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## FREE SPEECH: AT WHAT PRICE?\*

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It is now 30 years since Mr. Felix Frankfurter, then law teacher, called upon the political scientists for help. I propose to consider in what manner we might respond to his appeal.

In a review of the first book by one of our now distinguished colleagues, Mr. Frankfurter urged political scientists and economists to quit trying to be lawyers and to act more like specialists in the study of human relationships. "What we have a right to expect from economists and political scientists," he said, "is an analysis of what true governmental problems are, in the light of what actually goes on in the world and wholly apart from the technicalities of American constitutional law. . . . Until the economists and political scientists attend to their special tasks and we lawyers to ours and each has awareness of the other's problems, we shall continue to have . . . cross-sterilization of the social disciplines."<sup>1</sup>

Last week Mr. Frankfurter terminated a quarter century of service on the nation's highest tribunal. From that tribunal come oracular pronouncements of profound significance, fixing bounds to the power of law-making assemblies. I have read many of these pronouncements with considerable care, and I am convinced that the men who utter them need a kind of assistance which the political scientists can supply. I propose, therefore, to give you my judgment as to how this profession may render a service which one of the nation's most eminent jurists called for 30 years ago.

I shall speak about the problem of putting meaning into the Constitution's declaration that Congress—and by extension the 50 state

legislatures—shall make no law abridging the freedom of speech, or of the press. And my objectives will be to identify certain aspects of that problem most likely to be illuminated by the political scientist's kind of attack and, having found the site for our effort, to say enough about what we might do to convince you that we ought to move in with our tools.

The Supreme Court has not yet come to agreement on the basic presumptions which will underlie the decision of nicer issues of legislative authority relating to speech and press. At least two present members of the Court, Justices Black and Douglas, have declared their commitment to a presumption that the prohibitions of the First Amendment are absolute—that the prohibitions of laws which abridge the freedom of speech or press are absolute denials of power to impose restraints on speech and press. It will come out in a moment, however, that they favor a qualified absoluteness.

Opposed to the idea of absolute prohibition is the so-called balancing doctrine—the contention that the nation's interest in freedom of speech and press is in competition with its interests in some other valued things that sometimes are endangered by unrestrained expression, that the competing interests ought to be evaluated and balanced out, and therefore that a test of reasonableness ought to be applied in litigation where abridgment of speech or press is charged.

A third point of view about the fundamental character of the free speech guarantee has been pressed with great persistence by Professor Alexander Meikeljohn of the University of Chicago. The First Amendment, according to him, protects political communication only. It is designed to keep government from restraining what people say in their efforts to instruct, criticize, and control their govern-

\* Presidential address, American Political Science Association, Washington, D. C., September 5, 1962.

<sup>1</sup> *Harvard Law Review*, Vol. 45 (1932), p. 764.

ment. As respects political speech, the prohibition is absolute. As respects all other expression, Professor Meikeljohn argues, government may abridge freedom of speech and press so long as it does not violate any of the constitutional limitations found elsewhere in the Constitution. When a restraint of non-political speech is challenged on due process grounds, for instance, a court should evaluate the gains and losses which can be credited to the act, and determine its validity by application of tests of reasonableness.

No matter which of these three basic presumptions controls judicial thinking about laws that have an impact on self-expression and communication, critical decisions will turn on tests of reasonableness. This is admittedly so, and obviously so, in the case of the balancing doctrine; reason inevitably must rule when choice is made among competing values. Reason, therefore, must rule under the Meikeljohn formula when the restraining act is found to encumber non-political speech.

It has been argued that the concept of absolute prohibition excludes a concept of reasonableness. Justice Douglas has stated emphatically and repeatedly that inquiry into what is reasonable is wholly inappropriate when a court is convinced that speech or press has in fact been restrained. Indeed, I think it likely that Justices Douglas and Black, and Professor Meikeljohn when he contemplates utterances that have political significance, endorse the idea of absolute prohibition because they expect it to remove controversy about what is reasonable from the judicial forum.

In my judgment this is a vain hope. The absolute prohibition doctrine runs squarely into issues of reasonableness at three points. When you examine what Justices Black and Douglas have said from the bench and in addresses delivered at other places, you learn that one of them or both of them has asserted: *first*, that the First Amendment does *not* protect *all* kinds of verbal expression: *second*, that expression which the First Amendment does protect sometimes loses protection because it is inextricably mixed up with other action; and *third*, that statements which ordinarily are immune from restraint by government may be forbidden if the words can be said to be the efficient cause of certain punishable actions.

Consider these statements by the two men who have, more than once, said that the prohibitions imposed by the First Amendment are absolute:

Justice Black in a public address, two years ago: "There is a question as to whether the

First Amendment was intended to protect speech that courts find 'obscene'."<sup>2</sup>

Justice Douglas, speaking also for Justice Black and Chief Justice Warren in 1957: "Of course, we have always recognized that picketing has aspects which make it more than speech. . . . I would adhere to the principle . . . that this form of expression can be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the State can regulate or prohibit."<sup>3</sup>

Justice Douglas, speaking only for himself, in the Dennis case in 1951: "The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality."

The bounds of legislative power to abridge speech and press on each of these three frontiers, can be fixed only after the judge has decided where a reasonable man would draw the line. I have not time to trace the reasoning which leads to this conclusion. Call to mind the consequences of John Marshall's effort to skirt around the morass of reasonableness inherent in the necessary and proper clause. Find out, he said, whether the act of Congress falls within the commerce power; if the act is an exercise of the commerce power we need not inquire whether it is necessary and proper for the regulation of commerce, for the power to regulate commerce is plenary, whole, complete. By this strategy the judges slipped away from questions of reasonableness at one point, only to walk straight into them at another—when does commerce begin and end?—what is a direct and what is an indirect impact on goods in movement?—and so on. I trust you have not forgotten the *E. C. Knight* case, *Hammer v. Dagenhart*, *Carter v. Carter Coal Company*.

Believing, as I do, that a rule of reason will control the decisions that mark the front of a developing constitutional law of free speech and press, I can tell the political scientist where he should stake out his claim and assemble his tools. The scholarly study which helps lawmakers and judges decide what government may *reasonably* do to regulate the speech and other expression of the nation—this is what God had in mind for them to do when he created political scientists.

This is a worthy and urgent mission. How shall we go about the job? I shall comment

<sup>2</sup> "Bill of Rights," *New York University Law Review*, Vol. 35, p. 865, at p. 867.

<sup>3</sup> *International Brotherhood of Teamsters v. Vogt*, 354 U. S. 284, at 297 (1957).

briefly on each of three gateways into this jungle of human relationships.

*One.* There is need for a fuller and more careful ordering of communication and non-communicative expression, and their relationships to the values, beliefs, expectations, and behavior of men and women.

*Two.* It is obvious on a reading of judicial opinions and scholarly literature, that our best thought would profit from a few alternative analytic designs—models of analysis designed to identify and relate to one another the components of an issue of unrestrained speech versus restricted speech.

*Three.* There is need for a fresh look, and a hard look, at the intellectual supports for the grand presumption in favor of unrestrained verbal expression which underlies virtually every bit of our serious literature.

An equal attention to all three of these points would allow very little time for any of them. I prefer to expand my remarks on the first two. The scrutiny of intellectual foundations, which any of you, or Justice Frankfurter, might think the Number 1 assignment for political scientists will be disposed of right now in the few sentences I can allow.

A hard look at the intellectual foundations might reveal that the case for free speech, as it is made in contemporary American literature, rests mainly on a distrust of government rather than on a high esteem for a free flow of information and a lively combat among the ideas that compete to control action. Note the lack of acknowledgment in this literature that legal regulation of a communication problem, in many instances, may have as its result a freeing rather than a trammeling of communication—this result because enactment of a law on the subject gives the moderates in the community a talking point which restrains the more passionate part of the population from a do-it-ourselves job of policing. The hard look might help us put together more intelligently our supposition that the pen is mightier than the sword and our wish to secure and preserve certain cultural gains. Can anyone doubt that the communication of man to man facilitates the step backward as well as the step forward? Are we so committed to an idea of progress that we must believe that all social change is for the better—therefore that all argument and agitation for change must inevitably result in cultural advance? Contemplating the history of pogroms and genocide in our own time, I am unable to understand why there is so little support, if indeed there is any support in our literature, for governmental action designed to

lessen or prevent the indoctrination of children which produces adults who seek relief in persecution. Do we believe that impregnation with hate ought to be tolerated so that all of us may be enlightened and ennobled by the debate it excites? Or are we simply overpowered by uncertainties, not trusting our elected officials to select for extirpation at the stage of character formation the evil which we will later demand that they destroy on the battlefield?

You will see why I believe we need a speculative attack on the free speech problem by a mind as disciplined as that of John Stuart Mill, and as free from compulsion by previous writing as Mill appears to have been. You may see, also, why I am reluctant to forego what I will be told when one of you writes that book.

I speak with more confidence about the other two enterprises I recommend—the careful ordering of situations in which issues of free speech versus restraint arise, and the development of models for analysis of such issues.

On the first of these assignments, the general survey which reveals where the problems lie, let us start with the forum. Most of our writing is about communication from man to man out in the open. If this be the ordinary situation, then there are special situations that ought to be brought into fuller cognition and recognition.

*Citizen to His Government.* Possibly this is where speech and press ought to be most unrestrained. But there must be limits as to when and where the citizen can speak to his servant. The judge must be immune from the helpful coaching which interested spectators can supply throughout the trial. And the Senators have a point when they say they hear enough if they listen only to one another when they sit in formal session. If we thought more about it, we might conclude that we ought to impose some further conditions on the forum when the individual competes with the great organization in pressing his interests on elected officials or administrative agents. I think this is a hard surface on which we should sharpen our ideas about equality.

*Government to Citizen.* When the President was elected, I stood firmly planted in a state of nature, determined to scrutinize the deeds of my servant and help remove him from office if he did not meet my expectations. By the time his first term was up I had been made over. When I voted to give him a second term, and a third term, and a fourth term, did my vote testify to a conviction that a public servant had fulfilled my expectations? Or did my voting merely prove that I had been sweet-talked into

accepting anything he chose to give? If you think this is a dilemma only for fuzzy thinkers, ponder the uses of the bureaucracy. The Congressmen may not enact a law which forbids the individual or a group to conduct a propaganda campaign designed to terminate a social practice or uproot a moral commitment of the population. May the Congressmen set a bureaucratic force on a counter propaganda campaign intended to smother the reformers and make ineffective the communication which they are guaranteed a right to advance—and pay for the governmentally based campaign with money exacted from you, me, and the man who got buried?

*Communication within Government.* A few days ago Senator Hubert Humphrey, the majority party's whip in the Senate, introduced me to some of his friends from Minnesota—introduced me as one of his teachers. I told the Senator's friends that there was one thing I had failed to teach the Senator—that is, that a leader of the Democratic party can never be sure who is going to filibuster. I am sorry the Senator is not here tonight, for I would have reminded him that, throughout the decade before he was born, United States Senators who called themselves liberals, were chafing at gag rule. Abuses of speech and restrictions of speech within government are not likely to be litigated under the First Amendment. But they lie in that universe of expression and communication to which the nation must bring order, and in respect to which the political scientists must bring counsel.

*Communication within Non-Governmental Organizations.* I think Justice Holmes did us a disservice with his reference to yelling "Fire!" in a theatre. Speaking from the floor while the play is in progress on the stage ought not be governed by the rules which govern communication on the street corner. We have supposed that the presiding officer properly determines the order of speakers where all have an invitation to speak. Would anyone argue that the Constitution forbids lawmakers to empower presiding officers, school teachers, and football referees to impose silence on the many while one person makes himself heard?

*The Carriers of Messages.* Does the guarantee of free press deny government the power to impose an obligation to carry messages? Is the right of an editor to print his own crazy ideas a right to keep out of his publication the ideas of all other men he thinks to be crazy—or the ideas he thinks worthy but unsuitable for immature readers? Consider the public need for news in a one-newspaper town; the stranglehold on the flow of information and ideas that lies

within the power of the great newsgathering organizations like Associated Press.

Finally, that special forum, *The Schoolroom*. What is the right of government to intervene in the development of character and the equipment of a child for a man's understanding? Does the wish of the constitution-makers and our own confirming determination to have a system of free speech deny us the right to use government to impose educational goals on unwilling parents? Silly question? Consider this confident statement by a man of considerable distinction in the literature of constitutional law as it relates to civil rights. Professor Milton R. Konvitz speaking:

The state may compel parents to send their child to a public or private school where he would acquire the basic means with which to search for the truth *in his own way* . . . it would follow that the state may prescribe only the minimum number of subjects, study of which would be compulsory, such as English, spelling, arithmetic, American history and geography, and hygiene. . . . The state should not make *secondary* education compulsory as against the claims of religious objectors; for I do not see that a free, pluralistic society stands to lose in the long run if some people know their holy books thoroughly but are ignorant of Faulkner and Hemingway or even of Shakespeare, as long as they have acquired the basic tools for the pursuit of secular knowledge and there is a public library in their community to which they can go for books.<sup>4</sup>

I trust I have said enough to make clear what kind of assignment I recommend for political scientists when I urge them to provide an orderly array of the significant relationships between our verbal expression and our other interests and activities. My brief remarks do not disclose the magnitude of that assignment. A scholar's report of the significant relationships will attend to the content of expression and the ear that hears the message, as well as the forum in which the word is delivered. If tests of reasonableness are to determine whether government may impede or inhibit a particular expression, the judge will have to satisfy himself as to the importance of the message to the individual who utters it, to the individual who receives, and to the society which may profit or lose if such messages move freely among the population. When you put the values which support the application of restraint on the scales with the personal and social evaluation of the message, the outcome

<sup>4</sup> *Fundamental Liberties of a Free People* (Ithaca: Cornell University Press, 1957), p. 122.

will vary according to whether the utterance is a groan or a grunt, a foul expletive, a blasphemous assertion of conviction, the idle chatter of a rattle brain, and on through a succession of categories up to the vital message that answers the question: What shall I do to be saved?

Intermixed with the importance of the message—perhaps inseparably blended—is the character of the audience. You would not allow adults to go about the playgrounds advising white children to beat up their Negro playmates; you might be reluctant to forbid the publication of a book which urged the same course of action on adults. The textbook intended for students in medical school may appropriately carry instructions which you would not permit in a book advertised as a do-it-yourself handbook of abortion. (Credit Mr. Malcolm Cowley for the illustration.<sup>5</sup>) The remark which is thought highly appropriate if whispered to an attractive companion may fall before the test of reasonableness if addressed to a group of old ladies.

I am confident that Justice Frankfurter will endorse the surveying job which I have described as eminently suited to the special competence of political scientists. He might insist that lawyers are better equipped than political scientists for the next assignment which I present for your consideration. I referred to it earlier as the development of models of analysis which have as their purpose to identify and relate to one another the components of a free speech case. How do you evaluate an act of government—legislative, administrative, or judicial—which imposes a restraint upon speech or press? This is what the judge must do in any litigation where the validity of the restraint stands or falls on tests of reasonableness. I am convinced that none of the judges to date—and this goes for Justice Black, Justice Douglas, Justice Frankfurter, and Judge Learned Hand—I am convinced that none of the judges has so far produced an opinion that stands as proof that his decision rests on a comprehensive, sharply discriminating, and systematic scrutiny of the known and probable social consequences of the act under consideration. I think that the interests and the training which mark the thoughtful and competent political scientist make our discipline a prime hope for fulfillment of this need.

We must presume that there is more than one rewarding way of going about the evaluation of a public policy. I would not venture

even to guess what alternative approaches and procedures may be turned up in a generation of assiduous scholarly study. In order to make sure that you understand what kind of enterprise I have in mind, I will give you the outlines of my personal attack on this problem.

The structure which I have adopted to guide my own analysis rests on three foundations: value position; suppositions and beliefs about effectiveness of means to ends; and attitudes toward uncertainty.

I can handle value position when I view a thing, a matter, as instrumental; I can do nothing with value viewed as ultimate, self-fulfilling, esthetic. If you tell me that nothing, absolutely nothing, gives you more satisfaction than popping your knuckles, about all I can do to straighten you out is to call your attention to other things you might value more highly if you gave them a trial. But if you say you pop your knuckles because that is the best way you have found to attract attention and cause people to seek your company, I can make a display of evidence glued together by reasoning which may convince you that you had better look for another way of making friends and influencing people. Value, to be a useful concept in analysis, must be instrumental value.

You can fix a value for free speech and press by generalizing the utility of expression—by a conception that free expression is essential to an open society, or to maintenance of democratic government, or to some other end equally sweeping and inclusive. The generalized approach, in which the instrumental value of expression is seen as diffused rather than identified with particular goals, is helpful in fixing foundation presumptions concerning public policy. As I see it, the usefulness of the generalized approach ends with the fixing of presumption. I regret that the limits you fix for listening prevent an explanation of why I believe this.

The identification, differentiation, and evaluation of means to an end is extremely difficult in any social situation that we conceive to be a significant problem. It is especially so where the problem is the rightfulness of an act of government which impedes or inhibits verbal expression. Consider the simple case of courtship and the hospital. Value 1—Romance. Value 2—Quiet for hospital patients. Means to romance—the serenade from the sidewalk and the call to trysting place when the nurse sticks her head out of the window. Means to quiet for patients—a city ordinance which, admittedly abridging the freedom of communication, makes it a penal offense to play a banjo, sing joyfully or plaintively, or call out in a loud

<sup>5</sup> In *Saturday Review* for July 7, 1962.

voice on side walk or street adjacent to hospital grounds.

Two central points then, in the evaluation of means to valued ends. First courtship. Maybe the nurse will ordinarily or always not hear the call to romance. If she does hear, the public exposure of her availability may excite a disposition to mayhem which thwarts the swain's visions of fond embrace. Countless are the obstacles which obstruct the path of true love.

This is only one side of the end-means equation. Consider means for achieving Value 2—the quiet which promises rest for patients in hospitals. Maybe patients never hear serenades and yelling from the sidewalk because doctors and nurses make too big a racket. If heard maybe the sound is a reassuring connection with the outside world. Indeed, the behavior which the city fathers sought to frustrate may have therapeutic effects worthy of an appropriation for periodic serenades.

I choose this simple illustration because it presents the elements of decision which confront us in all cases of actual or proposed restraint of speech or press. Always, I am sure, there are differences of belief about what the particular speech or publication is good for—what valued end the speech or publication advances and how surely it advances that end. Always, I am sure, there are differences of belief about what the proposed restraint is good for. Will the law which forbids the address actually keep the message from being broadcast? Will the restraints which are imposed neatly excise the evil they are intended to combat, or will they spread their effects to consequences we are unwilling to incur? And so on.

This is only the start of analysis. Are there not other means by which the valued end could be achieved? The swain can make a call on the telephone or send a letter—with flowers. The hospital can be insulated against outside noises. We remove the jury temporarily from society so as to allow communication to proceed unconfined. Perhaps we should adopt the same policy for patients who need hospital care.

Beyond all this lies a complex of questions about what might happen if public officials do not attempt to regulate the speech or press that some people find offensive. Individuals or non-governmental groups may put their own regulations into effect and do greater damage to self-expression and public communication

than a thoughtfully drafted legislative act could conceivably do.

Running throughout these imagined events and relationships is a disturbing uncertainty. Not always is the one who evaluates an abridgment of speech or press firmly set in his value position. Rarely, indeed, can he be certain that he estimates accurately the effectiveness of a means to an intended end. Perhaps never can he be wholly confident that he foresees the unintended consequences of an act. Faced with such uncertainties, one man may be loyal to his intellectual processes and do what his analysis recommends; another man, less willing to assume risk, may rush back to the cover of a basic presumption.

It may be that I should have knocked out a few paragraphs of what I have already said, to make room for some comment on the practical use of the analytic scheme I have described. I will say only that it has put in place, for me, some of the formulae which have dominated judicial opinions—clear and present danger, dangerous tendency, gravity of the evil discounted by its improbability. When you spread out in your conception the values which compete for aggrandizement, the complicated pattern of relationships between chosen means and other available means to valued ends, the uncertainties which beset every aspect of your problem—when you spread out all of this in your mind you see better what the familiar judicial formulae are good for and you are alerted to sectors of the social problem which they do not comprehend and put in place. This has been my experience with the particular analytic design which I have inadequately developed for my own use.

You have, in these remarks, one response to Professor Frankfurter's challenge. I have indicated the character of three inquiries which I believe political scientists eminently qualified to undertake. I do not see a more urgent call for our service. A social environment, cordial to self expression and hospitable to sure and easy communication, is essential to the free life we have fixed as our highest goal. But uninhibited self expression and unrestricted communication are not free gifts of nature; they come at a price. I see no more worthy task for this profession than the instruction of lay citizens, judges, and statesmen who must calculate the price and decide how much free speech and free press are worth—when, where, and for whom.