided June 29, 1981. In both cases, the court avoided First Amendment claims, subordinating them to the government’s powers to enforce employment contracts and restrict foreign travel.

porters covering the Pentagon for our two most influential dailies, the *New York Times* and the *Washington Post*, could by their writing often be mistaken for public information officers. The peace demonstrations against the Vietnam War jolted the press into realizing that there was a body of opinion and resolve that it, and the country, had to take seriously. Recent demonstrations in western Europe against nuclear weapons are accomplishing the same thing.

**M**y concerns are ones that many others share. Mainly, they amount to a nagging and growing fear that freedom of speech and press may be hollow values for a public that gives more and more distressing signs that it has nothing much to say. The causes include, it seems to me, the mind-deadening fare of television; the smothering of elections (and the office holders they produce) by money; and the almost incomprehensibly vast and complex mind-forming actions by corporate America to maintain and enlarge a national ideological orthodoxy. Perhaps a bit less conventional is my main worry about the Moral Majority types: their ability to process political money, and not their campaigns for social purity. If one believes in robust political discussion, well, one believes. As Milton asked, "Whoever knew Truth put to the worse in a free and open encounter?" And if one believes—as I do—that freedom of speech is the due of even those who if in power would destroy civil liberties, one has to believe in its exercise by those who, if they could, would censor all expression they did not like. Democracy is a sort of daily wager that the anti-democrats won't win out. We hedge the bet by giving legal force to rights, but even so sometimes the wager may be lost, and freedom's enemies may win for a time. The First Amendment, in protecting minority rights, protects also the rights to become a tyrannizing majority; and our main vulnerability is not the zealotry of some but the mindlessness of many.

**T**he meaning of the freedom of speech that is the theme of this essay is one too seldom expressed. It is that free speech is the principal protector of peace. In whatever measure free speech is not an end in itself (and I think it not), its primary function today is just that: peacekeeping.

Freedom of speech should be thought of not only as a Constitutional principle but also, and of even more importance, as a constitutive principle. I mean that in no historical sense, only in the sense that it is futile to think of a democratic polity resting on anything other than a social contract. However a state may have evolved, whatever transformations it may have undergone, it simply must—if it pretends to democracy—hold that it embodies and represents an agreement of the people, one currently in sway whether or not it has any history. That agree-

ment has always to be in process of renewal, the people must be continuously re-giving consent; again, a proposition that seems unavoidable for a democracy. And without the freedom of speech, such renewing is patently impossible.

Free speech and consent are inseparable principles in a democracy. It is at least thinkable that in some autocracy free speech could be allowed, as a privilege, by a governing elite confident of its power. But it is not even thinkable that in a polity claiming to derive all its powers from the consent of the citizens that free speech can be other than an unshakable right. Put differently, *any* abridgement can only mean the removal of an area of governing power from the consent of the governed; for if it cannot be discussed it cannot be presumed to have been consented to.<sup>2</sup>

We have all tolerated various diminutions of our consenting authority, have accepted such as the normal practice of governing. The classic polar extremity is troop-ship sailings; who wants to discuss *that*? Was specific consent given to that ship's sailing? Of course not, though perhaps one can be held to have given consent to—to have helped legitimate—the person or persons who dispatched it. But for *that* purpose? There is the rub.

I no longer, in this thermonuclear age, want anyone dispatching those ships—I am speaking metaphorically—without my consent, and have grown more and more skeptical of the representative methods we have for ascertaining consent. I say that, even knowing that in the thermonuclear age instantaneous decisions are deemed more necessary than ever. Sending the troop-ships off to Vietnam with only the most thinly stretched form of citizens' consent was bad enough. But what if a president were to choose to dispatch our intercontinental missiles upon suspicion that the Russians were preparing to shoot theirs or on learning of missiles on their way: is my consent to be inferred? Or even after an attack and its devastation may have occurred is my consent to be inferred to a retaliatory strike which will cause millions of deaths there and probably millions more in counter-retaliation *here*, including (likely as not) my own? Clearly, this is a dilemma to which growing millions of the world's people are becoming sensitive.

Intellectual honesty compels acknowledging that my views on such matters are inconsistent with ones earlier held by myself and many other liberals. Take, for example, the "clear and present danger test." A couple of generations of American liberals gave it their proud allegiance. True, we occasionally did look over our shoulders at just what it was Justice Holmes had said—"Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . ."—and wondered momentarily just how firm a founda-

<sup>2</sup> If the people's thinking is directed or manipulated by demagogues, bosses, or advertisers, we get, at best, a diseased form of consent; but that is a topic for another—or another day.

tion it actually was.<sup>3</sup> But when Judge Learned Hand and Chief Justice Vinson ditched it in order to sustain the Smith Act and convict the Communists in *U.S. v. Dennis* (1950), we clung still to its assumed protection. No more: I want none of it, or of any other balancing test which pits the mighty claims of national security against our right to speak freely and to dissent fully.

**W**hy this change of trust toward government? The easiest answer (and probably the principal one) is the destructiveness of modern war. Survival of person, property, and culture is at great risk, and more and more of us feel unrepresented in their defense. We see the decisions that mean to us more than any others being made by a few elected officials—most of whom one did not or because of residence could not vote for—and a horde of nonelected ones and their counterparts in the governments of allies. We are even told that crucial war-making decisions may be made by programmed computers.

We falteringly begin to wonder anew about political theory's root question. Whatever else a state may be for, it must provide for most of its members better chances of survival than anarchy would. Is that still true, or have we by technological wizardry been brought back to beginnings, where we must ask whether the state power, with its monopoly of modern weaponry, is not today the chief threat of survival? If a lover of life and culture were given, as he rose from reading the latest news of threatening war, a magic wand that would whisk away all the state apparatuses of the nuclear and near-nuclear powers, leaving anarchy at their departure, would he wave that wand? Imagine that person being whom-ever you respect most; would the wand wave? Again putting the question differently, is a death wish the modern form of the social contract?

I think it is, but only in the measure we tolerate limits on political speech and dissent. Hobbes, and in fact most of us, held that state power was the only alternative to lives brutish and short; if it still may be, it is so only when free speech lives within it. If we recognize that "national security" ought to be reducible to "citizen security," and concede, as we must, that that is at high risk in this thermonuclear era, then here if anywhere the "debate on public issues should be uninhibited, robust, and wide open."<sup>4</sup> It is precisely those areas where national security is claimed that can least tolerate limitations. "Political freedom ends when government can use its power and its courts to silence its critics. My point is . . . that defamation of the government is an impossible notion for a democracy. . . . A society may or may not treat obscenity or contempt by publication as legal of-

<sup>3</sup> No act of Congress—or of any federal body—has ever clearly failed the test.

<sup>4</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270.

fenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics." We need to extend that true statement farther.<sup>5</sup> Profound change has occurred in American governing when without effective judicial opposition, and in some cases with *judicial connivance*, Marchetti and Marks are censored, Halperin eavesdropped on, Snepp vindictively punished, Agee hounded into a corner.<sup>6</sup> The government in all these cases acted to confirm radical paranoia. Worse than that, it made life's chances weaker: in all these abridgements it enlarged its power to act unaccountably as the sole judge of how it shall use its power and for what ends.

"There are inherent contradictions," said William Casey of the CIA, in asking Congress to give "total exclusion" from the Freedom of Information Act to his agency, the National Security Agency, and the Defense Intelligence Agency, "in applying a statute designed to assure openness in government to agencies whose work is necessarily secret. This application has caused intelligence functions to be seriously impaired without significant public benefit."<sup>7</sup> Repression is protean: in Milton's day, state licensing (which we thought little of until the *Marchetti* case); in ours, state secrecy (which he would have little questioned). For us as for Milton, the question is what does the state forbid or order which is opposed to the liberty one requires to exercise both personhood and citizenship? Mr. Casey would balance openness in government against secret, unaccountable government and without question would give the judgment to the latter. We can be sure, too, that part of that necessary secrecy would include nondisclosure of just how the CIA's work has been "seriously impaired." As has been said, "balancing" could never begin without the initial premise "that repression is safer than freedom."<sup>8</sup> We are expected, therefore, to trust particular bureaucrats, whose virtually entire *public* record has been one of corruption, incompetence, and illegality.

<sup>5</sup> Harry Kalven, "The New York Times Case," *The Supreme Court Review* (1964) 205. Kalven would, "by dialectic progression," himself extend it.

<sup>6</sup> Victor Marchetti and John Marks are authors of *The CIA and the Cult of Intelligence*, of which prior restraint of many parts was upheld; Morton Halperin was wiretapped for nearly two years in order to discover what he was saying to others about the administration's policies, and his suit for damages has wandered through the courts since 1973; Frank Snepp had his book royalties confiscated for describing from nonclassified sources the ineptitude of officials in managing our withdrawal from Vietnam; Philip Agee has lost his passport for publishing the names of federal employees hired to spy or engage in illegal political activities abroad.

<sup>7</sup> *New York Times*, September 25, 1981.

<sup>8</sup> Laurent B. Frantz, "The First Amendment in the Balance," *71 Yale Law Journal* (1962) 1439.

There are other causes at work for people's growing uneasiness about state power beside their fear of dying. The times are rife with paradox. Everywhere there is spreading distrust of government; but all the same, governments everywhere ask for and generally get acquiescence in their possession of larger might. Centrifugal forces are evident in many states around the globe, more today than yesterday and probably fewer than tomorrow. Central governments come and go and don't seem to make much difference in a world whose many problems have become internationalized (even if political organs have not). They do better at their punitive desires, such as now, in Britain and the United States, "disciplining" the poor.

But they do well at war making and war preparing. That is well-nigh all that governments know how to do, in what we must hope (even if blindly) are the twilight days of the national state system. Recently, a fashionable interpretation of Russian conduct has been to say that with economic failures all over the place the Kremlin turns to what it can do to its satisfaction: military adventures and armaments production. But if true of the Russians, and it may well be, it is true of the rest of us as well. What else have the Thatcher or Reagan administrations known, or did Carter's know, how to bring off?

Liberals are foolish if they make light of the dangerousness of international relations today and of the threatening might of the Soviet Union. The destruction of our country is a conceivable possibility, if not an imminent one; if not by one adversary then later by some other. But liberals, and all others, are equally foolish to see national annihilation as something that can be averted through reliance on national states, pursuing their individual interests as defined by power holders and managers. If ever life demanded the free and thoughtful voicing of the claims of life—of the rights of the living to go on living—it is now. Not only our country and our civilization but humanity requires that no ideological barrier stand in the way of that. If one accepts the dire strategic analyses that come today from those who shape American foreign and military policies<sup>9</sup> the need for radical political debate is even greater. Policies that dictate the subordination of every other interest of the people to the preparation for war which, if it comes, is assuredly annihilative ought, at the very least, to be democratically consented to. We should not, to be clear about it, even avoid debating, at the extreme, "whether better dead or Red." Certainly along the way to that we should without ideological inhibitions be exploring whether withdrawal from the arms race is not a less risky path than its pursuit; and should above all and first of all be debating what comes close to being outside all our political discussions, and

<sup>9</sup> For example, in such publications as *International Security Review*.

that is the question of what are the security interests of our people; not of our multinationals or of our prestige but of ourselves.

**T**he freedom of speech is, to repeat, the constitutive principle of any political society, of whatever extent, that thinks of itself as based on consent. In the measure that we allow it to be abridged, or corrupted, or to fall into disuse, we exchange consent for sheep-like acquiescence. The British constitutionalist, Ernest Barker, used to define democracy as government through discussion. There is no getting away from that, or the imperative of dissent that it implies. We were all born, culturally speaking (even those of us descended from enslaved Africans), in the Hellenic commitment to discourse. That took place in the *agora*, in the market place, and was a political process.

But to celebrate free speech and discussion when effective fora and ways of influencing policy determinations are as remote and elusive as ours are can be mere sentimental flourish. Everyone who has sat in meetings to plan a public statement, conference, or demonstration knows what the main question always becomes: "how do we reach the media?" Those who want to speak to an issue not yet of interest to the media know too the reality of supplication. In complex and large modern societies there may be a good available alternative to this media-dominated system of discourse, but if there is I do not know it. Concentrations of ownership and corporate magnifications have, however, taken us in two directions, one of which—the greater production of information, of "coverage"—is not wholly good, for our minds struggle against its mass as well as grow from it, but it is probably indispensable to the formation of either informed dissent or consent. The other—the diminution of varieties of opinion and news treatment and of the portals of access to reader and viewers—seems altogether bad; but what can be done to democratize this oligopolistic industry is beyond this essay's scope. Those who direct the principal media are not only our discussion leaders, but are an aristocracy of great power. As such, they cannot be expected to be in the forefront of dissent, although they do defend well their own rights, including the central ones of free news-gathering.

Those reporters' rights are vastly important, they do serve well the interests of society, and, difficult as the process may be, sooner or later the American system does give a hearing to the variety of strongly and seriously held views that abound, *except for the big heresies*. Civil rights was such in the South between, roughly, 1954–1960, when virtually all public discussion was shut off, and for a few years longer than that in many places; no forward movement was really possible until the right to talk about segregation was secured.

Too much of our foreign and military policies is dogma, questioning of which is heretical. That is accentuated by our ingrained distrust of Russia or Com-

munism (I am never quite sure which is basic). The Marxist doctrine of “permanent revolution” has been matched by ours of “permanent scapegoat.” Why do we dislike/distrust/hate/fear—whichever it is—Communist Russia so? And why have we for so long? As segregation and civil rights had to be made discussible once, so such questions do now. War vs. peace has to be discussible; therefore, dissent and heresy have to be respected; and, therefore, claims of “national security” must not be balanced against freedom of speech. When lawyers, academics, journalists, and other commentators simply assume that such balancing can and even must occur, they become instruments of state power. The balancing leads virtually always to deferral to the reigning security claims. For those can never be satisfied. “Like some gigantic, expanding ectoplasm, ‘strategic balance’ of nuclear weaponry hangs above us, sucking up everything . . . into itself.”<sup>10</sup>

Free discourse is not only a right, but in a democracy a necessity, indispensable to the governing process itself. Its limits? To ask what they are is to imply a need for them. Why should we take such for granted? That is in itself a question for public debate. In his concurring opinion in the *Dennis* case, Robert Jackson said, “This prosecution is the latest of never-ending, because never successful, quests for some legal formula that will secure an existing order against revolutionary radicalism.” The “formula” is sought because it is assumed there should be one, that the cause of security is good and necessary. Perhaps it is “never ending,” however, because no such formula can be grasped successfully within the First Amendment, or elsewhere in the Constitution.

What is obvious today is that the national state system is incapable either of satisfying the people’s wants or protecting their lives. Somehow it has to be transformed. The economies of the world are already escaping from it, though not in ways that bring less misery to the world’s poor. What more sensible political forms can evolve is, for the time being, a dark mystery. But so in the sixteenth and seventeenth centuries were the political forms that rescued Europe from the savageries of religious strife and, earlier, from its holy crusades. There is no way out, except uninhibited thought and discussion by people sorting out their interests and imposing them on their political institutions. We must insist that governments not stand in the way of that.

I sometimes think that the curse began with Aristotle, who taught us so thoroughly that the “polis exists by nature and that it is prior to the individual.” I do not propose that we unlearn that, at least not in Aristotle’s noble meaning. But the national state is light-years away from the polis, or behind it. When it became so is perhaps arguable, but it happened not later than Almagordo, if not during the first “great” war of this savage century. We need new political theory, that sees the state as adversary insofar as it holds itself unaccountably sovereign. The

10 E.P. Thompson, “Mid-Atlantic Moderate,” *New Society*, December 24–31, 1981.

task of our politics today is not the rebuilding of citizens' confidence in their states, but in themselves. To build confidence in their ability to find ways of getting along with each other, of jointly protecting the species' culture, of respecting the values that enlarge and advance life.

The instrument of that task is the freedom to speak on whatever pertains to social life. When that is curtailed or not used, government by consent is proportionally diminished. Or, if one philosophically prefers, our humanity is violated, and that is so whether free expression is thought of as a natural right, pertaining to the very nature of rational man, or, in an Aristotelian way, as action essential to realizing man's nature.

The polis may be "prior" to the individual, if by it we mean—and here we get in the vicinity of Aristotle's own meaning—the set of social influences that, in de Jouvenel's good phraseology, help enlarge the "mutual trust at the heart of the social whole." (And in this sense, may it not also be prior to the national state, which possibly has to be seen as a developmental mistake?) For the widening of social trust the instrument also is free discourse.

When politicians, in or out of office, ask for trust, one does well automatically to deny it; when they say, let us reason together, they are worth at least a try. For discourse enables the discovery of the "mutual trust," a common good that is something more life-like than any abstraction such as "national security"; and for this reason it is often feared by state managers.

Unhappily, "reasoning together" among citizens and leaders occurs but seldom in the West, and hardly ever in the East and the new national states of the so-called Third World. Fearsome as is an American government led by the likes of our recent presidents (each of whom, as Calvin Trillin has observed, makes you incredulously nostalgic for his predecessor), the Russian state is even more frightening. That enormous accumulation of unrestrained power! One may take such consolation as he can from the possibility that it may be effectively checked by factors that operate also on our own leaders: fear for their own lives, for loss of their own positions during an upheaval, and by doubts whether its people would obey marching orders.

There we have it. That doubt—again, I speak somewhat metaphorically—is the people's ace. Orthodoxy is war's friend; dissent is that of peace. When we keep discussion alive, when we insist that it be honored and tolerated, we keep alive the chances of peace. What else have we, as a people, to offer the Russian people that is more peace-including than the example of a society not sealed into its rulers' policies but vibrant with skepticism and freely resistant to all state orthodoxies? The doubts we sow here could well spring up in the East. This ugly, gorgeous, beloved country of ours, so grim, so beautiful, and so loved, is yet so fearful. Let us take seriously the possibility that nothing liberals and radicals can do for it and for the world is a greater service than to show that we do not fear it.

Poles have been in insurrection, young Afghans are fleeing conscription, West Europeans are in the streets protesting our military strategies, and in our own country a critical mass of opposition to nuclear weaponry builds up, ably strengthened by European peace movements. All these and more signs point to days ahead when the rulers of the superpowers will feel increasingly defensive. We are shortsighted indeed if we do not anticipate that repression and its twin, political orthodoxy, will thrust forward. The probable question is not whether new and strong restraints on questioning and dissent will be undertaken by nervous governments—for such will almost surely happen—but whether, this time, people will have character enough to practice freedom, despite governments' bullying.