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ABSTRACT

This book is a collection of essays on free speech issues and attitudes, compiled by the Commission on Freedom of Speech of the Speech Communication Association. Four articles focus on freedom of speech in classroom situations as follows: a philosophic view of teaching free speech, effects of a course on free speech on student attitudes, historical essentials of teaching free speech, and two opposing views on teacher attitudes on free speech in the communications classroom. Subjects of other essays are: the judicial process in relation to freedom of speech; freedom of speech in ancient Athens; a case in which the American Civil Liberties Union sought limitations on freedom of speech; the opposing philosophies of Thomas Hobbes and John Stuart Mill; the rhetoric of intimidation in Indiana during World War I; and Supreme Court decisions relating to the First Amendment during its 1971-1972 term. The book ends with an extensive bibliography of articles, books, and court decisions relating to freedom of speech and published between July 1971 and June 1972. (RN)

Free Speech Yearbook: 1972

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New Editor for 1973

The new editor of the Free Speech Yearbook is Alton Barbour, Department of Speech Communication, University of Denver, Denver, Colorado 80210. Those who wish to submit manuscripts to be considered for use in the 1973 Yearbook should send three copies as soon as possible to Professor Barbour.

The Newsletter

The Commission on Freedom of Speech publishes its newsletter, Free Speech, each quarter of the academic year. News concerning freedom of speech as well as subscription requests should be sent to the editor, Haig Bosmajian (Department of Speech, University of Washington, Seattle, Washington 98105). After June 1, 1973, the new editor will be Peter Kane, Department of Speech, State University of New York at Brockport, Brockport, N. Y. 14420.

Yearbook Volume Numbers

The Speech Communicati Association began publication of the Free Speech Yearbook in 1970. Volumes are numbered from that date, with the 1970 Yearbook being Volume I, the 1971 Yearbook being Volume II, and the present publication being Volume III. From 1962 through 1969 the Committee (now Commission) on Freedom of Speech printed a limited number of yearbooks in mimeograph form. Back issues of the mimeographed yearbooks are not readily available; however, libraries can make arrangements for photocopies with the Speech Communication Association's New York office.

TEACHING FREE AND RESPONSIBLE SPEECH: A PHILOSOPHICAL VIEW

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Few people would deny that there are legitimate limitations on freedom of speech; but while legal minds cautiously formulate tests that will justify curtailing free speech, the general public, if opinion polls are an accurate index, is inclined to restrict speech impulsively. In 1950, a poll of high school students, conducted by Purdue University, indicated that 60 per cent believed that police and other groups should have the power to censor books and movies, 63 per cent believed that communists ought not to be allowed to speak on radio, and 25 per cent believed that the government should not permit some people to make public speeches at all.[1] Early in 1970 the Columbia Broadcasting System conducted a telephone survey in which respondents were asked, "Do you think everyone should have the right to criticize the government, even if the criticism is damaging to our national interests?" Only 42 per cent of the persons contacted favored that right.[2] Hazel Erskine, after making a survey of public opinion poll questions relating to free speech for the period 1936 to 1970, came to the following conclusion: 'Acceptance of free speech for any kind of radical appears to be at a new low for the past three decades. Before 1950 a maximum of 49 per cent would have allowed an extremist to speak freely. During the 1950's permissiveness toward radicals never climbed above 29 per cent. Since 1960 only 2 in 10 would accord free expression to any extreme point of view."[3]

Such evidence indicates that tolerance of free expression in others is not an innate tendency; it is learned. If we take it for granted that tolerance for freedom of expression has to be cultivated, do we have a right and/or an obligation to try to inculcate attitudes favorable to freedom of expression in the schools? The purpose of this paper will be to examine the philosophical implications of an affirmative answer to that question.

In our schools and colleges we deal with immature and plastic minds; consequently, we have a strong responsibility to justify what we do to those minds. To men like B. F. Skinner there is no problem. Skinner thinks human behavior is always controlled and manipulated, and he argues that if good men do not manipulate behavior to good ends, bad men will manipulate it to bad ends. Here is a short statement from one of Skinner's essays:

> We cannot make wise decisions if we continue to pretend that human behavior is not controlled. . . . /It is a/ dangerous notion . . . that most people follow democratic principles of conduct "because they want to. . . ." Although it is tempting to assume it is human nature to believe in democratic principles, we must not overlook the "cultural engineering" which produced and continues to maintain democratic principles. If we neglect the conditions which produce democratic behavior, it is useless to try to maintain a democratic form of government.[4]

It seems evident, then, that Skinner would support conditioning students to hold favorable attitudes toward freedom of expression because freedom of expression is necessary to support democratic government. Nor is Skinner alone in this view. Most educators who have, in the past four or five decades, compiled lists of general objectives of education generally agree that such pragmatic objectives as "civic responsibility" are justified.[5]

For the sake of argument let's assume that teaching freedom of expression is defensible if it leads to good ends. We must next inquire what are the good ends it supposedly insures. The social utility theorists, like John Milton, John Stuart Mill, and a large number of apologists who have followed in their footsteps,[6] emphasize at least three desirable social outcomes from the tolerance of free expression. First, the quality of political discussion is said to be enhanced by an atmosphere of open discussion. Democratic political decisions are supposed to rest upon reason and truth, and the only way we can assure public access to reason and truth is through unrestrained expression of ideas. If citizens are denied access to certain kinds of information and opinions, their judgments are distorted. As Alexander Meiklejohn puts it, "It is that mutilation of the thinking process of the community against which the first amendment to the Constitution is directed." All social utility theorists assume that constructive social change should be based upon reason and truth and that the free expression of ideas will guarantee that reason and truth prevail.[7]

Secondly, the social utility theorists claim that the cultural development of society is fostered by free expression. Literature and drama grow vigorous in an atmosphere which allows experimentation in literary forms. The same beneficial result of freedom to experiment applies to the graphic and classic arts.[8] In the field of science and technology, the free exchange of ideas is the sine qua non of progress.

Finally, freedom of expression is said to have social utility because it is a weapon by which the citizen can defend himself against the tyranny of government and the excesses of strong vested economic interests in society, such as corporate conglomerates, labor unions and politically active professional organizations, like the AMA and NEA.[9]

The foregoing argument can be summarized as follows: To justify teaching freedom of expression in the schools because of its social utility one must make two

assumptions: (1) People should be manipulated for good purposes because bad men will be trying to control them for opposite ends, and, (2) Freedom of expression does in fact result in good ends--in a qualitatively better society because it restrains selfish interests and insures that good judgment, truth, and reason prevail in political and cultural affairs. Both of these assumptions are open to serious question.

Of late, doubts have been raised about whether freedom of expression really does produce the qualitatively superior society it is alleged to produce. Does freedom of expression tend to produce political decisions based upon truth and reason? Peter Schrag, writing in a recent issue of Saturday Review, says, "American political campaigns have never been the great national debates about issues that the celebrants of democracy have always wished them to be. They tend to dramatize the immediate, exaggerate the obvious, and obfuscate the significant."[10] Schrag's doubts are shared by some social scientists and rhetorical scholars who, in recent studies of politics, suggest that reason and truth-seeking may be peripheral considerations.[11] Likewise a cogent case can be made that unrestrained freedom in literature and art does not increase the quantity of quality works but tends to degrade the popular taste. Only in the field of science and technology can a clear-cut case be made that freedom of speech produces qualitatively better products.

With respect to the argument that freedom of expression is a weapon to defend the individual citizen against big government and big vested interests, men like Marcuse argue that tolerance actually has the opposite effect. Instead of weakening governmental arbitrariness and modifying the asocial aims of vested interests, tolerance weakens the defenses of society by innocuously dissipating the energies of those who are exploited.[12] Other critics point out the debilitating effect upon free expression as a corrective of abuse occasioned by the unrepresentative control of the media, the radio stations, television stations, and newspapers, through which information is disseminated.[13]

Finally, there seems to be some degree of incompatibility between the assumption that men should have freedom of choice and an educational approach which says, in effect, "We shall see that you have freedom of choice by indoctrinating you with democratic ideals." H. Gordon Hullfish expressed the dilemma clearly when he wrote:

> At times we refer to a belief which holds that each individual should develop his own values and learn to use them as a means of gaining meaning and purpose for his daily living. We recognize that this is an individual matter; that democracy provides each individual with this opportunity and privilege. At other times, however, what we refer to is an individual perception of democracy that we have staked out as a way of life into which the immature individual should be inducted. I don't believe we can have it both ways. If the latter meaning is at issue the former meaning is denied. If we know in

> advance what the democratic way of life is, we are acting wastefully, if not dangerously, when we permit each individual to formulate his weltanschauung independently. Moreover, if we know in advance what this way of life is, we shall have little further need for the free ranging intelligence, the play of idea upon idea, the give and take of discussion and conference. . . . For my part I prefer to leave the problem of a way of life in the hands of each individual, helping him, to be sure, but leaving up to him the choosing, the judging, the reflection which gives him his personal character.[14]

Just how dangerous it is to proceed on the assumption that we know what is democratic and what is not, and are therefore licersed to condition others to our view, can be easily demonstrated. Marcuse, for instance, finds it an easy step to twist the social utility justification for freedom of expression into a justification of intolerance. If the discussion of political issues, as Marcuse sees it, is supposed to bring about socially desirable outcomes, then certain policies cannot be advocated. No one should be allowed to promote war, to favor "discrimination on the grounds of race and religions," or to "oppose the extension of public services, medical care, etc."[15] Experience has shown that these policies are undemocratic. If so, why not suppress them?

Given the above considerations, I doubt if the highest and best justification for teaching about freedom of speech in the schools springs from the social utility argument. Perhaps we should no more think of teaching students freedom of speech by telling them that free expression is necessary to preserve a democratic style of life than we would think of teaching them a particular religion on the ground that, if they accept it, they will be inducted into Heaven. Our educational system is already too devoted, I think, to molding students into useful instruments of the state or of society. I think the educational system should not be designed to mold students into any particular life style--instead, the schools should provide conditions under which students can discover their own life style.

In 1954 Abraham Maslow, in his book Motivation and Personality, postulated what he called the self-actualizing motive of human beings. According to Maslow, and other champions of self-actualization, like David Riesman and Carl Rogers, society always wants to shape the individual, to insist upon "false goals and conformity." "Society and its members reject, punish, ridicule and threaten the individual who seeks to become himself rather than aiding and abetting him."[16] The self-actualizers would combat this force toward social conformity by stressing the desirability of, and the necessity of, people to experience the world and themselves as they are rather as some theory, belief or convention would make them appear.[17] How else can a student experience the world and himself as they are except in an atmosphere of free expression. He must have the freedom to explore all manner of political systems--not just democratic ones, all manner of literary and artistic dimensions including those produced by communists and fascists, all manner of moral

and ethical values--not just those sanctioned by libertarian democracies.

Schools should be less concerned with teaching formal classes in freedom of expression (though I think it might be wise to have courses in the literature of the subject) and more concerned with becoming models of free expression in themselves. If it were assumed that it is more important to train the individual to become himself than it is to condition him to a particular pattern of democratic social organization, teachers could focus on the real importance of freedom of expression, which is to give each person the right to become himself. Glenn Austin writes:

> The pressures of all our mass media toward uniformity and subsequent conformity in a society in which many of us read the same papers, listen to the same radio commentators watch the same television programs, listen to the same commercials--these pressures are almost overwhelming. Our problem is not one of obtaining conformity, but one of retaining individuality and diversity, even non-conformity against all these pressures.[18]

If the teaching and practice of free expression in the schools is rationalized as a condition necessary to achieve self-actualization, the result will be to produce a qualitatively better life for the individual. Desirable social outcomes will be subordinate to the fact that freedom to be one's self is the goal. If students are allowed to become themselves rather than being conditioned by educators to fit approved democratic patterns, desirable social outcomes will undoubtedly occur, but they will be by-products of what Carl Rogers calls the "fully functioning person."[19]

In closing let me quote a passage from Glenn Austin, again, in which Austin captures the essence of a short book by Harold Benjamin called The Cultivation of Idiosyncrasy:

> Society needs individuals who have a sense of commitment to value systems which have been critically examined and which have stood up under that examination, and who recognize that others may not agree. It needs an educational system which appreciates creativity, individuality and diversity; which encourages the free ranging intelligence to examine all areas of life and all points of view. (Freedom of thought need not mean merely that we think as, when, and if, we please.) It needs an education in which students work on real problems, in which there are genuine alternatives available, and in which students make real choices after a critical evaluation of alternative possibilities. It needs an education in which controversial issues involving conflicting value assumptions are brought out into the open and critically examined. It needs to recognize that anything that will not survive critical examination is not worth believing in . . . . "That society which comes

closest to developing every socially useful idiosyncrasy in everyone of its members will make the greatest progress toward its goals."[20]

At present freedom of expression in our society is precariously attained and preserved primarily through the courts. External sanctions of one sort or another must constantly be invoked to preserve freedom because internalized controls favorable to freedom of expression have not been developed in the individual. While I think we will never have a society in which external controls can be done away with, we can, by educating individuals in an atmosphere in which freedom of expression is not only tolerated but is a model of behavior, reduce the dependence upon external coercion. The self-actualized man, perceiving freedom of expression as a goal in itself, as a necessary condition to the quality of individual life, will be the best defender and most tolerant practitioner of free speech.

FOOTNOTES

[1]Franklyn Haiman, Freedom of Speech, Issues and Cases (New York: Random House, 1965), p. xiv.

[2]Hazel Erskine, "The Polls: Freedom of Speech," Public Opinion Quarterly, 34 (1970), 483.

[3]Ibid., 484.

[4]B. F. Skinner, "Freedom and the Control of Men," The American Scholar, 25 (1955-1956), 56. See also Skinner's books Walden Two (New York: Macmillan, 1948) and Beyond Freedom and Dignity (New York: Knopf, 1971).

[5]See, for example, Educational Policies Commission, Education for All American Youth (Washington, D. C.: National Education Association, 1944, revised 1952).

[6]John Milton, Areopagitica and Of Education, edited by G. H. Sabine (New York: Meredith, 1951). John Mill, "Essay on Liberty" in Harvard Classics, vol. 25 (New York: Crowell Collier and Macmillan, 1909).

[7]Alexander Meiklejohn, "The Rulers and the Ruled," in The Principles and Practice of Freedom of Speech, edited by Haig Bosmajian (Boston: Houghton Mifflin, 1971), p. 319.

[8]See "United States v. Roth" in Haiman, pp. 107-108.

[9]See J. M. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1956).

[10]"The Failure of Political Language," Saturday Review, 55 (March 25, 1972), 30.

[11]Good examples are Paul I. Rosenthal "The Concept of the Paramessage in Persuasive Communication," Quarterly Journal of Speech, 58 (1972), 15-30, and Stanley Kelley, Jr., "Afterthoughts on Madison Avenue Politics," The Antioch Review, (1957), 173-185.

[12]Herbert Marcuse, A Critique of Pure Tolerance (New York: Beacon Press, 1965).

[13]Zechariah Chafee, Jr., "Does Freedom of Speech Really Tend to Produce Truth," in Bosmajian, (note 7), pp. 321-334.

[14]"Education for Democracy" in Harold J. Carter, ed., Intellectual Foundations of American Education (New York: Pitman, 1965), p. 88.

[15]See Arthur Schlesinger, Jr., "The Politics of Violence," Harper's, 237 (August, 1968), 21.

[16]C. N. Cofer and M. H. Appley, Motivation: Theory and Research (New York: Wiley, 1964), p. 675. See also Carl Rogers, Client-Centered Therapy: Its Current Practice, Implications, and Theory (Boston: Houghton Mifflin, 1951), and David Riesman, The Lonely Crowd (New Haven: Yale University Press, 1956).

[17]Ibid., p. 663.

[18]"Freedom, Conformity, and Uniformity," in Carter, (note 14), p. 77.

[19]"The Concept of the Fully Functioning Person," Psychotherapy, 1 (1963), 10.

[20]See Carter, (note 14), p. 77.

TOWARD A MORE REALISTIC VIEW OF THE JUDICIAL PROCESS IN RELATION TO FREEDOM OF SPEECH

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Thurmond Arnold, former Professor of Law at Yale, once wrote, "Human institutions, in an environment which worships reason, fail in influence and prestige unless they appear to be firmly grounded on reason and fundamental principle."[1] He then described "The Law," "The Sanctity of the Constitution," and "The Impartiality and Rationality of the Judicial Process," as myths which most Americans find necessary to accept. He said:

> In spite of all the irrefutable logic of the realists, men insist upon believing that there are fundamental principles of law which exist apart from any particular case, or any particular human activity . . . . The truth of such a philosophy cannot be demonstrated or proved. It exists only because we seem unable to find comfort without it.[2]

Arnold argued that Americans are made insecure by the idea that the law is made by men and that it thus changes from day to day. Even more disturbing, perhaps, is the concept that the constitution is what the prevailing power group says it is.

Thurman Arnold was talking about lawyers, legal scholars, law students and the general public. He contended that those law professors who attempt to inject a note of reality into their lectures must deal with "the temper of students who expect to find law to be something which they can take down in notebooks, and who do not wish to be confronted with the confused picture of what is actually going on."[3]

Departments of speech communication are often confronted with the same type of students. Recently many of these departments have added courses relating to the operation of the judicial process. This essay concerns one of these courses, Freedom of Speech. Students and faculty often approach such a course as "true believers" in two ideas. The first is that "Freedom of Speech is guaranteed in our society. The second is that "The Law" is a logical entity formulated by wise men immune to their own prejudices or outside influence. These ideas are myths. In order for students to intelligently consider the problem of free speech in contemporary society, they must realize this. One need only to recall the Alien & Sedition Acts, the Espionage Act of 1917, the Smith Act and the McCarran Act to refute the first belief. The second requires more

attention. This essay will attempt to show that constitutional interpretation and related judicial decision-making are chancey, subjective processes. The first way to observe this subjectivity is to examine the very factor which is thought to insure orderly, logical legal development, stare decisis.

Stare Decisis in First Amendment Law

Stare Decisis is a legal term which means, "let the decision stand."[4] It is an important element of the common law whereby a decision applies in similar cases and is binding on the lower courts. It relies on the application of reasoning by analogy in which the conclusion drawn from one set of facts is applied to a similar set of facts. It is capable of manipulation, however. There is often no really analogous situation from which a precedent can be drawn. This has been particularly apparent in the development of the legal concept of "symbolic speech." As each new activity has been considered for First Amendment protection on the grounds of its non-verbal expression, it has not been found so obviously analogous to one model that others were automatically excluded. Draft card burning is not clearly analogous to any other activity. The flag salute is not the same as the display of a red flag. Wearing arm bands in a public school is not the same as carrying placards on a public street. Even demonstrating in front of a courthouse is not the same as marching through a legislative chamber. Therefore, as each new behavior has been brought into the judicial arena, judges have had an opportunity to select from among several models. A judge could choose to use a situation in which another activity had either been accorded or denied First Amendment protection. This can be seen in the treatment of "demonstrations." Those judges who were in favor of restriction selected labor picketing as the relevant model. Justice Hugo Black exemplied this method of reasoning. Those who would give more protection to demonstrators suggested public forum and leaflet analogies. Justice William O. Douglas has taken this position.

A second factor allowing for individual decision-making is the existence of several contradictory decisions. This situation is common prior to a Supreme Court ruling on an issue. Before the Supreme Court decision in Davis v. Massachusetts,[5] there were cases available to support either the argument that city officials could have discretionary authority over streets and parks or that they could not. Thus a judge had some freedom to select those opinions which supported his beliefs. The same situation arose in relation to picketing, draft card burning and school regulations. During the formative period of a legal concept, law is very fluid. Different jurisdictions arrive at different conclusions, and these results can be used by still other courts.

Other factors allow for individual interpretation of the law. A judge can distinguish away a relevant case if the result does not support his position and can avoid an unfavorable precedent by showing that the situation has changed since the Court made the earlier pronouncement. This latter technique was especially apparent in the Hague v. CIO conflict where the District and Circuit Courts argued that, while their decisions might be contrary to an old Supreme Court holding, they were consistent with recent

rulings of the Court.[6] Reference was made to the change in constitutional interpretation resulting in the application of the First Amendment to state action. Mention was also made of recent decisions of the Court which, while not strictly analogous, supported a more libertarian position than the earlier Davis case.

A lower court judge can also avoid using a Supreme Court decision as precedent if he can point out something about the decision itself which destroys its weight. This was particularly obvious in judicial reaction to the Hague v. CIO decision. That decision had not expressly overruled the earlier Davis ruling, and there was not a majority opinion. Both of these facts were pointed out in State v. Fowler, where the judge of the Rhode Island Supreme Court upheld the validity of a discretionary permit ordinace in seeming opposition to the intent of the Hague decision.[7]

The Justices of the Supreme Court have even fewer limits on their ability to make subjective decisions. Very important, of course, is the power of that Court to decide which cases it wants to hear. A case is considered if four of the Justices want to hear it. Thus the Court can refuse to hear cases that would force decision of hard questions in ways either consistent with or departing from precedent. Even when the Court has decided to hear a case it may use precedent subjectively. By the time a case reaches the Supreme Court, the issue has usually been considered a number of times at lower levels. The Supreme Court Justice can select from among lower court cases those with which he agrees and use them to support his arguments. If a similar case has not been brought before the Supreme Court, a Justice can simply articulate a new doctrine. This was done in the red flag case of Stromberg v. California.[8] In articulating such a doctrine, the Court is free to use whatever models it chooses. At first there were few freedom of speech cases from which to choose. As the law developed, however, the Court could choose from public forum cases, leaflet cases, picketing cases or several other types.

The only precedents that the Supreme Court must consider are its own earlier rulings. Ways can be found to avoid following these rulings. For example, Justices can simply admit that they were wrong, or that an earlier Court was wrong. This has not happened very often, but it did happen in the flag salute controversy, and it is an available technique.[9] A Justice who did not participate in a prior decision can formulate a new doctrine which makes the old case obsolete. The Court can decide the instant case on its facts without overruling the earlier case. This was done in Hague v. CIO. The Supreme Court can also make distinctions on the facts. Such distinctions were made in several of the sit-in and demonstration cases. Adderley v. Florida[10] relied on the difference between a jailhouse and a legislative chamber to distinguish it from Edwards v. South Carolina.[11] The same distinction was employed in Cox v. Louisiana.[12]

Thus even the most conservative element in the judicial process, the application of precedent, cannot be depended upon to provide consistent legal interpretation of the constitution. This conclusion can be verified by a brief look at traditional literature in jurisprudence and at more recent social science writings in the field.

Traditional Literature in Jurisprudence

Students of public address are familiar with the "great man" approach to history. In the field of jurisprudence, much of the "classical theory" has been the work of such men. While they may not have completely described what the law is and how it works, their views helped to determine what, in fact, it became. Those views give little support to the idea of judicial decision-making independent of human variables.

In 1881 Oliver Wendell Holmes wrote:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corrollaries of a book of mathematics.[13]

Perhaps in all the writing since 1881, there has been no better description of the law.

A second classic work in jurisprudence, The Nature of the Judicial Process by Benjamin Cardozo, was published in 1921.[14] Cardozo's introductory remarks help to explain why no one has been able to describe exactly how the judicial process works. He wrote:

> The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times or more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain; he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft.[15]

Cardozo discussed four methods of arriving at a decision. Each began with the finding of applicable precedents and the determination of what to do with them. He noted, "Stare decisis is at least the everyday working rule of our law."[16] He suggested, however, that exceptions should be made when precedent conflicted with the best interests of society. Cardozo realized that judges will disagree as to what constitutes this "best interest." He admitted that personal opinions, values and prejudices would be factors in that decision. He was optimistic, however, about the results of such interpretation. Cardozo wrote, "The eccentricities of judges balance one

another . . . out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."[17]

Roscoe Pound was Dean of the Harvard Law School for many years. He agreed that a judge has the opportunity to make decisions according to his view of what the law should be. He suggested that a judge is fooling himself as well as society if he claims to be judging by any other method. He concluded, "The element of most enduring effect in legal development is professional and judicial ideals of the social and legal order.[18]

Whether William O. Douglas will be considered a "great man" is for history to decide. He is a former law professor as well as a Justice of the Supreme Court. Thus his philosophy of law is relevant. Douglas does not entirely discount the doctrine of stare decisis. In a 1949 Columbia Law Review article he wrote, "Stare Decisis provides some moorings so that men may trade and arrange their affairs with confidence . . . . It is a strong tie which the future has to the past."[19] Douglas also stated, however, that in deciding which precedents to follow, the judge may make room for his own philosophy. He made an even stronger point in relation to constitutional issues. To rely on precedent as a binding factor in such situations would be to "let men long dead and unaware of the problems of the age in which he lives do his thinking for him."[20]

Another "great man," Thomas Reed Powell, contended that a strict application of precedent would be possible only if the law were a completely logical system. Professor Powell, who taught at Harvard and Columbia law schools, argued that the law is not simply a matter of logic. This is because minor premises are often the result of qualitative judgments rather than "such a simple assurance that Socrates is a man." The resulting illogic of the law makes it a confusing process to those within the system as well as those without. Powell concluded, "The force of precedents and the decisions of the future lie within the determination of perhaps one Justice or also of two, who may very well have been unable to tell themselves just what turned them one way or the other."[21]

Some scholars have reacted against what they regard as ad hoc decision making without due regard to either logic or principle. One of these was Herbert Wechsler who wrote, ". . . judgment must distill a principle that determines the case at hand and that is viable in respect of those other situations, now forseeable, to which the logic of the principle demands that it apply."[22] He contended that if the decision were not supportable in such general and neutral terms, it did not satisfy the minimal conception of "equal justice under law." Thurmond Arnold would argue that belief in the existence of such neutral principles is an illustration of our need for myths.

Most scholars have agreed that precedents are to be followed unless there is a good reason not to follow them. The reasons for exception depend on the specific judge. As was noted in the Yale Law Journal, "In the suppressed moral premises of judicial opinions, in the choices between words of different value tones, in the selection,

classification and interpretation of facts and precedents, and in the tracing of lines of causation, we find prime indicators of the value patterns of a judge, a judiciary, or a society."[23]

Social Science Literature

In the early 1940's C. Herman Pritchett began to publish voting records of Supreme Court Justices arranged according to values supported.[24] In 1955 Felix Cohen suggested that there was a need for "increased use of statistical methods in the scientific description and prediction of judicial behavior . . . ."[25] By 1961 Joseph Tanenhaus could point out several areas where social science techniques had been used to analyze the judicial process.[26] This research also supports the position that legal decision-making is a subjective process. It examines factors which may influence the ways decisions are made.

Backgrounds and Decision-Making

There has been increasing recognition that judges' backgrounds might be a factor in the way they make decisions. In a 1966 article in the Harvard Law Review, Joel Grossman summarized some important studies in this area.[27] He described three categories of research. The first attempted to collect background data about judges. According to Grossman, the most influential of these was John Schmidhauser's "Collective Portrait of the Justices of the Supreme Court."[28] This study showed that most Supreme Court Justices have been recruited from the upper middle class.

A second category of research has attempted to correlate backgrounds with voting records. Grossman listed several such studies. Nagel tried to correlate party affiliation with voting performance.[29] He concluded that Democratic judges were more likely than Republican judges to support the designated liberal position. It is doubtful that this was much of a surprise. Schmidhauser concluded that among justices who took extreme positions, party and sectional background seemed to strengthen attitudes toward regionally divisive issues. Among moderate and neutral judges, party frequently proved stronger than regional background. He also found that justices with experience on lower courts had a greater propensity to abandon precedent than did those without such experience. He noted that justices who dissented most often were those with the lowest propensities to overrule. Schmidhauser concluded, therefore, that the typical dissenter was not an innovator, but an advocate of "traditional doctrines which were being abondoned."[30]

In the third category of research on judicial backgrounds--to determine to what extent these findings can account for the variance in judicial behavior--little of significance was reported. Bowen noted that none of the variables most significantly associated with judicial decisions explained more than a fraction of the total variance among judges. Grossman concluded that these findings cast doubt on the explanatory power of

background variables taken by themselves.[31]

Values and Attitudes

Closely related to background studies have been studies of attitudes and values held by judges. These have attempted to find out whether identification of particular attitudes and values would permit predictions of voting behavior. In 1961 Glendon Schubert analyzed all of the cases on which the Supreme Court divided on the merits during the 1961 term. On the basis of voting behavior, he designated three types of political attitudes; the liberal attitude, the idiosyncratic attitude, and the conservative attitude. Applying these attitudes to cases that were to be considered in the 1962 term, he found that he was able to predict voting behavior.[32]

The study of values as variables in decision-making began with the studies of C. Herman Pritchett in the 1940's. A later study by David Danielski attempted to support the hypothesis that disagreements in the court were the results of differences in values.[33] He suggested that justices had been committed to certain values long before they arrived on the Court. His particular study compared the values of Justice Butler and Brandeis as determined from an analysis of a speech given by each. Values did indeed appear to be ranked in different order of importance, and could have explained differences on particular decisions. These studies seem to support the statement by Murphy that "since the constitution is written in broad terms . . . saying what this is allows, perhaps even requires, the Justices to apply their own value preferences."[34]

Small Group Theory

Some studies have attempted to apply small group theory to the process of decision-making. Two early studies by C. Herman Pritchett and Eloise Snyder indicated that the Supreme Court could be divided into subgroups or voting blocs.[35] Later Walter Murphy argued in Elements of Judicial Strategy[36] that a Justice of the Supreme Court could maximize his influence through a process of bargaining. He contended that a Justice has a valuable object with which he can bargain. That object is his vote or his concurrence in an opinion. His sanctions are his ability to change his vote or to write a dissent. Murphy indicated several hypothetical and some real instances where this process of bargaining may be a realistic one.

Another study which employed small group analysis was done by Richard Richardson and Kenneth Vines.[37] They explored interpersonal relationships on three United States Courts of Appeal and concluded, "Since in all circuits, the reversal of cases by the appeals courts is largely directed toward turning non-libertarian decisions into libertarian ones, we suggest that dissent in the lower appellate courts is usually an expression of non-libertarianism."[38]

Inter-Court Interaction

Jack Peltason was the first "new breed" political scientist to study the impact of the Supreme Court's decisions on lower courts.[39] In 1955, Peltason noted that the Supreme Court does not always have the final decision in a conflict. He said that lower courts represent a variety of interests, and these interests are frequently different from those represented by the Supreme Court.[40] He compared the relationship between the lower courts and the Supreme Court to that between the Supreme Court and the Constitution. He argued that, ". . . just as it is said that the Constitution is what the judges say it is, so it can be said that a Supreme Court decision is what the subordinate judges who apply it say it is."[41]

Murphy pointed out that state judges are more apt to disagree with the Supreme Court than are lower federal court judges.[42] This is logical since state judges are not only closer to the situation, but owe their appointments to local political groups and can be removed, if at all, only by state action. Murphy agreed that, ". . . the Supreme Court usually does not render either the initial or the final decision in a case."[43]

Other Elements

Other factors affecting judicial development have received comment. Some scholars have speculated about the influence of law journals. Peltason compared these to reviews by drama critics. Their effect may not be that great, but they appear to have some influence. Many law review articles are cited in legal opinions. In 1959 Chester Newland published a study of "Law Reviews and the Supreme Court," in which he summarized the citations of legal periodicals by the Supreme Court from 1924 through 1956.[44] His findings indicated that those judges who cited law review articles the most were the ones in favor of change. A law professor commented that the Supreme Court follows not the election returns, but the law reviews. On the other hand one author thought that the judge made up his mind first, and then consulted law reviews to support his decisions.

Perhaps the most influential factor in the development of law is outside of the legal system. That factor is the historical situation in which a court or litigant finds itself. This situation determines to a large degree what laws legislatures will pass, what will thus become indictable offenses and, consequently, what issues will face the courts. The First World War, for example, eventually resulted in the Espionage Act with its subsequent trial in the courts. The Red Scare of the early twenties resulted in laws prosecuting those who displayed a red flag. This in turn led to the decision of the Supreme Court that such display was a form of speech. The Second World War brought compulsory flag salute laws and a further expansion of the term, "speech." The post World War II Communist scare resulted in the McCarran Act which again changed the law. The developing labor movement in the 1930's and the civil rights movement twenty years later also clearly influenced the way in which the First Amendment Law developed.

Even outside the broad context which determines which laws are passed, however, there are many other contextual factors which influence the development of legal concepts. The mechanics of the judicial process allow for arbitrary decisions and for the influence of pure luck. The law enforcement officials in any area have vast discretion as to how stringently they will enforce the law, and whom they will indict for its violation. Once a person has been indicted, financial resources, publicity, availability of group backing and volunteer legal services may affect the quality of legal aid given to the defendant. All of these things may in turn be influenced by the timing of the offense in relation to the development of current issues. During the time when flag desecration was an important issue to the ACLU, a Milwaukee girl was indicted for violation of the Wisconsin desecration statute. Her picture appeared in The Milwaukee Journal, and immediate offers of legal assistance were forthcoming. Perhaps five years earlier she would not have been so fortunate.

Legal help is an important variable. This is true not only because the skill of a lawyer may determine success or failure, but because the lawyer decides which arguments are used in a legal contest. This in turn affects the possibility of appeal to a higher court, and may eventually determine which issues are decided by the Supreme Court. Benjamin Twiss compared the arguments of counsel to a cafeteria. The judges are not apt to use all of the arguments in their decisions, but their selection is often limited to those arguments in the lawyers' briefs.[45] Melvin Wulf wrote, "Though a lawyer cannot confidently predict that he will win any given case, he controls to a large extent the grounds upon which the court will decide his claims if they are decided favorably."[46] Such decisions of strategy may entail more than the lawyer's guess as to which arguments will be more effective. They may also be based on that lawyer's ideas of the proper function of courts and judges. There is some thought, for example, that the rationale used for decision in the case of the Pentagon Papers might have been different if Alexander Bickel had not represented the New York Times. Bickel is the leading academic advocate of judicial restraint, and it may be that his brief reflected that point of view.

Conclusion

Neither our historical experience in the development of First Amendment law, nor the literature in the field of jurisprudence gives much support to the thought that constitutional interpretation is a logical and rational procedure immune from societal or personal pressure. Many freedom of speech teachers and students have little faith in the good judgment of legislators or of citizens. Most writers would prefer that the judiciary have the last word in determining what speech should be constitutionally protected. Such a conclusion should be reached only after looking at reality and realizing that in the judicial process also, we are resting our faith in fallible men who often make subjective judgments.

History supports the position that the men on the courts and their personal, political and social biases determine legal development. One may look with fear or

with joy at the Nixon appointees to the Court, but it is already clear that their effect will be noticeable. We must realize that when we speak of "the law," we are describing a way of writing about human institutions in terms of ideals. The Law "meets a deep-seated popular demand that government institutions symbolize a beautiful dream within the confines of which principles operate, independently of individuals."[47] It is perhaps desirable to have such an ideal; it is not desirable to act and to teach our students to act as if a myth were in fact real.

FOOTNOTES

[1]Thurmond Arnold, The Symbols of Government (New York: Harcourt, Brace & World, Inc., 1962), p. 9.

[2]Ibid., p. 32.

[3]Ibid., pp. 52-53.

[4]Jack Piano and Milton Greenberg, The American Political Dictionary (New York: Holt, Rinehart and Winston, Inc., 1962), p. 212.

[5]Davis v. Massachusetts, 167 U.S. 43 (1897).

[6]Hague v. CIO, 101 F.2d 774 (1939); CIO v. Hague, 25 F.Supp. 127 (1938).

[7]State v. Fowler, 83A.2d 67 (1951).

[8]Stromberg v. California, 283 U.S. 359 (1930).

[9]West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[10]Adderley v. Florida, 385 U.S. 39 (1966).

[11]Edwards v. South Carolina, 372 U.S. 220 (1963).

[12]Cox v. Louisiana, 379 U.S. 536 (1965).

[13]Oliver Wendell Holmes, The Common Law (Boston: Little, Brown, 1881), pp. 1-2.

[14]Benjamin Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921).

[15]Ibid., pp. 9-11.

[16]Ibid., p. 20.

[17]Ibid., p. 33.

[18]Roscoe Pound, "Juristic Science and Law," Harvard Law Review, 31 (1918), 1057; "The Theory of Judicial Decisions," Harvard Law Review, 36 (1923), 645.

[19]William O. Douglas, "Stare Decisis," Columbia Law Review, 49 (1949), 736.

[20]Ibid., p. 736.

[21]Thomas Reed Powell, "Some Aspects of American Constitutional Law," Harvard Law Review, 53 (1940), 532.

[22]Herbert Wechsler, "The Courts and the Constitution," Columbia Law Review, 65 (1965), 1012.

[23]Felix S. Cohen, "Field Theory and Judicial Logic," Yale Law Journal, 59 (1950), 265.

[24]David J. Danielski, "Values as Variables in Decision-Making," The Federal Judicial System, ed. by Sheldon Goldman and Thomas Jahnige (New York: Holt, Rinehart and Winston, Inc., 1968), p. 244.

[25]Felix Cohen, "Transcendental Nonsense and the Functional Approach," Columbia Law Review, 35 (1935), 833.

[26]Joseph Tanenhaus, "Supreme Court Attitudes Toward Federal Administrative Agencies 1947-1956--An Application of Social Science Methods to the Study of the Judicial Process," Vanderbilt Law Review, 14 (1961), 473.

[27]Joel V. Grossman, "Social Backgrounds and Judicial Decision-Making," Harvard Law Review, 79 (1966), 1551-1564.

[28]Ibid., p. 1553.

[29]Ibid., p. 1557.

[30]Ibid., p. 1559.

[31]Ibid., p. 1561.

[32]Glendon Schubert, "Judicial Attitudes and Voting Behavior," Federal Judicial System, ed. by Goldman and Jahnige (see note 24), pp. 254-282.

[33]Danielski, pp. 244-254.

[34]Walter Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964), p. 13.

[35]Walter Murphy, "Courts as Small Groups," Harvard Law Review, 79 (1966), 1565-1568.

[36]Murphy, Strategy.

[37]Richard J. Richardson and Kenneth Vines, "Interpersonal Relationships on Three United States Courts of Appeal," Federal Judicial System, pp. 145-147.

[38]Ibid., p. 145.

[39]Theodore Becker, ed. The Impact of Supreme Court Decisions (New York: Oxford University Press, 1969), p. 62.

[40]Jack Peltason, Federal Courts in the Political Process (New York: Random House, 1955), p. 14.

[41]Ibid., p. 14.

[42]Walter Murphy, "Lower Court Checks on Supreme Court Power," The Impact of Supreme Court Decisions, ed. Theodore Becker (New York: Oxford University Press, 1969), p. 70.

[43]Ibid., p. 66.

[44]Chester Newland, "Law Reviews and the Supreme Court," The Federal Judicial System, pp. 326-333.

[45]Benjamin R. Twiss, Lawyers and the Constitution (New York: Russell & Russell, 1962), p. 12.

[46]Melvin Wulf, "Tragedy of 'The Times,'" Civil Liberties (September, 1971), p. 11.

[47]Arnold, p. 33.

FREE SPEECH IN ANCIENT ATHENS

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One may glean from ancient and contemporary writers of Greek history that ancient Athenians had "free speech" /isegoria/. However, free speech was like a chameleon, its meaning was constantly changing against the evolving Athenian historical background. This study will determine how free speech evolved as Greek history progressed in ancient Athens.

The writer will first deal with Homer's Iliad, representing early Greek times around the eighth-century Homeric Age. Then by sketching the democratic evolution of the Athenian constitution under Solon, Cleisthenes, and Pericles, the writer will show to what extent more people at Athens increasingly enjoyed free speech. The essay is necessarily funneled from Homer's Iliad, as representing all of Greece, to Athens' representing only one Greek city-state. The reason is two-fold. First, the material one finds about free speech concerns only Athens. Second, and partially the reason for the first, is that, aside from Athens' being the intellectual center of the ancient Greek world where most authors and historians would naturally congregate and leave written materials for posterity, Athens was the only city-state to allow its citizens free speech. Only Athens was a democracy. The other totalitarian city-states were not noted for tolerating free speech among their citizens.

Homer

Some controversy has arisen over an episode in the Iliad. A "commoner," one Thersites, spoke in the Achian Assembly.[1] The Achian Assembly was comprised only of warriors and fighters. This Assembly is to be differentiated from the Council which was attended only by the chiefs, /basileis/.[2] According to Robert J. Bonner, anyone could speak in the Assembly:

> There was an assembly consisting of all free men, which met regularly to hear decisions and proposals of the royal council, presented by the king or a member of the council. In a society thus organized, oratory was essentially aristocratic. There was not complete freedom of speech. Only chiefs could address the royal council; but no man was denied the right to speak in the assembly, though it was always assumed that no member of the lower classes possessed the gifts of eloquence.[3]

G. T. Griffith has taken issue with the notion that commoners could address the Assembly:

> The incident of Thersites, which is cited to illustrate that "commoners" could address an assembly, does not, it seems to me, establish the case. Thersites addressed the people certainly, but he had no business to do so, and he was chastised for it by Odysseus. . . . The chastisement of Thersites would doubtless have been less severe if his actual remarks had been less objectionable; but the lines quoted make it difficult to believe that he was within his rights in speaking, and only went wrong when he spoke ill of his betters.[4]

Griffith is correct in observing that Thersites spoke ill of his betters. To Odysseus, Thersites said:

> Hateful was he to Achilles above all and to Odysseus, for them he was wont to revile. But with shrill shout he poured forth his upbraidings upon goodly Agamemnon.[5]

However objectionable Thersites' remarks may have been, the writer finds no indication in Homer's narration nor in Odysseus' following speech to Thersites which suggests Thersites had no business in presuming to speak to the Assembly. Indeed, one might simply ask what the purpose of the Assembly may have been had it not been an opportunity for those privileged to attend it to also voice their opinions? From Odysseus' denunciation of Thersites, one may infer that a commoner should not presume to upbraid royalty; however, it does not follow that a commoner could not speak at all in the Assembly. Thus, the writer concludes with Bonner and not with Griffith. It seems that there was an Assembly--Homer tells us so. It further seems plausible that those able to attend it, and among those must have been commoners (else why would Thersites have been there), surely were able to speak concerning the business at hand. But it would also seem probable that those in the Assembly did not enjoy complete free speech during the Homeric Age. One could not upbraid royalty, and probably should not speak against one stronger than oneself for fear of reprisal later. Thus, in eighth-century Homeric times, there was a Council composed of kings and nobles who no doubt enjoyed free speech in the Council and elsewhere. There was also an Assembly of citizen-warriors, and though it may have been somewhat ineffectual, those in it enjoyed some measure of free speech. Non-citizens, women, and slaves could not speak in the Assembly. Free speech in ancient Greece existed as early as the eighth-century B.C., but it was limited in scope.

Pre-Solonian Athens

From the eighth-century Homeric Age down to the archonship of Solon in 594 B.C., historical data is fairly sparse. Botsford and Robinson place 683 B.C., or even earlier, as the date when the office of archon was instituted.[6] The archon replaced the king, and was elected by the Areopagus, the Athenian equivalent of the old Homeric Council. There was also a people's Assembly, a hand-down from earlier times. Not everybody who resided in Athens could be a member of this Assembly. One had to belong to a tribe and to a phratry:

> The citizens of Athens in the pre-Solonian state were divided into four tribes /phylai/* and smaller groups called phratries /phratrioi/, every citizen was a member of a tribe and of a phratry; and membership in both was hereditary.[7]

To be a member of the Assembly, one not only had to be a member of a tribe and phratry, one also had to own land: "In pre-Solonian Athens, full citizenship and membership in the Assembly /ekklesia/ was limited to those who owned land."[8] Barbarians and non-Athenian Greeks had no free speech in Athens.

It is important here to define better the concept of an Athenian citizen. Phratry, tribal, and property qualifications have already been discussed. Numa Denis Fustel de Coulanges has added the qualification of religion. As the Athenian Assembly was opened to more people, the number of actual citizenry paradoxically remained somewhat constant. The criterion of religion helps to explain this paradox. While Athenians were willing to open their Assembly, they were not willing to let newcomers into their religion. Coulanges has delineated Athenian interweaving of religion and politics:

> Religion was purely civil, that is to say, peculiar to each city. There could flow from it, therefore, only a civil law. . . . When they said that the law was civil, jus civile . . . they did not understand simply that every city had its code. They meant that their laws had no force or power except between the members of the same city. To live in the city did not make one subject to its laws and place him under their protection; one had to be a citizen. The law did not exist for the slave; no more did it exist for the stranger.[9]
>
> If we wished to give an exact definition of a citizen, we should say that it was a man who had the religion of the city.[10]

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*The original text contained Greek letters; this writer has replaced the Greek letters with English equivalents.

A man could not hold dual citizenship because he could not have two religions. The purity of the city-state religion had to be preserved. Religion, tribal, and phratry membership were the criteria which allowed one free speech in the Assembly before the Solonian reforms.

Solon's Reforms

Returning to the Solonian reforms around 594 B.C., Botsford and Robinson termed this "the journey from aristrocracy to timocracy."[11] Before Solon, the Council had been limited to nobles and ex-archons. Solon instituted a new Council of Four Hundred whose members were elected from the four old Ionian tribes, with each tribe electing one hundred members. In each tribe, there was to be a cross section from the rich to the poor. Under Solon's reforms, the zeugitae, the third class composed of warriors, could now hold office in the Council of Four Hundred; the fourth and lowest class, the thetes, were admitted to the Assembly.[12] Although the Council of Four Hundred was probouleutic in nature, that is, it prepared the agenda for the discussable matters in the Assembly, both the Council of Four Hundred and the Assembly did become more democratic: more people now had free speech in the government at Athens.

With the thetes now in the Assembly, some disagreement has arisen on whether or not they could speak in the Assembly. After the Solonian reforms, Bonner concluded: "In theory, every Athenian citizen possessed the right of speaking in the Assembly."[13] Victor Ehrenberg also believed that all citizens could now speak in the Assembly:

> Solon was the first to claim in purely human terms the eternal rights of justice and freedom for every member of the community. Nobody will doubt that he gave ordinary Athenian citizens a standing without which there would never have been a democracy. Even the constitution which he shaped contained elements of an essentially democratic character such as an assembly in which every citizen could get up and speak, and a people's court to which every citizen could appeal.[14]

Actually, someone has doubted that Solon gave the ordinary citizen the right to speak in the Assembly. Griffith assumed the worst:

> At Athens . . . it might not be right simply to assume that from the reforms of Solon onwards any citizen who could attend the Assembly could also speak in it.[15]

The evidence clearly shows that the thetes could attend the Assembly; therefore, they probably had a voice in the government as Conner and Ehrenberg indicated. However, as the thetes were not paid to attend the Assembly, one may realistically conclude that not many thetes were financially able to take advantage of the situation. The government was still primarily run by those who could afford the time off from work to go to the Assembly.

Having discussed the legislative scene, it is appropriate to analyze the "street corner" aspect of free speech. The Athenian citizen was not allowed to say anything that entered his mind to say. Strict limitations were placed upon what he might say:

> In the time of Solon and Cleisthenes, the fathers of their democracy, the Athenians did not believe that democracy meant licence, that freedom meant anarchy, that equality under the law meant freedom to say anything one wished. . . .[16]

Abuse of certain aspects of free speech could deprive one's speaking in the Assembly, the Council, or the courts. Following are some of the laws which might debar one from speaking at Athens during and after the time of Solon:

> The law forbade slanderous statements /kalos legein/ regarding the dead under any circumstances, and regarding the living in temples, courts of law, public offices, and during festivals.[17]

> Magistrates in their official capacity were especially protected against slander. The penalty was disenfranchisement. The magistrate himself could inflict a summary fine upon anyone who spoke disrespectfully of his official acts in a public office.[18]

Additionally, folkways affected one's free speech in the agora. Correct life habits, fulfilling one's duties toward one's parents, not shirking military duty, and never having thrown away one's shield in battle would no doubt make one less susceptible to ruthless revilings by one's peers and enemies.

Cleisthenes' Reforms, c. 510 B.C.

As one historically approaches Cleisthenes' reforms, Ehrenberg has observed that the Athenian democracy slowly came into full fruition as the power of the wealthy families proportionately decreased. The wealthy Eupatrid families regained temporary power under the tyrant Hippias, but they lost it for good with the advent of

Cleisthenes. Cleisthenes re-admitted the disenfranchised citizens, which the Eupatrids had struck from the citizenry roles, to keep himself in power with a broad base interested in his reforms. Although it is not purposeful to discuss how Cleisthenes won his reforms, one should note his reforms. Cleisthenes formed ten demes which replaced the four old tribes. Hence, the Council of Four Hundred was remolded into a Council of Five Hundred with fifty members chosen from each of the ten demes. This Council of Five Hundred was truly democratic and its members had free speech.

> In his constitution, for the first time in Athenian history, /ekklesia/ and /boule/, exponents of the whole citizen population, had a real say in the business of the government, even of the day-to-day government. The sovereignty of the people was seen in its real meaning; it was anything but an empty phrase.[19]

Lest one perhaps be carried away with Ehrenberg's exuberance concerning Cleisthenes' reforms, Hignett has suggested that neither Cleisthenes nor the nobility were ready at this stage to give the government totally over to the mob:

> Provisions for regular meetings of the ekklesia had to be made by Cleisthenes, but he seems to have kept their number down to a minimum and in the strict control over the agenda of all meetings of the ekklesia which he gave to the boule, he established a further safeguard against the abuse by the demos of its sovereignty.[20]

Griffith further notes that there was still no pay for attending the Assembly or for being a juror.[21] This fact would indicate that not all of the poor people could afford to attend the meetings or court proceedings. Even under Cleisthenes' reforms, one must be reminded that women could not vote, nor could any males vote or speak in the Assembly unless they were eighteen years or older.

Having traced what free speech was in theory around the fifth-century B.C., it is worthwhile to note how Athenians did not always allow free speech among themselves. For instance, the tragedian Euripides was supposedly prosecuted for impiety toward the gods. Euripides' fellow poet Aeschylus was charged with divulging "secrets" about the gods in one of his plays. The philosopher-scientist Anaxagoras was charged with holding that the sun was an incandescent stone larger than the Peloponnesus. Actually, this charge was an indirect attack on Pericles through his favorite, Anaxagoras.

Periclean Democracy

After 451 B.C., the age of Periclean democracy and imperialism, free speech seems truly to be a fact. Some exuberant writers have seen in Pericles' Funeral

Oration the epitome of Athenian democracy. The speech was delivered in the winter of 431 B.C. On everyday political life, Thucydides has Pericles say:

> There is no exclusiveness in our public life, and in our private intercourse we are not suspicious of one another, nor angry with our neighbor if he does what he likes; we do not put sour looks on him which though harmless, are not pleasant.[22]

Actually, as witnessed above in the case of the poets and philosopher, the Athenians were not so lenient toward one another. Aside from ostracism which was instituted by Cleisthenes, another institution grew up in Periclean Athens. Graphe paranomon clearly checked free speech in the Assembly:

> During one year after the passage of a new law the mover was liable to indictment and punishment for unconstitutional legislation, /graphe paranomon/. The unconstitutionality might consist either in the character of the legislation or in the failure to observe the procedure provided by the law. The penalty was assessed by the jury and might be severe. After the expiration of a year the mover was free from personal liability, but the law could be attacked at any time.[23]

One could clearly use graphe paranomon as a political tool to discredit one's enemies.

In all societies where everyone is "equal," some seem to be more equal than others. Although every Athenian citizen was theoretically able to speak in the Assembly, only a few actually chose to do so. Only those with the gift of eloquence or the fortitude to face the masses actually spoke.[24] These men were known as the "orators." The Athenians needed to invent some method to check this elite group of orators, so they invented the dokimasia. The dokimasia was originally a scrutiny over the magistrates before they entered their office.[25] But it was extended to the orators as well:

> If one of the habitual speakers in the assembly was suspected of certain specific dishonorable acts, he could be prosecuted, not for the offense, but for continuing to speak in the assembly after committing the offense. . . . The dokimasia of orators was concerned only with the criminal and dishonorable acts that had not already been made the basis of criminal prosecution.[26]

Pericles' Funeral Oration notwithstanding, the Athenian people trusted no one, not even themselves. The presumption that one is innocent until proven guilty seems not to have

always operated in ancient Athens.

In 443 B.C., Pericles founded an Athenian colony at Thurii in southern Italy. Kathleen Freeman gives an interesting account of how the Athenians there safeguarded the possible abuses of free speech by instituting

> . . . a provision to prevent tampering with the laws, namely that a person wishing to propose an amendment of an existing law must speak with his head in a noose; if he or she failed to convince, the noose was tightened instantly, and the complainant was strangled.[27]

Although it is unclear what women were doing in the Assembly at Thurii, the story nevertheless suggests the seriousness of attempting to change laws in a colony far from Athens.

While it is difficult to pinpoint an exact date when free speech became a reality, around 460 B.C. seems a likely date. Around this time, pay was given to jurors to attend the courts and pay was shortly thereafter given to members of the Assembly so they could attend. The poorest citizen could now attend, and it was an anachronism to limit the right of free speech to any privileged group.[28] Of course, the democracy did not set well with the rich, but there was not too much they could do about it. Showing his displeasure with the democracy, the "old Oligarch" bemoans how his class was held up to scorn and public ridicule:

> The comic poets are encouraged to mock at any individual, for the people know that he will not be one of themselves, but rich or aristocratic or powerful; occasionally a poor man . . . anxious to be distinguished from the crowd, may be mocked, and they do not mind that.[29]

When the rich despair, one must truly have a democracy.

However, it was the Athenian democracy and ideal of free speech which brought Socrates to trial in 399 B.C. Plato has Socrates sum up the nature of the accusations brought before him:

> For of old I have had many accusers, who have accused me falsely to you during many years . . . telling of one Socrates, a wise man, who speculated about the heaven above, and searched into the earth beneath, and made the worse appear the better cause.[30]

> Let the affidavit be read: it contains something of this kind: It says that Socrates is a doer of evil, who corrupts the youth; who does not believe in the gods of the state, but who had other new divinities of his own.[31]

While it is not purposeful to pass judgment on Socrates here, one should note some important aspects from these charges. One will recall the emphasis which Coulanges placed upon a citizen's having the religion of the state. Socrates, as well as Anaxagoras, was prosecuted for mysterious religious beliefs. Nor does it appear that one could be too vocally speculative in trying to change the Athenian established government. Socrates' concepts, many of which were inimical to the Athenian democracy, were not well received by other Athenians.

Conclusion

Ancient Athens did have a free speech tradition. It was necessarily linked to its democratic Assembly and Council. Without these democratic institutions, one rarely finds a free speech tradition. Before the Athenians had free speech, heredity, wealth, property, and class qualifications had to be voided one by one over a long historical process before Athens could boast the world's first democracy, and hence the first heritage of free speech for its citizens. After the Solonian reforms, c. 594 B.C., isegoria was granted to more Athenians, especially the thetes, although one should recall that a lack of pay probably kept most thetes out of the Assembly until they received pay around 460 B.C. Finally, it was suggested that street corner free speech--Socrates' case is perhaps the most illustrative--was limited. However, one may romanticize the ancient Athenians, one cannot help but compare them to our free speech tradition. Given these implications, one may compare and contrast for himself.

FOOTNOTES

[1]Homer, Iliad, trans. by Andrew Lang, Walter Leaf, and Ernest Myers (New York: The Modern Library, 1950), pp. 25-27.

[2]G. T. Griffith, "Isegoria in the Assembly at Athens," in Ancient Society and Institutions (Oxford: Basil Blackwell, 1966), p. 117.

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[7]C. Hignett, A History of the Athenian Constitution (Oxford: Clarendon Press, 1952), p. 47.

[8]Ibid., p. 79.

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[10]Ibid., p. 194.

[11]Botsford and Robinson, p. 83.

[12]Ibid.

[13]Bonner, p. 69.

[14]Victor Ehrenberg, "Origins of Democracy," in Polis und Imperium (Zurich und Stuttgart: Artemis Verlag, 1965), p. 287.

[15]Griffith, "Isegoria," p. 121.

[16]Werner Jaeger, Paideia: The Ideal of Greek Culture, trans. by Gilbert Hignet (3 vols.; Oxford University Press, 1944), III, 113.

[17]Bonner, p. 70.

[18]Ibid., p. 71.

[19]Ehrenberg, "Origins," p. 298.

[20]Hignett, p. 152.

[21]Griffith, "Isegoria," p. 124.

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[23]Robert J. Bonner, Lawyers and Litigants in Ancient Athens (Chicago: University of Chicago Press, 1927), p. 99.

[24]G. F. Schomann, A Dissertation on the Assemblies of the Athenians (Cambridge: W. P. Gratin, 1838), p. 111.

[25]Bonner, Lawyers and Litigants, p. 97.

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[28]Griffith, "Isegoria," p. 125.

[29]Arnold Wycombe Gomme, The Old Oligarch in More Essays in Greek History and Literature, ed. by David A. Campbell (Oxford: Basil Blackwell, 1962), p. 43.

[30]Plato, The Apology, trans. by B. Jowett (5 vols.; Oxford: Clarendon Press, 1892), II, 110.

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ACLU LIMITATIONS ON FREE SPEECH: THE CASE OF ELIZABETH FLYNN

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On May 7, 1940, the American Civil Liberties Union removed from its Board of Directors Elizabeth Gurley Flynn, an ACLU charter member. The bases of her dismissal were her membership in the American Communist Party and certain public criticisms she had leveled against the ACLU Board. Her removal followed the adoption earlier in the year of a resolution which in effect excluded Communist Party members from ACLU governing committees and argued that the group's officers be subjected to a "test of consistency" in their defense of civil liberties.

Miss Flynn's trial is of special significance for students of free speech because both the charges and procedures involved in her removal focus directly on many of the same civil liberties for which ACLU is widely recognized as the first and foremost defender.[1] Specifically, this essay argues that the ACLU denied to Miss Flynn many of the same procedural and substantive safeguards it so vigorously claims for those it defends in the American courts. The thesis is also developed that the ACLU's "test of consistency" clause under which Miss Flynn was removed as well as the present modified version brings ACLU dangerously close to running from whatever risks are involved in granting freedom of speech to all its members.

The Trial

The subject of the trial lived from 1890 to 1964, and most of the time in New York. At the age of 15, she quit school to devote full time to working for the rights of labor. As an I.W.W. leader, she was many times arrested but never convicted on charges of inciting to riot while in demonstrations and picket lines. In 1920, she helped organize the ACLU and served on its National Committee until elected to the Board of Directors in 1937. That same year she joined the Communist Party and was later elected to its Executive Committee. In 1939, ACLU re-elected her to its Board for a three-year term with the full knowledge that she was a Communist and with the assurance that this activity was irrelevant to her ACLU role. Actually, there is no evidence that anyone in ACLU ever questioned her loyalty to the Union or to civil liberties. Lucille Milner, ACLU secretary who was present at the trial, said of Miss Flynn: "One thing was certain. Elizabeth Flynn had won the admiration of all who worked with her . . . . Few on the Board could match her record for loyalty to the Civil Liberties Union and the cause we represented."[2]

Miss Flynn's removal followed the adoption in February of 1940 of an ACLU Resolution excluding from its governing committees any person "who is a member of a political organization which supports totalitarian dictatorship in any country, or who by his public declarations indicates his support of such a principle." It specifically mentioned the Soviet Union. The Resolution emphasized that ACLU was not excluding Communists from its membership and that the Union was in no way planning to be any less zealous in the defense of Communists' rights. Instead, the Resolution said ACLU was insisting that the personnel of its governing committees be subjected to a "test of consistency" in the defense of civil liberties in all aspects and in all places. The Union argued "that consistency is inevitably compromised by persons who champion civil liberties in the United States and yet who justify or tolerate the denial of civil liberties by dictatorships abroad."[3]

The Resolution passed the National Committee by a vote of 30 to 10 and the Board of Directors by 13 to 7. A minority on both committees strongly protested the act. "The resolution," argued several "will disappoint all those who feel that the Civil Liberties Union is the last organization in the world to start a species of Red hunt, which is precisely what this carefully dressed-up resolution aims to do."[4] Protest also came from several on the National Committee including Dr. Alexander Meiklejohn who insisted that "the sole test for us is our sincere devotion to the American Bill of Rights . . . ."[5] Finally, the Resolution touched off an ideological struggle so intense that Dr. Harry F. Ward, who had served as ACLU Chairman since its founding, resigned in protest against the Resolution. Dr. Ward argued: "The Union is doing in its own sphere what it has always opposed the government for doing . . . . The essence of civil liberties is opposition to all attempts to enforce political orthodoxy."[6]

In spite of many objections, the Resolution was not rescinded, and the Board of Directors formally asked Miss Flynn to resign on March 5, 1940. Miss Flynn refused to resign, insisting that her membership in the Communist Party should not prohibit her from continuing on the ACLU Board since it was known at the time of her election that she was a Communist. Thereupon, the Board filed a formal charge for her removal. Before the date for her hearing, Miss Flynn invited two additional charges by publicly attacking the Board in articles published in the New Masses and Daily Worker. Miss Flynn faced her fellow Board members on these charges on May 7, 1940. The trial lasted for six hours. Chairman John Holmes insisted that the meeting was a "hearing" rather than a "trial."[7] Years later Lucille Milner recalled the scene: "The memory of it will go with me to my grave," she wrote. "Certainly, in all the twenty years . . . no one dreamed that such a scene could possibly take place. There we sat around the table, the founders and charter members of the first organization in American history to defend everybody's right to free speech."[8]

Three charges were presented against Miss Flynn. The first offered by a Mrs. Bromley on March 4, stated: "I . . . ask that a hearing be held as to whether or not Miss Flynn be expelled on the basis of the charge that Elizabeth Gurly Flynn is not entitled to retain directorship on the Board on the ground that she is a member

of the Communist Party."[9] Mrs. Bromley presented as evidence the ACLU Resolution of February 5, 1940, and asked Miss Flynn two questions: (1) Was Miss Flynn a member in good standing of the Communist Party as of now, and (2) would Miss Flynn concede that she was a member in good standing of the National Committee of the Communist Party. Miss Flynn answered each question with a "yes. certainly."[10]

Miss Flynn then responded to the charge. Her first move was to object to the trial procedure. Miss Flynn asked for a special trial based on the grounds that several Board members had already shown they were not impartial, emphasizing that several had assumed the role of complainants, while others had already announced that she should be removed. This request was denied. Miss Flynn then objected to the "star chamber" proceedings and asked for a public hearing; this request was also denied. Finally, she requested that all correspondence that had come to the national office relative to her case be forwarded to the National Committee should the Board vote to expel her. This, too, was denied.

On the substantive charge that her membership in the Communist Party disqualified her to remain on the ACLU Board, Miss Flynn advanced five arguments: (1) That the charge was unfair because she was re-elected to the Board after publicly announcing that she was a party member. "I defy them to prove," said Miss Flynn, "any change in my position on civil liberties or my conduct in defense of them . . . since I became a member of the Communist Party."[11] (2) That the charge demanded of her a "loyalty oath" in that she was forced to pledge allegiance to a form of government as well as civil liberties. (3) That the charge penalized opinions and injected issues and attitudes on foreign governments and policies into ACLU, which violated the group's traditional policy of concerning itself only with American affairs. (4) That the Board was being unfair in asserting that she believed in civil liberties only as a means of spreading Communism in the United States. She argued that such reasoning was metaphysical, and had no basis unless it could be proven that she had not practiced the civil liberties policies of the Union. (5) That her membership in the Communist Party was in no way incompatible with ACLU and offered as evidence a copy of the Constitution of the American Communist Party.

The Board then quizzed Miss Flynn at length on her obligations to the Party. The following cross-examination by Arthur Hays illustrates this line of questioning.

Mr. Hays: "I want to know to what extent your vote as a Director is influenced by the fact that you belong to the Communist Party . . . ."

Miss Flynn: "Since I have been a member of the Communist Party, I have never submitted to any committee, body, official or person of the Communist Party any of the decisions or actions or contemplated actions of American Civil Liberties Union. I have never even discussed it with officials and members of the Communist Party."[12]

Finally, Board member Abraham J. Isserman asked Mrs. Bromley, who formally made the charge against Miss Flynn, whether any actions of Miss Flynn made her an improper member of the Board. Mrs. Bromley replied: "My charge against Miss Flynn is based not upon her personal actions, but upon her membership in the Communist Party."[13]

The Board then took up the two lesser charges. Both alleged that Miss Flynn was unfit to remain on the Board because of articles published in the New Masses and the Sunday Worker. In an article for New Masses entitled "Why I Won't Resign from ACLU" Miss Flynn said "ACLU directors have become class conscious . . . . These pseudo-liberals take fright at the giant on the horizon which points the future everywhere--the Soviet Union. I don't belong with them anymore."[14] In the Sunday Worker, she asserted that "the National Committee is a carefully selected list of well known liberals," resembling "an old men's home out for an afternoon airing!"[15] Several Board members felt that on the basis of these comments Miss Flynn had disqualified herself to serve on the Board. Miss Flynn, however, claimed that both articles were written in self-defense. She said after the Board made a public announcement that she had been asked to resign, that she, in turn, had a right to make a public response and these newspapers were the only channels open to her.

After Miss Flynn completed her defense, she was asked to leave the room while the Board deliberated the charges. The transcript henceforth notes frequent "off the record comments." The record shows, however, that she was found guilty on all charges. The crucial vote, of course, was on the vote to sustain the charge that Miss Flynn's membership in the Communist Party made her unfit to remain on the Board. The vote on this charge was 9 in favor and 9 opposed. The Chairman then voted "yes" to make it 10 to 9. Among those voting "no" was ACLU attorney Arthur Garfield Hays. In explaining his vote, he asserted: "If I believe that that person, as an individual, believes in civil liberties, . . . I won't vote to expel her because she is a member of the Communist Party."[16]

After the trial, Miss Flynn's expulsion did not become final until approved by the National Committee which included fifty-one members throughout the United States. The vote of this group was 27 in favor, 12 opposed, and 12 not voting. Among those voting in favor were Robert E. Sherwood, Dr. Harry Barnes, and Van Wyck Brooks. Among those voting "no" were Dean Lloyd K. Garrison, Robert Morss Lovett, and Dr. Alexander Meiklejohn. Among those not voting were Dr. Frank Graham, William Draper Lewis, and Harold D. Lasswell.

Implications For Freedom of Speech

The background and transcript of this unusual trial--or, if one prefers, "hearings"--provides several insights into the history and practice of due process and free speech. Certainly, the 1940 Resolution and Miss Flynn's expulsion

illustrates that even a staunch defender of civil liberties can be pressured into compromising its principles. ACLU has always maintained that it defends the civil liberties of everybody--"even the rights of those who might, if they came to power, suppress civil liberty."[17] Yet, in the case of Miss Flynn, the Board qualified this principle and, in effect, said that one who subscribes to a political philosophy which allegedly does not grant civil liberties to others gives up some of his civil liberties. Clearly, in adopting the 1940 Resolution and expelling Miss Flynn, ACLU placed First Amendment restrictions on those whom it is willing to admit to its Board of Directors. In so doing, ACLU failed in its mission to defend "everybody's rights without distinction."[18]

ACLU's action in this case can best be described as a rhetorical strategy designed as an adjustment to the pressures against American Communists following the signing of the Nazi-Soviet Non-Agression Pact in August of 1939. Prior to this time, ACLU had withstood such pressures even though in some quarters the organization had long been labeled "subversive" primarily for its defense of Communists, Fascists, and Socialists. In fact, ACLU had never attempted to hide the fact that Communists were active in its group. In the early thirties, for example, the Fish Committee reported that "ACLU is closely affiliated with the Communist movement in the United States . . . . It claims to stand for free speech, free press, and free assembly; but it is quite apparent that the main function . . . is to overthrow the Government, replacing the American flag by a red flag . . . ."[19] Arthur Hays appeared before a Congressional Committee to deny the latter charge but freely admitted that one ACLU Board member expressed a preference for the Communist Party.[20] Again in 1938, an ACLU pamphlet asserted that ACLU's governing boards represent every shade of political and economic opinion and listed one Communist on its Board. Finally, as late as April, 1939, the Union declared in a pamphlet entitled "Why We Defend Free Speech for Nazis, Fascists, and Communists" that the Union "takes no position on any political or economic issue or system. It is wholly unconcerned with movements abroad or with foreign governments."[21]

Events of late 1939 eventually persuaded the ACLU to modify this position. Following the signing of the Non-Agression Pact, the Soviet invasion of Finland, and reports of Fifth Column activities in Europe, a wave of intolerance swept the country. About this time, Martin Dies, Chairman of the House Committee on un-American Activities, implied that ACLU was an agent of the Communist Party and requested the Justice Department to file criminal charges against ACLU for its failure to register as an agent of foreign interests. Faced with this image, many ACLU leaders pressed for a cleansing of foreign elements. Norman Thomas, for example, publicly called for a purging of all Communists, alleging that ACLU officers cannot justly claim rights in America while openly or tacitly supporting Stalin abroad. Others like John Dos Passos resigned from the National Committee because ACLU had failed to purge Communists from its governing boards.[22] ACLU's Board more or less admitted it was reacting to this pressure when it announced the 1940 Resolution. "The occasion for raising this issue at this time," said the Board, "is the increasing tension which

has resulted everywhere from the direction of the Communist international movement since the Soviet-Nazi pact."[23]

It can be argued that ACLU chose an unwise rhetorical strategy in adopting the 1940 Resolution and subsequently purging Miss Flynn. While these actions may have removed some of the public pressure, they may also have forced ACLU to compromise its position on civil liberties. First, in purging Miss Flynn, ACLU may have succumbed to a "guilt by association" syndrome. The irony, of course, is that ACLU had rigorously fought this pernicious practice for two decades. Yet, the transcript is devoid of even one piece of evidence or charge that Miss Flynn had ever violated by word or deed a single principle of the Civil Liberties Union. The Board remained significantly silent when Miss Flynn asked: "Is there any member of this Board whose record as a consistent militant fighter for these rights can outweigh the records of William Z. Foster and myself . . . ."[24] And no objections were raised when Board member Lamont contended: "I challenge you . . . to find one single vote or one single decision that this Board has taken where Miss Flynn or anybody else has sabotaged, filibustered, or deliberately tried to delay the work of the Board for their particular interests or the interests of some particular group."[25] In other words, Miss Flynn was not removed because she was disloyal to civil liberties, but because she was affiliated with an unpopular group.

Of course, there were the charges that Miss Flynn had publicly attacked the Board and thus no longer deserved to serve on its membership. But these charges grew out of the controversy over her refusal to resign. Miss Flynn made a public response to a public charge against her. A good case can be built that in purging her for writing the articles, ACLU was actually punishing Miss Flynn for defending herself. Furthermore, it is doubtful that ACLU would have removed her on the basis of these articles. The transcript shows other instances in which Board members had made public attacks on the group without punitive action. Norman Thomas, for example, wrote an article in Socialist Call in 1939 in which he called certain Board members hypocrites and insincere, and Mr. Thomas was not purged.[26]

Secondly, the ACLU denied Miss Flynn many of the same procedural safeguards it consistently demands for others. Admittedly, the hearing was not a legal act, but the Board had the option of granting Miss Flynn full due process. In view of her long standing association with ACLU, surely she was entitled to every procedural safeguard. Yet, her request for an impartial jury was denied with the result that three of those who initiated the charges against her also judged the case. Another member, Chairman Holmes, had allegedly stated publicly that Miss Flynn was a "symbol of difficulties"[27] and should be reviewed. At the same time, the group refused Miss Flynn a vote even though she too was a Board member. The Board also denied Miss Flynn's request to include a number of letters and documents in the material forwarded to the National Directors for the final vote on her dismissal, thus denying her the use as authorative evidence the opinions of several well-known ACLU members who argued against the Resolution.

Thirdly, the Board tried Miss Flynn on a retroactive application of the 1940 Resolution. Both the Executive Board and National Committee knew Miss Flynn was a member of the Communist Party when she was re-elected to the ACLU Board in 1937. Thus removing her for that reason under a rule passed after her election comes close to subjecting Miss Flynn to an ex post facto law--another pernicious act long fought by ACLU.

Finally, it is difficult to explain why the Board had to rush through the proceedings in one long session even though at least one member asked for an adjournment in fairness to Miss Flynn. In its haste, the Board even failed to call Miss Flynn back into the room to tell her the verdict. Miss Flynn said: "Even the meanest criminal in a court of law is allowed to receive the verdict of his jury face to face."[28]

Aside from the injustices inflicted upon Miss Flynn, the Board also abandoned several other practices. Prior to this time, for example, the Board had carefully avoided attempts to enforce a political philosophy or orthodoxy on its members or governing officials. In adopting the 1940 Resolution, the majority actually forced an unpopular minority opinion out of its ranks. True, Communists could still be members, but ACLU's refusal to let them hold office made second-class citizens of them. In addition, the Resolution, in effect, demanded a disguised loyalty oath of its officers which went beyond loyalty to the Bill of Rights and actually embraced political ideology--another practice long denounced by ACLU. Furthermore, in passing this Resolution, the group embroiled itself in international politics, whereas in the past, it had confined its activities and concerns to civil liberties at home.

These breaks with ACLU's traditions can, of course, be defended on the grounds that Communists are inherently opposed to civil liberties. This is exactly what much of the press including the New York Times did. Following the adoption of the Resolution, the Times asserted: "The defense of civil rights ought not to be entrusted to those who do not believe in civil rights. . . . /T/he American Communists have chosen the side of slavery. Let them abide by their decision. Liberty and Communism don't mix."[29] While this argument still has much appeal, its users rely, as did the Board which removed Miss Flynn, on vague pretexts of loyalty instead of the overt behavior of those whom they judge. Such practices somehow seem demeaning for an organization whose sole purpose is to protect against such tyranny.

The ACLU still lives with this dilemma. During the McCarthy era the Board made the Resolution part of its Constitution. In 1966, however, the Board took a new look at the policy, and appointed a special committee to study the matter. In 1968, ACLU removed the Resolution, but for some reason, retained a "test of consistency" clause which insists that all persons who are members of the National Board or Committee or any affiliate group "shall be unequivocally committed . . . to the concept of democratic government and civil liberties for all people," and further requires that the leadership of the Union precludes "support of those principles which reject or qualify . . . the freedoms associated with the forms and processes of political

democracy."[30] In other words, ACLU is still willing to permit certain people to hold membership in its organization, but not serve in leadership roles. In this, ACLU appears to be trying to avoid one of the risks of free speech. Their argument seems to be that a Communist, for example, might subvert the organization to different ends from those for which it presently exists. But isn't that a function of free speech? In other words, if a Communist holds membership in ACLU and he can convince the membership, indeed a majority of them, that a Communist should serve on the Board, should he not have that opportunity. Such are the risks as well as the virtues of free speech. Surely, ACLU does not want to be in a position in which it insists that every other group except itself should run the risk of free speech.

ACLU prides itself on its support of Justice Hugo Black's statement in the Barenblatt case: " . . . the real interest . . . of the people /is/ in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves . . . ."[31] ACLU can best serve this interest of the people by not submitting its own members to the tyranny of its own majority, and thus permit its members to advocate unpopular conceptions of government and civil liberties without subjecting them to penalties.

FOOTNOTES

[1]The major source material for this paper was the trial record as released by Corliss Lamont in The Trial of Elizabeth Gurley Flynn (New York: Horizon Press, 1968).

[2]Lucille Milner, Education of an American Liberal (New York: Horizon Press, 1954), p. 272.

[3]Lamont, pp. 42-43.

[4]New York Times, February 6, 1940, p. 1.

[5]Lamont, p. 213.

[6]Ibid., p. 210.

[7]Ibid., p. 105.

[8]Milner, p. 273.

[9]Lamont, p. 35.

[10]Ibid., p. 44.

[11]Ibid., p. 98.

[12]Ibid., p. 115.

[13]Ibid., p. 130.

[14]Quoted in Lamont, p. 160-61.

[15]Quoted in Lamont, p. 153.

[16]Ibid., p. 174.

[17]Quoted in Lamont, p. 182.

[18]Quoted in Lamont, p. 182.

[19]U. S. Congress, Senate, Conditions in the Coal Fields in Bell and Harlan Counties, Hearings before a subcommittee of the Committee on Manufacturers, 72d Cong., 1st Sess., May, 1932, p. 224.

[20]Ibid., p. 227.

[21]Quoted in Lamont, p. 181.

[22]Ibid., p. 24

[23]Ibid., pp. 185-86.

[24]Ibid., p. 14.

[25]Ibid., p. 169.

[26]Ibid., p. 149.

[27]Ibid., p. 47.

[28]Ibid., p. 18.

[29]New York Times, February 7, 1940, p. 20.

[30]"The Test of Consistency," The Nation, August 5, 1968, p. 69.

[31]American Civil Liberties After Fifty Years (ACLU Pamphlet, April, 1960), p. 5.

FREE SPEECH: THE PHILOSOPHICAL POLES

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We hear much talk about "free speech" today. Persons of every persuasion voice their opinions on the limits of free expression. Such discussions have implications which are legal, moral, rhetorical, political, and philosophical. In this paper the writer will consider the essentials of the philosophy of liberty, i.e., some of the choices one confronts concerning the nature of man's involvement with society and himself.

To limit this discussion, this essay will consider only "modern" political philosophy. Modern political philosophy begins with "the rights of the individual, and conceives the State as existing to secure the conditions of his development." Classical political philosophy, on the other hand, starts with "law" and the "right of the State."[1]

Although modern political thought is premised on the rights of the individual, there has been considerable debate over the meaning and role of liberty in society. One still confronts many critical choices: What is "liberty" and "free speech"? Who shall have it? When? How much? Who shall grant it? Or is it a "natural" right? Under what conditions, if any, shall it be denied?

If one plots the extreme philosophical positions (within modern thought) along a continuum of how much individual-right man should have, one will find Thomas Hobbes' (1588-1679) absolute "Sovereign" at one end and John Stuart Mill's (1806-1873) absolute libertarianism on the other. Between these two extremes will fall the beliefs of our founding fathers, John Milton and, more recently, Alexander Meiklejohn. A comparison of the views of Hobbes and Mill on free expression provides considerable insight into the potential benefit, as well as the possible perils, of liberty. Often a person will advocate one view or another, whether liberal or conservative, with less than adequate consideration of its means or its implication for man and society. Here the writer will define and compare the polar philosophies of free speech advocated by Hobbes and Mill. This comparison reveals the matrix of philosophical choice one must consider when studying human liberty.

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Thomas Hobbes

Thomas Hobbes "valued security far more than liberty."[2] Hobbes believed that man's primary need was to survive. He felt that people, before they establish some kind of government, are equal; but most important is their equal ability to kill each other.[3] In this pre-political predicament there is no security because, according to Hobbes, "each man" has the "Liberty . . . of doing any thing, which is his own Judgment, and Reason, he shall conceive to be the aptest means thereunto."[4] Hobbes considered such a condition to be dangerous. He argued that man must organize politically to find self-protection. Blair Campbell explained what Hobbes had in mind:

> The self must be harnessed, disciplined, and indeed coerced, if man is to live without fear; his behavior must be circumscribed by rules. Moreover, he requires sanctions if his vanity is to be kept within peaceful bounds; and since he is in a state of constant psychic flux, he cannot rely on his own self-admonitions. Therefore, these sanctions must be given external force, they must be politicized.[5]

Hobbes assumed that men are not naturally social and political: man has to create an artificial framework to find order and protection. Hobbes' ideal government is an absolute sovereign (individual or assembly, monarch or democracy) which rules authoritatively after it has been contracted by the people. Through this "social contract" individuals swap their freedom for personal safety. In his Leviathan, Hobbes explained the nature of this agreement:

> The only way to erect such a Common Power . . . is to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgement.[6]

Hobbes' condition of consent remained the same regardless of the machinery of government. He wrote, "Whether a Common-wealth be Monarchicall, or Popular, the Freedome is still the same."[7] The stability of this sovereign was to be preserved at all cost, because upon that condition depended man's security. Harvey C. Mansfield, Jr. believed that Hobbes "wished to suppress private judgments of good and bad in politics because such judgments endanger civil peace."[8]

Hobbes, then, argued that because man in his "state of nature" (before government) is unsafe, he should seek safety under the shelter of a sovereign. Individuals should do nothing to disrupt this situation. J. B. Stewart interpreted Hobbes to mean that people should, "seek concord within the commonwealth in every expedient way; be not enthralled by other goods, for they are inferior; endeavor always--quieting, appeasing, adjusting, compromising in all things--to prevent the death of the commonwealth."[9]

Hobbes believed it was necessary to restrict man's freedom. Under Hobbes' sovereign state one gives up freedom of expression for security and, as some interpret Hobbes, for "human happiness."[10] Hobbes recognizes, however, that when man contracts with the sovereign, he retains certain liberties. Men continue to have the right to move bodily about, to do "what their own reasons shall suggest" when there are no laws preventing it, and to disobey "if the Soveraign command a man (though justly condemned,) to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live . . . ."[11]

Although Hobbes describes certain minimum rights of man, they are linked more to life-essentials and the will of the state than to any concern for human freedom. What, for example, does Hobbes say about individual free expression? He argued that government should rigidly control not only man's actions but also his opinions. Hobbes considered free discussion to be dangerous because ". . . the Common-peoples minds . . . are like clean paper, fit to receive whatsoever by Publique Authority shall be imprinted in them."[12] Hobbes' remedy for "the poyson of seditious doctrines"[13] is preventative. The sovereign simply does not allow it. Hobbes wrote:

> It is annexed to the Soveraignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace; and consequently, on what occasions, how farre, and what, men are to be trusted withall, in speaking to Multitudes of people; and who shall examine the Doctrines of all bookes before they be published. For the Actions of men proceed from their Opinions; and in the well governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord. And though in matter of Doctrine, nothing ought to be regarded but the Truth; yet this is not repugnant to regulating of the same by Peace. For Doctrine repugnant to Peace, can no more be True, than Peace and Concord can be against the Law of Nature.[14]

Hobbes' absolute sovereign could take the form of democracy, though he warns that it will be the most troublesome. Hobbes felt that participation would weaken the power of the sovereign. Laurence Berns explained Hobbes' reservation about a sovereign-democracy:

> For within democracy there is always keen competition between popular orators, or demagogues, and the power of each demagogue is dependent upon his power to control and dispense patronage . . . . From this it is easy to understand the chief defect of democracy, the tendency to breed factions and civil wars . . . . Those who complain of lack of liberty under monarchy do not understand what they really want . . . . It is not liberty but dominion or power and its attendant honor that they want. The true cause of their disaffection is that monarchy deprives them of the opportunity to show off their wisdom, knowledge, and eloquence in deliberating, or seeming to deliberate, about matters of the greatest importance. The love of liberty, according to Hobbes, turns out to be only a mask for the desire for praise, for vanity.[15]

Hobbes, then, believed that for man to have security he had to be governed by authority. This meant giving up much of his personal freedom. While Hobbes permits people to move physically, to do things not prevented by law, and to protect their own lives, they must remember that there can be, not individual will, but the one will of the sovereign--one ruling opinion, voice, decision, and action.

John Stuart Mill

In his On Liberty, John Stuart Mill advocated a libertarian philosophy, the right and need ("utility") of man to be free. In this section, the writer will compare the thoughts of Hobbes and Mill.

The first area for comparison is their treatment of personal protection. Both Hobbes and Mill were concerned for man's safety. Hobbes, however, stressed the sacrifice of individual freedom for security. "The end of Obedience is Protection."[16] Mill, on the other hand, maintains "that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[17] Mill's attitude about personal protection, then, resulted more from a concern for the freedom of the other man. In no other sense was a government or a person to interfere with man's freedom, even for that man's own protection. Mill argued that a person's "own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right."[18]

The second subject of interest to both Hobbes and Mill is the nature and role of sovereignty. Because Hobbes believed that guarantee of safety was justification enough for rule by authority, he spends little time defending this arrangement. When he does he clothes this condition in a spirit that seems somewhat foreign to it. He speaks of "a Common Power" and a "Common Peace," and concludes that "nothing the Soveraign Representative can doe to a Subject, on what pretence soever, can properly be called

Injustice, or Injury; because every Subject is Author of every act the Soveraign doth . . . ."[19] Hobbes denies individual free expression, but claims the "Soveraign Representative" to be at-one with the people.

Mill would have none of this. Regardless of its effectiveness or efficiency, any sovereignty, other than that of the individual over himself, is by its very nature bad. Richard Lichtman declared that Mill "questions not merely the wisdom of the decrees that society imposes on its constituents, but the very right of society to impose decrees, wise or ignorant."[20] Even in a relatively open society Mill warned of pressures which pull the human spirit to conformity. He was greatly concerned that modern society tends to intimidate man. "Our merely social intolerance kills no one," he wrote, "roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion."[21] According to Henry Magid, Mill meant that "the individual is sovereign over himself" and "the thoughts of the individual are part of himself, and therefore the principle requires that society exert no control over them."[22]

The third topic of concern for both Hobbes and Mill is that of individual participation in affairs of society. When Hobbes discusses "democracy" he means a sovereign-democracy. Even within this context, however, he considers democracy to be a weakness. Hobbes believed democracy not only led naturally to "factions and civil wars,"[23] but, says Mansfield, "to the extent that democracy does increase participation, it is bad, for it ceases to do the work of sovereignty."[24] Hobbes' conviction was founded on a faith in a form of government--absolute rule.

Though Mill felt a need for government, his emphasis seemed to be upon a condition of society, rather than any particular plan of polity. Government was necessary to "prevent harm to others"; however, government was not to infringe upon man's freedom. Herein is where Hobbes and Mill are poles apart. Although Hobbes recognized that man would retain the right to save his own life, he gives the sovereign absolute rule over man's opinions and actions. Mill emphasizes the importance of individual freedom. Neither government nor society is to restrict man's freedom as long as he does not harm others. Mill wrote:

> Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst.[25]

Mill placed liberty above any total loyalty to government. And his "theory of liberty," according to Henry Magid, "is practically relevant only when society becomes more important than the state."[26]

Some critics of Mill think that his degree of devotion to liberty will lead to a breakdown in societal order. They ask what will be the nature of man's existence in Mill's free society. While Mill reserves for government the responsibility of human safety, his faith in freedom, unlike Hobbes, not only allows but encourages a liberal license for personal advocacy of opinion. We find here another basic difference between Hobbes and Mill. Hobbes believed free opinion to be poisonous to his sovereign form of government. Willmoore Kendall, in his attack on Mill's "open society," predicts that "such a society" would "descend ineluctably into ever-deepening differences of opinion, into progressive breakdown of those common premises upon which alone a society can conduct its affairs by discussion, and so into the abandonment of the discussion process and the arbitrament of public questions by violence and civil war."[27]

Even Mill placed some restrictions on his free society. He warned of the "tendency of the most idealistic and high-minded reform movements to harden into dogmatic systems which forced conformity and thereby inhibited future progress."[28] Mill warned that for his free society to work man had to be reasonable. As John Ward found, "it is his faith in reason that buttresses Mill's plea for the freedom and primacy of the individual."[29] Mill added:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply to human beings in the maturity of their faculties. We are not speaking of children, of young persons below the age which the law may fix as that of manhood or womanhood . . . . For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage.[30]

While Mill pauses to point out a few conditions he considers important for the success of his kind of society, his main emphasis is upon the potential of free man for individual and societal progress. Mill has faith in free man. Freedom produces, not poison, but a transfusion of new life in individuals and in society. For Mill liberty is a condition necessary for progress. Life must have liberty.

Mill argues so vigorously for freedom that liberty becomes not only a condition for progress, but possibly its cause. He warned, however, that "the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes."[31] The freedom to do something, then, is sterile without the doing. The very practice of public involvement is generative of good. Profit is inherent to the pursuit. Mill wrote:

> The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom makes no choice. He gains no practice either in discerning or in desireing what is best. The mental and moral, like the muscular powers, are improved only by being used.[32]

Mill believed that free involvement can produce personal development. But what does freedom do for society in general? When opinion is "fully, frequently, and fearlessly discussed," he wrote, it can become "a living truth" and not just "a dead dogma."[33] Specifically, Mill developed three reasons why a majority opinion in society is never justified in suppressing a minority opinion:

1. If the opinion is right, people are deprived of the opportunity of exchanging error for truth.

2. If the opinion is wrong, people lose, what is almost as great a benefit, the clearer perception and livelier impression of existing truth, produced by its collision with error.[34]

3. When the conflicting doctrines, instead of being one true and the other false, share the truth between them: and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part.[35]

Conclusion

When considering the philosophy of free expression, one confronts many choices. Within the context of modern political philosophy, there is a range of opinion from Hobbes' sovereign ruler to Mill's free man. Hobbes requires the individual to position himself to be at-one with the will of the sovereign. Mill argues that freedom is essential for individual and societal good, if not a cause of it. Hobbes had men exchange liberty for security. Mill wanted government to preserve protection, but the very thought of power to control man's freedom, regardless of how fair or efficient, was unacceptable to him. Man must be free both to discover and to discern the desirable for himself. "A person whose desires and impulses are his own," he wrote, "are the expression of his own nature, as it has been developed and modified by his own culture--is said to have a character."[36]

FOOTNOTES

[1]E. Barker, Plato and His Predecessors, p. 27, quoted in Leo Strauss, The Political Philosophy of Hobbes: Its Basis and Its Genesis, translated by Elsa M. Sinclair (The University of Chicago Press, 1952), pp. 155-156.

[2]J. Roland Pennock, "Hobbes's Confusing 'Clarity'--The Case of 'Liberty,'" American Political Science Review, 54 (June, 1960), 429.

[3]Thomas Hobbes, Leviathan, (New York: E. P. Dutton & Co. Inc., 1914), p. 63.

[4]Ibid., p. 66.

[5]Blair Campbell, "Prescription and Description in Political Thought: The Case for Hobbes," American Political Science Review, 65 (June, 1971), 388.

[6]Hobbes, Leviathan, p. 89.

[7]Ibid., p. 113.

[8]Harvey C. Mansfield, Jr., "Hobbes and the Science of Indirect Government," American Political Science Review, 65 (March, 1971), 108.

[9]J. B. Stewart, "Hobbes Among the Critics," Political Science Quarterly, 73 (December, 1955), 547.

[10]George Mace, "An Abuse of Words," Western Political Quarterly, 20 (September, 1967), 639.

[11]Hobbes, Leviathan, pp. 110-114.

[12]Ibid., p. 180.

[13]Ibid., p. 172.

[14]Ibid., p. 93.

[15]Laurence Berns, "Thomas Hobbes, 1588-1679," in History of Political Philosophy, ed. by Leo Strauss and Joseph Cropsey (Chicago: Rand McNally and Company, 1963), p. 368.

[16]Hobbes, Leviathan, p. 116.

[17]J. S. Mill, On Liberty, edited by R. B. McCallum (Oxford: Basil Blackwell, 1948), p. 8.

[18]Ibid., pp. 8-9.

[19]Hobbes, Leviathan, p. 112.

[20]Richard Lichtman, "The Surface and Substance of Mill's Defense of Freedom," Social Research, 30 (Winter, 1963), 470.

[21]Mill, On Liberty, p. 28.

[22]Henry M. Magid, "John Stuart Mill, 1806-1873," in History of Political Philosophy, ed. by Leo Strauss and Joseph Cropsey (Chicago: Rand McNally and Company, 1963), p. 693.

[23]Berns, p. 368.

[24]Mansfield, p. 100.

[25]Mill, On Liberty, p. 14.

[26]Magid, p. 692.

[27]Willmoore Kendall, "The 'Open Society' and Its Fallacies," American Political Science Review, 54 (December, 1960), 978

[28]Magid, pp. 691-692.

[29]John William Ward, "Mill, Marx, and Modern Individualism," Virginia Quarterly Review, 35 (Fall, 1959), 532.

[30]Mill, On Liberty, p. 9.

[31]Ibid., pp. 24-25.

[32]Ibid., pp. 51-52.

[33]Ibid., p. 30.

[34]Ibid., pp. 14-15.

[35]Ibid., p. 40.

[36]Ibid., p. 53.

PATRIOTS VS DISSENTERS: THE RHETORIC OF INTIMIDATION IN INDIANA DURING THE FIRST WORLD WAR

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> Loyalty to the flag means whole-hearted and absolute allegience to the United States. No patience can be shown to the man who does not accept this definition of patriotism.
>
> Richmond Palladium[1]

During the First World War, when legal duress proved unjustified or impractical as a means of forcing a suspected disloyalist to refrain from offensive behavior, Indiana patriots willingly turned to devices of intimidation to suppress dissent. Refusing to recognize a middle ground between treason and patriotism, war supporters at the least wanted to convince recalcitrants and slackers that public expression of unpatriotic sentiments would be unwise. In many instances patriots tried to compel dissenters to accept a measure of patriotic responsibility or to make a public gesture of loyalty. The case of Isaac Baum, an Indianapolis tailor, illustrated a basic patriotic approach to subduing unpopular actions. On the morning of July 6, 1917, as Baum opened his shop on North Pennsylvania Street, he noticed a small crowd gathered in front of the store. He soon learned why these people had looks of astonishment on their faces as they gazed through the shop window. Two Justice Department agents called on Baum, demanding to know why he was displaying a picture of Kaiser Wilhelm. Warning Baum to avoid such displays in the future, the government operatives departed, taking with them a book which had been opened to the revolting picture of Wilhelm.[2] Revealing the readiness of some patriots to resort to more ominous, direct threats to coerce dissenters, a letter signed by "Black Halk /sic/, Fort Wayne Division" informed John Genth that unless he bought war bonds he could look for his "nice big barns to go up in flames" or his house to "get a stick of powder."[3] Both cases reflected a reliance of patriots on the ability of pressure from other persons to affect the behavior of an alleged disloyalist.

Belief in the power of public opinion to achieve uniformity of behavior among some Americans sustained organized tactics of intimidation. A strongly worded letter of reproach would warn the recipient that fellow citizens suspected his disloyal tendencies.

A visit from defense or law enforcement officials carried the threat of further action. Persons listed as slackers by defense agencies were threatened with public exposure and the consequent social or economic ostracism. Asserting that no individual or organization could withstand hostile public opinion, the editor of the Logansport Tribune cautioned that in wartime all citizens must obey orders regardless of task, regardless of legality.[4]

Avid patriots attempted to suppress dissent by making public examples of selected disloyalists. Charles Dhe, Chairman of the Benton County Council of Defense, called for Secret Service men to investigate pro-German residents in Parish Grove Township. Dhe felt that it was time 'to make an example," since "we must shut the mouths of those people before they do more dirt."[5] Circuit Court Judge John Bretz of Jasper told Will Hays, Chairman of the State Defense Council, that "the atmosphere" in the Jasper area would be "clarified . . . very extensively" if "some of our talkative disloyalists were brought up in federal court and dealt with as they appear to deserve."[6] On another occasion, in April, 1918, John Shirk of the Franklin County War Savings Committee expressed his belief that taking up the case of one pro-German in that county "would have a very wholesome effect . . . among those who are not showing their loyalty to the United States that they should."[7]

A Hoosier citizen suspected of disloyalty faced an amazing array of organizations and devices dedicated to his destruction. The official responsibility for investigating alleged disloyalty belonged to the state and county defense councils. The administrative duty fell to protection committees established within the defense council structure. The State Defense Council appointed George Harney, editor of the Crawfordsville Review, to the post of state director of protection activities. Under his direction the county defense councils established local protection committees.[8] In Ripley County twenty-nine men maintained a vigil over the fourteen municipalities in the area.[9]

The State Council instructed Harney's division to discover quietly any evidence of disloyalty "which warrants preemptory action or the reporting to the state for such attention as may be deemed necessary."[10] Although county protection chairmen were known to the general public, officials desired to conceal the identity of other members of the committees. Behind their self-imposed cloak of secrecy and with the excuse of authority, some defense councils extended the scope of the assignment to their groups. Tippecanoe County defense leaders ordered their protection committee to root out and suppress disloyalty.[11] In Wells County Sheriff J. A. Johnson appointed deputies in every precinct with power to arrest any person guilty of disloyal talk or action against the government.[12]

Protection committees depended upon citizen informants to report the names of those persons displaying improper sentiments.[13] Conditioned to expect a pro-German agent behind every suspicious activity, loyal Americans daily reported as many as 1500 cases of disloyalty across the nation.[14] Neither the Justice Department nor the state defense agencies possessed the machinery to investigate each case. To aid in this

work, a group of private citizens organized the American Protective League which grew to involve 200,000 members in over 1000 communities.[15]

By mid-spring, 1918, the APL had established branches in many Indiana communities, including Batesville, Noblesville, Fort Wayne, Terre Haute, Seymour, Marion, South Bend, Logansport, Kokomo, Muncie, Crawfordsville, and Indianapolis.[16] Each branch consisted of a chief and an assistant chief, known to the public, who had under their supervision a large number of secret operatives known only by assigned number.[17] APL organization proceeded slowly in Indiana where selection of a state director proved to be a troublesome problem.[18] Once organized, the APL actively assisted the State Defense Council in the investigation of cases of alleged disloyalty. By mid-May the League had handled at least 150 inquiries in Indiana.[19] The APL found favor with George Murdock, Indianapolis agent of the Bureau of Investigation. In a report to his Justice Department superiors in Washington Murdock could offer no suggestion for the betterment of the APL in Indiana since he had "absolutely no criticism to make" of their activities.[20] By assisting with the organizational work of the APL, the State Council of Defense endorsed the enterprise which closely paralleled the workings of the protection committees.[21]

APL operatives filed reports that summarized information uncovered while investigating disloyalty cases. In Indianapolis a Liberty bond salesman, Patrick Moran, approached citizen J. D. Riggs regarding Riggs' refusal to buy bonds. Riggs expressed a lack of concern for the boys in the trenches. Moran reported the incident to bond drive leaders who in turn assigned it to the APL for study. Operative #411, unidentified on even the official report, obtained affidavits from Moran, Riggs' next door neighbors, Riggs' cousin, and Riggs' employers at the Link Belt Company. From the latter he learned that Riggs had access to Link Belt's plans for government work. The other sources indicated that Riggs was pro-German. The APL submitted this report without interpretation to the State Defense Council for whatever action it might undertake.[22]

In some sections of the state groups of patriots formed unofficial protection committees to supplement the work of the defense councils, the APL, and federal agents. The Gary Patriotic Committee was composed of leading professional people who were determined to rid Gary of German influences. They once went out as a Vigilance Committee and compelled a man to tear to pieces a picture of the Kaiser which was hanging in the suspect's home.[23] The Loyal Citizens Vigilance Committee of Miami County emerged as the most conspicuous and most controversial such group. Founded in the spring of 1918, the committee quickly grew to a membership in excess of 2,000 persons including prominent professionals and businessmen, farmers, educators, and ministers.[24] The committee was directed by the assistant chief of the local APL branch.[25] Its stated purpose was to act as a patriotic influence, supporting the war, preserving loyalty, and protecting law and order.[26] In May thirty members of the committee took a rural Miami County man from his home, covered his body with yellow paint, and warned him of more serious punishment to come should he still refuse to display proper sympathy for the United States.[27]

The propensity to violence shown by the Miami County group led to complaints being lodged with Indiana Adjutant-General Lester Smith. In a late August, 1918, meeting of the State Defense Council Smith asked the defense leaders to review the lawlessness in the Peru area.[28] Smith recounted the case of Thomas McGloin, a farmer who was being harassed by the Loyal Citizens. McGloin had complained that the committee was demanding a greater contribution to the War Chest than he was willing to make. Not inclined to follow Smith's suggestion that he make the contribution, McGloin soon reported that a crowd of 2000 persons had surrounded his house one evening and threatened him while he attempted without success to contact law enforcement officers. The Adjutant-General expressed concern that patriots in Miami County were apparently resorting to violence with no objections from defense bodies or law agencies.[29]

The Council seemed inclined to defend the Vigilance Committee. Suggesting that state officials "would do well to keep hands off and let Miami County take care of itself," Frank Wampler called attention to the Miami group's blue-blood composition.[30] Michael Foley, who had replaced Will Hays as State Council Chairman, had found during the course of a recent visit to one of the committee's meetings that the members were a "thoroughly patriotic and representative set of people."[31] In fact in early August Foley had commended the committee for its "courage to publicly denounce any man, or class of men, who are not willing to do their duty."[32] Council member E. M. Wilson disclosed that he and Captain Harney of the Protection Division had met with McGloin in Indianapolis. They were convinced that McGloin's allegations "did not convict the Vigilance Committee in any sense."[33] The State Council finally decided to remand the case to the Miami County Council of Defense. County chairman W. A. Hammond sent back an indictment of McGloin's account of the incident and defended the Vigilance Committee members as "good, law abiding citizens" who had "positive instructions not to violate the law in any way."[34] Regardless of the facts in each such incident the Loyal Citizens Vigilance Committee acquired a public image as an intolerant opponent of any form of dissent. Its reputation encouraged citizens to avoid a confrontation.

Persons reluctant to "do their bit" faced the threat of public exposure by defense bodies. Labeling persons not aiding the Red Cross as "sinners," the Pulaski County Democrat announced that it held a list of names of the non-contributors. Before publishing the names, the Democrat offered the transgressors a chance to repent.[35] Similar threats were made by the Fulton County Council of Defense, the Fourth Liberty Loan organization in Spencer County, and the Delaware County Defense Council.[36]

Defense leaders displayed great ingenuity in designing means of compiling the lists of slackers. Some war drives depended upon door to door soliciting for contributions. Campaign committees frequently determined prior to the canvas a quota for each person or family in its jurisdiction. If a person refused to subscribe that amount, the canvasser filled out a "yellow card" with details of the individual's economic situation. Loan officials used these cards to determine which persons should receive additional solicitations.[37] On some occasions officials set out to compile patriotic indexes. Women's registration, a national campaign scheduled for ten days in April,

1918, was the most comprehensive such effort. Census takers tried to interview every woman in America to discover what contributions each had made to the war effort and what special contributions each might be willing to make in the future.[38] Wabash County officials compiled a war census card index, recording the patriotic activities of each family in the county. From this census the Council could determine who should be officially encouraged to lend assistance to the war. Those refusing would "be put into the class" in which they belonged.[39] In the Bluffton area the Harrison Township Liberty Association printed pledges of loyalty. A person refusing to sign the card would be subject to a loyalty investigation.[40]

Some reflective citizens objected to the coercive implications of the efforts to compile patriotic lists. Referring to women's registration, Colonel Russell Harrison, Secretary of the Marion County Defense Council, explained that the registration "is entirely a volunteer matter. There is no law requiring women and girls in this city to fill in and sign war service registration cards."[41] Although discounting any attempts to force women to sign up for war work, the government requested that each woman register with the census taker.[42] Enraged by Harrison's open-minded disposition, Anna Essinger of the Sullivan County Defense Council wrote Michael Foley that if "Mr. Harrison is correct, we believe we may as well discontinue the work of registration."[43] Ignoring the issue raised by Harrison, Foley responded that the article by Harrison had been "unauthorized" and emphasized a statement of Governor James Goodrich "decrying any further delay in the women's registration."[44]

The State Council of Defense tolerated the coercive use of lists. During its March 27, 1918, meeting some council members raised minor reservations but overall seemed to support the practice.[45] On another occasion a Crawfordsville editor inquired about the prudency of publishing a list of persons not contributing to the local War Chest. Foley answered that he was not "inclined to protect the feelings of anyone who is against any of the war activities."[46] Foley suggested that the matter was one for local decision but offered his "Amen" should the decision be to publish the list.[47] The Council understood that the matter of contributions to war drives was entirely voluntary; so "practically the only thing that can be done is to bring lack of patriotism to public attention."[48]

Although frequently threatening to do so, officials did not make a habit of distributing lists of slackers to the public. On one occasion each, newspapers in Scott and White Counties published lists of contributors to the Red Cross.[49] Persons whose names did not appear were assumed to be slackers. On another occasion readers of the Indiana Bulletin learned that by looking at a map of the Washington Township area of Jackson County they could see "one tip of the Kaiser's mustache curled up from Dudley town and the tip at Sauer's Church, while the Crown Prince and the Empress look out through the eyes of every wooden-shoed lad and pig-tailed lady-chen that you meet on their way to the parochial school."[50] A poor response to women's enrollment in the area inspired this cartographic invective.[51]

Defense groups used lists mainly as threats against dissidents. Indianapolis

patriots purchased a full-page advertisement in the Indianapolis News in which they spelled out the fate of those "indexed." They threatened to preserve the index "so that coming generations may read it."[52] Fayette County officials discussed plans to erect a large black tablet on the court house lawn, a "Roll of Dishonor" listing in red letters the name of any proven anti-American within the county.[53]

Lists of disloyalists prompted defense organizations to send intimidating letters to those listed. During the Fourth Liberty Loan drive in Miami County in the fall of 1918 the state loan director advised county officials not to be "afraid to tell the truth . . . concerning the slackers, as well as other more influential men who might be indifferent toward the loan."[54] Ninety-eight persons refused to buy bonds. Bond salesmen filled out a card listing occupation, annual income, total worth, record of prior war support, and reason for refusal for each recalcitrant.[55] Freeman Morse wanted to keep his money so he could spend it as he desired.[56] George Allman and Edward Condon each claimed too great a debt to allow bond purchases.[57] Fern Hoffman, a Peru schoolteacher, had subscribed to the first three bond issues and felt unable to buy this time.[58] Dismissing all of these excuses as inadequate, the secretary of the county loan organization noted on each of the cards that the individual must buy bonds.

The loan committee dispatched telegrams and letters to those deemed capable of larger purchases. J. J. Dunn received a curt telegram: "You are reported as not having subscribed adequately to Fourth Liberty Loan. You should buy one thousand dollars. Time is short. If without funds your banker will lend so you can make adequate subscriptions. See your banker before noon tomorrow."[59] Twenty-two area residents received letters reminding them that their failure to buy bonds was having a demoralizing effect on the community. The letter explained that those less able to subscribe could not understand why they should when the better-off citizens did not. The letter urged "shirkers" to reconsider their decisions. If they did not, they faced being stamped forever as having failed the government in its hour of need. The letter ended with an ominous threat: "Please consider the matter deeply; then write us your decision, which we hope will not embarrass you or compel us to take further steps."[60]

Mistakes occurred. G. R. Chamberlain of the Peru First National Bank was assailed for having bought only $300 worth of bonds when $1000 had been the assigned quota.[61] He responded that he had subscribed for not $300 but $3300 worth of the issue and had previously bought $3000 worth of the first three bond issues. Fearing public embarrassment, this victim of intimidation felt compelled to sign up for another $1000 of the Fourth Loan even "if it takes the hide off to pay for them."[62] The bank confirmed his additional purchase.[63]

Checking her family's daily mail, Mrs. Susan Baker of Garrett spotted a letter to her son Parker from J. V. W. McClellan, Chairman of the DeKalb County Defense Council. Opening it, she found a message accusing the youth of not doing his duty as an American citizen. McClellan advised that "there is no room for such yellow dogs in this country. . . . Uncle Sam will not stand for slacking."[64] Incensed by the belligerant note, Mrs. Baker sent it to the State Defense Council, warning: "I expect to

carry this to Washington." Referring to the low character of the note's author, the distressed mother asserted that Parker "has been sickly for many years and is physically unfit to do many things that he would like to do."[65]

Should veiled threats to smear an accused disloyalist's public reputation fail to stimulate better behavior, patriots could be more direct in their attacks on one's security. One reprehensible practice was to threaten a person with loss of a draft exemption should he do or say anything which suggested misplaced war sympathies. District Exemption Board No. 2 asked an Elkhart board for the names of farmers who failed to buy Liberty bonds and who did not support the Red Cross. Newspapers reported that "a decision may be made to reopen some army draft cases in which farmers are concerned."[66] When Earl G. Klenck of Evansville reportedly cursed an American soldier, a local committee took him before Albert Funkhouser, the Federal conscription agent, where he agreed to pledge his loyalty, fly the flag, and purchase a bond.[67] Witnesses appearing before the Third Indiana District Army Appeal Board on behalf of registrants seeking exemption were asked if they had bought a liberty bond.[68]

Some individuals were threatened with loss of jobs or economic self-sufficiency. Huntington County defense leaders sent local merchants a list of eight persons certified as not supporting the government. The merchants were directed "to see that the persons named . . . shall not have an equal privilege with loyal Americans."[69] Adams County sources reported that a well-known farmer who refused to buy bonds could not find a customer for a wagon load of fine apples.[70] Near Huntington, Clear Creek Township officials asked merchants not to trade with a certain man. Unable to sell his cream, unable to buy coal, the farmer reportedly mended his ways and bought the limit of Thrift stamps and gave liberally to other war activities.[71]

In other instances patriots threatened the job security of those not willing to fully support the war. Clay County coal miners passed resolutions holding non-bond holders ineligible to work in the mines.[72] Gary Mayor R. J. Johnson fired city engineering inspector Benj Szinyi for not being in sympathy with America.[73] The Secretary of the Marion County Defense Council obtained the discharge of a "disloyal employee" of the Premier Motor Car Company.[74] This individual transferred to the National Motor Car Company, and again he was dismissed at the insistence of the ever vigilant defense official.[75] At a mass meeting in Evansville employees of the Bernstein Overall Company called for the dismissal of Mrs. Alma Kisstinger and Mrs. Mamie Armstrong for not supporting the Red Cross and for making irreverent remarks about President Wilson.[76] Refusing to work with a "hungabbler," fellow employees at the Columbia Harness Company in Indianapolis forced the release of Charles Best.[77] After conferring with state officials, Robert Proctor of the Elkhart County War Savings Stamp Committee asked the county auditor to fire his deputy, A. S. Stuttenrotz, for the latter's failure to purchase stamps.[78] The Indianapolis Board of Public Safety dismissed patrolman Charles Baumann for alleged utterances disloyal to the United States.[79]

Officials interfered with public meetings of dissident groups. By prohibiting

gatherings or by infiltrating those that were held, authorities stifled open discussion. Once, when planning a peace meeting to protest the "cossack methods" of local police, Gary socialists encountered seventy-five patrolmen surrounding their meeting hall.[80] Earlier in the day Federal Agent George Bragdon had arrested a Chicago socialist scheduled to address the Gary group and had grilled several local socialist leaders.[81] Mayor Roswell O. Johnson pledged the use of the entire police force, if necessary, to prevent the meeting.[82] In Boone County the Defense Council publicly commended Sheriff D. N. Lewis for his prompt action in suppressing a socialist meeting.[83] The state's Lieutenant Governor, temporarily at the helm of Indiana during Governor Goodrich's serious illness in the fall of 1917, assured Marion County patriots that he would "prevent the holding of a disgraceful peace meeting."[84]

Often government representatives would attend meetings of dissident groups. In Indianapolis a number of citizens called a meeting to form an anti-conscription organization. The Indianapolis Star reported that during the meeting so thick was the gloom cast by the presence of Captain Thomas Hall of the Secret Service, United States Marshal Mark Storen, and Deputy Marshals Frank Barnhart and Frank Ream that the expected organization was not perfected.[85] As soon as participants recognized the officers, "oratorical ardor subsided."[86] Marshal Storen delivered a brief speech, pointing out "the risks they ran in attempting to hold such a meeting . . . when the entire secret service was on the alert to discover and root out just such propaganda."[87] The Star warned that every person at the meeting would be an object of interest to Federal authorities.[88]

Frustrated by the ineffective efforts of courts to cope with all varieties of disloyalty and determined to invest their actions with authority, some defense bodies constituted themselves into extra-legal courts of justice. Their purpose was ostensibly to decide on the merits of evidence presented against alleged disloyalists to ascertain whether further action might be justified.[89] Without authority, they assumed the right to subpoena and examine suspects and witnesses and to mete out punishment to violators of whatever policy was at issue.

Although stressing the need for reasonable procedures, the State Council of Defense nevertheless approved these extra-legal activities. Shelbyville lawyer and county defense leader Ed Adams questioned state officials as to his power to compel persons to appear before the council.[90] George Harney responded that "no power was given . . . to summon witnesses and take testimony."[91] Disregarding his own admission, Harney continued: "In Indiana we have been proceeding as though we had this power and have been obtaining very satisfactory results."[92] He then outlined the means by which a local defense council could assume these court-like powers: "You can summon them by letter, directing them to appear before the Council (registered letter the best method). For the protection of the offender and all concerned he should be sworn and his statements taken by a reporter and such final disposition made as the case seems to warrant." He pointed to the use of this system in Vigo, Huntington, Randolph, Miami, and LaPorte counties.[93]

In practice the assumption of unwarranted powers by defense groups led to abuses of the rights of private citizens. Although devoid of statutory authority, summonses were treated by patriots as though they were law. The Elkhart County Council of Defence dispatched the Goshen police chief to escort Reverend Henry Weldy to a meeting of the Council.[94] A more blatant violation of standard legal procedure occurred in Randolph County when an extra-legal committee placed a suspect in jail after deciding on his disloyalty. Committee members agreed that they would be willing to take the blame in case of any further legal action.[95]

Sitting as court, the Miami County Loyal Citizens Vigilance Committee terrified the Peru area. In late September, 1918, the committee sent a delegation to Macy to usher J. E. Ewer to the group's meeting place in the old Peru postoffice. Ewer declined to accompany the group, asserting that they had no authority to compel him to leave his home.[96] A week later the committee instructed another delegation of ten men to produce Ewer before the meeting.[97] Forcing their way into the Ewer home, they seized the alleged slacker and carried him to a waiting car, pointed revolvers to ward off curious neighbors, and sped with their captive to the waiting Loyal Citizens.[98] After a fiery session Ewer agreed to buy War Savings Stamps since it was the only way to assure the safety of his family. His pragmatism offended the members of the Vigilance Committee. They refused Ewer's offer and sent him on his way.[99] Commenting on the action, the Peru Journal proclaimed that "the time has passed when refusals upon the part of men charged with disloyal remarks and acts against the government will be allowed to take the form of refusing to come before the Committee for examination."[100]

Ewer refused to drop the matter. Believing that the Committee had flagrantly misused an illegally assumed authority, he carried his case to L. Ert Slack, United States District Attorney in Indianapolis. Ewer convinced Slack that there should not only be a Federal investigation of the case, but that state officials as well should become involved.[101] However, the war ended before any action could be initiated. By refusing to investigate the activities of the Miami County group earlier, officials put a tacit stamp of approval on terrorism, kidnapping, and kangaroo courts as long as they were designed to subdue disloyalists.

In August, 1918, the Putnam County Defense Council sat as a court to hear the case of Jennie Wolf who stood accused of publicly upholding the Kaiser while criticizing President Wilson.[102] Benjamin Crowin served as the prosecuting attorney; Jackson Boyd represented the defendant. The first witness, Dela Pickett, testified that Mrs. Wolf became enraged at co-workers at the Reed-Murdock tomato processing plant who were uttering hateful remarks about the Kaiser. Seven other witnesses corroborated Mrs. Pickett's account of the affair. Taking the stand on her own behalf, Mrs. Wolf admitted criticizing the President but proclaimed her patriotism. Although the hearing unearthed no substantive evidence of an illegal act, officials nevertheless berated Mrs. Wolf. At the request of C. C. Hurst of the Putnam County Council Michael Foley wrote the woman a letter outlining the sins of the Kaiser, adding: "Hereafter I shall expect you . . . to refrain from any comment in public or in private that is intended

to defend the German Kaiser or a single act of his bloody career."[104] After the "trial" Mrs. Wolf left her job at the packing plant.[105]

Although possessing no authority to compel behavior, the threats posed by extra-legal courts were often sufficient to frighten people into the desired action. After formally investigating five men in Spencer County for disloyalty a Defense Council committee demanded and received loyalty pledges in the form of monthly contributions to the Red Cross, promises to display the flag, and assistance in stopping disloyal talk in the community.[106] Called before Elkhart County's defense body, farmer Jacob Bechtel agreed to purchase "not less than $2,500 worth of the next Liberty Loan issue."[107] John Wilson of the State Council of Defense reported to national defense officials that "in very few instances did this procedure /calling persons before the local councils/ fail to secure a larger subscription from the individual."[108] Officials depended on the force of public pressure to legitimatize extra-legal courts. After holding two hearings involving disloyalty, Vigo County officials noted that giving publicity to the hearings "lets the man's neighbors and the people he works with know what kind of man he is."[109] The result would be that the "people will point the finger of scorn at them--best punishment there is."[110]

Occasionally a lonely voice protesting intimidation arose above the patriotic clamor that so marked the state. When merchants threatened a boycott, Huntington area farmers composed a defense of their allegedly disloyal actions. Rebuffed in efforts to publish this defense in Huntington papers, they forwarded it to the State Defense Council. Claiming loyalty to the President, they asserted that each had contributed his share to "nearly every fund that came along."[111] Threatened during a recent fund drive with fines up to $10,000 and imprisonment for fifteen years, they strongly disapproved of "these misrepresentations to the good people of our county, and neither will we submit to coercion and fraud." Poignantly they queried: "Where is your law and your court for such judgments?"[112] The farmers carried their protest to federal officials. Lawyer John C. Cline wrote the Treasury Department a letter protesting the tactics of coercion used against his clients.[113] Treasury officials agreed with Cline, condemning the use of any methods even resembling compulsion in connection with war fund drives. They foresaw the danger that over-zealous patriots could create citizen resentment rather than unity and support for the war.[114] But the merchants maintained their boycott until the farmers threatened to seek restraining orders and to file major damage suits against them.[115]

A few Hoosiers so resented efforts of patriots to intimidate them that they assaulted their harassers. James Himelick of Peru struck bond worker Bill Hood with a post digger.[116] In Indianapolis Elbert Martz used a sledge hammer on another bond salesman, Rolland Garrison, after Garrison called Martz a slacker for saying he could not afford a bond due to his daughter's serious illness.[117] In another incident a Liberty bond solicitor was assaulted near Spencer by an alleged pro-German wielding a hatchet.[118]

Regardless of occasional public criticism most Indiana defense officials encouraged the intimidation of slackers. The Indianapolis News argued that threats were not methods of sound sense. Sensing that persons forced to make a show of patriotism act hypocritically, the News allowed that threats and coercion may bring forth a small amount of money, but felt the moral effect would be better if slackers would be left to their consciences.[119] However, as late as October 1918, after the situations in Miami and Huntington counties had been in the public spotlight, Michael Foley was commending the Liberty Loan organization for pressuring two Cloverdale men who had not bought bonds.[120] Foley felt that Will Wade, director of bond sales in Indiana, had handled the matter in fine style: "While the amounts are not large, the purchases by these gentlemen will have the desired effect in this neighborhood."[121]

The willingness of Hoosier patriots to resort to coercive or illegal practices to enforce patriotism stemmed in part from the fervor of their own patriotism and in part from their conception of the Indiana situation. Believing that pro-German sympathizers endangered effective war work in the state, patriots felt a need to arouse people to a full awareness of the seriousness of the war and the need for total loyalty at home. By challenging those who might be inclined to express contrary opinions, leaders sought to achieve the unity they considered important. To be effective, challenges had to be strong. Courts of law had proved unequal to the task. Although achieving great support for the war, public persuasion failed to silence those who disagreed with official policy. Persons resistant to ordinary methods of persuasion might not be so resistant to threats to their personal security. By obtaining statewide publicity for the scattered battles against disloyalists, state officials hoped to bring the cases ultimately to the Court of Public Opinion which they believed capable of influencing a recalcitrant to change, if not his attitudes, at least his public behavior.

FOOTNOTES

[1]Richmond Palladium, April 6, 1917.

[2]Indianapolis Star, July 7, 1917, p. 11.

[3]Letter read by Inman Fowler, Indiana State Bar Association, Proceedings of the 22nd Meeting, July 10, 1918, pp. 17-18.

[4]Logansport Tribune, n.d., rpt. in Indiana Bulletin, February 1, 1918, p. 8, (official publication of the Indiana State Council of Defense).

[5]Dhe to Will Hays, January 24, 1918, Indiana State Council of Defense, Papers and Correspondence (hereafter ISCD), Series 11, Vol. 2, Archives Division, Indiana State Library.

[6]Bretz to Hays, December 29, 1917, ISCD, Series 3, Vol. 5.

[7]Shirk to State Council of Defense, April 17, 1918, ISCD, Series 11, Vol. 2.

[8]Indiana Bulletin, August 24, 1917, p. 4.

[9]Ripley County Council of Defense to Hays, August 4, 1917, (Typewritten), ISCD, Series 3, Vol. 15.

[10]Confidential Circular, Will Hays to County Councils of Defense, June 22, 1917, ISCD, Series 2, Vol. 1.

[11]Indiana Bulletin, November 30, 1917, p. 3.

[12]Indianapolis News, December 6, 1917, p. 5.

[13]For example, the Lafayette Courier, February 16, 1918, told its readers to report all cases of disloyalty to the county defense council.

[14]Thomas Gregory, "Suggestions of Attorney-General Gregory to the Executive Committee in Relation to the Department of Justice," American Bar Association Journal, 4 (1918), 312-13.

[15]The most recent and complete history of the APL is Joan Jensen, The Price of Vigilance, (Chicago: Rand McNally, 1968); updates Emerson Hough, The Web, (Chicago: Reilly and Lee, 1919), the officially authorized history of the APL.

[16]Typed list, n.d., ISCD, Series 20, Part 1; Records of APL activities in Indiana are limited. In a housecleaning during 1953 the National Archives destroyed most of their APL materials, including those pertaining to Indiana, see bibliographic note in Jensen, Price of Vigilance.

[17]Memorandum, n.d., ISCD, Series 20, Part 1.

[18]One man recommended for the job, Don Hawkins, was approved by state officials, but turned down in Washington. Another, Meredith Nicholson, withstood strong pressures and refused the job for reasons of health and other obligations; Hays to Winterbotham, February 12, 1918; Winterbotham to John Wilson, March 4, 1918; Wilson to Nicholson, March 12, 1918; Nicholson to Wilson, March 13, 1918; ISCD, Series 20, Part 1.

[19]Confidential, Frank Fishback, Charles Lewis, and Hugh McK. Landon to John Wilson, May 13, 1918, ISCD, Series 20, Part 1.

[20]Ibid.

[21]For example, the State Council of Defense selected the APL State Director.

[22]Official report of investigation, May 14, 1918, ISCD, Series 20, Part 1.

[23]Indianapolis News, April 5, 1918, p. 29.

[24]Frank Butler to Michael Foley, July 13, 1918, ISCD, Series 3, Vol. 12.

[25]Jensen, Price of Vigilance, p. 146.

[26]Butler to Foley, July 13, 1918, ISCD, Series 3, Vol. 12.

[27]Rochester Sentinal, Weekly Edition, May 2, 1918.

[28]Indiana State Council of Defense, Proceedings of the 64th Meeting, August 20, 1918, p. 11, (Typewritten), Archives Division, Indiana State Library.

[29]Ibid.

[30]Ibid., p. 20.

[31]Ibid., p. 22.

[32]Foley to William Schrader, July 31, 1918, ISCD, Series 3, Vol. 12.

[33]ISCD, Proceedings of the 64th Meeting, p. 21.

[34]Hammond to Foley, August 26, 1918, ISCD, Proceedings of the 65th Meeting, August 27, 1918, p. 11.

[35]Pulaski County Democrat, June 28, 1917, p. 4.

[36]Rochester Sentinal, Weekly Edition, September 12, 1918, p. 1; Rockport Journal, October 5, 1918; Indiana Bulletin, February 22, 1918, p. 3.

[37]Indiana Bulletin, February 22, 1918, p. 3.

[38]Women's Section, Indiana State Council of Defense, Manual of Registrars, Indiana Division, Indiana State Library.

[39]Indiana Bulletin, April 26, 1918, p. 5.

[40]Indianapolis News, May 1, 1918, p. 5.

[41]Indianapolis News, May 11, 1918, p. 3.

[42]Manual for Registrars.

[43]Eastinger to Foley, May 11, 1918, ISCD, Series 3, Vol. 16.

[44]Foley to Eastinger, May 17, 1918, ISCD, Series 3, Vol. 16.

[45]Indiana State Council of Defense, Proceedings of the 43rd Meeting, March 27, 1918, pp. 17-19.

[46]Foley to Joseph Snyder, May 24, 1918, ISCD, Series 3, Vol. 5.

[47]Ibid.

[48]John Wilson to George Wagner, May 24, 1918, ISCD, Series 3, Vol. 5.

[49]Scott County Journal, July 18, 1917; White County Democrat, March 1, 1918.

[50]Indiana Bulletin, September 21, 1917, p. 7.

[51]Ibid.

[52]Indianapolis News, April 17, 1918, p. 12.

[53]Indiana Bulletin, October 18, 1918, p. 2.

[54]Will Wade to O. F. Rhodes, October 6, 1918, Fourth Liberty Loan-Indiana, Papers and Correspondence, Vol. 27, Part 15, (hereafter Liberty Loan), Archives Division, Indiana State Library.

[55]Cards in Liberty Loan, Vol. 37, Part 15.

[56]Ibid.

[57]Ibid.

[58]Ibid.

[59]Telegram, Will Wade to J. J. Dunn, October 25, 1918, Liberty Loan, Vol. 37, Part 15.

[60]Letters dated October 17, 1918, and October 19, 1918, Liberty Loan, Vol. 37, Part 15.

[61]Card record for G. R. Chamberlain, Liberty Loan, Vol. 37, Part 15.

[62]Telegram, Chamberlain to Wade, October 23, 1918, Liberty Loan, Vol. 37, Part 15.

[63]Telegram, First National Bank of Peru to Wade, October 24, 1918, Liberty Loan, Vol. 37, Part 15.

[64]J. Y. W. McClellan to Parker Baker, October 14, 1918, ISCD, Series 11, Vol. 2.

[65]Susan Baker to State Council of Defense, October 24, 1918, ISCD, Series 11, Vol. 2.

[66]Indianapolis News, October 24, 1917, p. 1.

[67]Indianapolis News, October 25, 1917, p. 10.

[68]Indianapolis News, October 25, 1917, p. 17.

[69]G. M. O'Leary to Huntington Merchants, n.d., ISCD, Series 3, Vol. 8.

[70]Indiana Bulletin, October 25, 1918, p. 2.

[71]Indiana Bulletin, July 12, 1918, p. 2.

[72]American Legion, Clay County Post No. 2, Clay County's Answer, 1917-1919 (Chicago: Rogers Printing Co., 1919), p. 108.

[73]Indianapolis Star, September 15, 1917, p. 6.

[74]Marion County Council of Defense, Minutes, Meeting of January 20, 1918, (Typewritten), Archives Division, Indiana State Library.

[75]Ibid.

[76]Indianapolis News, June 28, 1917, p. 6.

[77]Indiana Bulletin, January 18, 1918, p. 8.

[78]Indianapolis News, July 19, 1918, p. 15.

[79]Indianapolis Star, December 27, 1917, p. 14.

[80]Indianapolis Star, August 31, 1917, p. 4.

[81]Ibid.

[82]Ibid.

[83]Indiana Bulletin, September 21, 1917, p. 3.

[84]Lt. Governor to Marion County Council of Defense, September 19, 1917; rpt. in Indiana Bulletin, October 5, 1917, p. 8.

[85]Indianapolis Star, June 1, 1917, p. 1.

[86]Ibid.

[87]Ibid.

[88]Ibid.

[89]Michael Foley to Marshall Hacker, August 12, 1918, ISCD, Series 3, Vol. 3.

[90]Ed Adams to State Defense Council, April 12, 1918, ISCD, Series 11, Vol. 4.

[91]Harney to Adams, April 13, 1918, ISCD, Series 11, Vol. 4.

[92]Ibid.

[93]Ibid.

[94]Elkhart County Council of Defense, "Secretary's Report, Meeting of July 19, 1918," in H. K. Bartholomew, History of Elkhart County in the World War, (Typewritten, 1925), Indiana Division, Indiana State Library.

[95]Indiana Bulletin, April 26, 1918, p. 3.

[96]Macy Monitor, n.d., ISCD, Series 3, Vol. 12.

[97]Peru Journal, October 8, 1918.

[98]Macy Monitor, n.d., ISCD, Series 3, Vol. 12.

[99]Peru Journal, October 8, 1918.

[100]Ibid.

[101]Indianapolis Star, October 10, 1918.

[102]"Transcript of Evidence," ISCD, Series 11, Vol. 4.

[103]Ibid.

[104]C. C. Hurst to Foley, November 2, 1918; Foley to Wolf, November 6, 1918, ISCD, Series 11, Vol. 4.

[105]"Transcript of Evidence," ISCD, Series 11, Vol. 4.

[106]Mrs. Helen Sumen, Spencer County in the World's War, 1914-18, IV, (1923), Indiana Division, Indiana State Library, p. 9.

[107]Elkhart County Council of Defense, "Secretary's Report, Meeting of July 19, 1918," in Bartholomew, History of Elkhart County.

[108]Typed report, n.d., Liberty Loan, Series 7, Part 4.

[109]Earl Houck to George Harney, April 25, 1918, ISCD, Series 11, Vol. 4.

[110]Ibid.

[111]Letter signed by eight Huntington residents, n.d., ISCD, Series 3, Vol. 9.

[112]Ibid.

[113]John Cline to Treasury Department, July 9, 1918, ISCD, Series 3, Vol. 9.

[114]Treasury Department to J. D. Oliver, July 15, 1918, ISCD, Series 3, Vol. 9.

[115]Huntington residents to Herbert Hoover, September 23, 1918, ISCD, Series 3, Vol. 9.

[116]Indianapolis News, April 10, 1918, p. 15.

[117]Indianapolis News, May 6, 1918, p. 3.

[118]Rockport Journal, n.d., in Spencer County World War History, IV, (Typewritten), Indiana Division, Indiana State Library.

[119]Indianapolis News, June 24, 1918, p. 6.

[120]Foley to Will Wade, October 7, 1918, ISCD, Series 7, Part 4.

[121]Ibid.

THE INFLUENCE OF A COURSE IN ETHICS AND FREE SPEECH IN CHANGING STUDENT ATTITUDES

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Background

Several scholars in the field of speech, notably Franklyn S. Haiman and Alton B. Barbour, have been prompt to point out the lack of application and integration of social science research and findings to some of the prevailing free speech issues. Haiman in his book Freedom of Speech: Issues and Cases makes a brief reference to some statistics emanating from several national opinion polls which tap the area of civil liberties. The Samuel A. Stouffer study entitled Communism, Conformity, and Civil Liberties, and the Purdue Opinion Poll of 1960 contained in H. H. Remmer's Anti-Democratic Attitudes in American Schools, suggest some startling percentages of Americans who would prohibit some people from making public speeches. Stouffer's data reveal that less than approximately 1% of those surveyed were worried about the state of civil liberties in this country.[1] This same general perspective seems to be supported by the findings reflected in a 1964 Gallup Poll, the core of Free and Cantril's analysis of The Political Beliefs of Americans. From a random national sample of 3,175 interviewees, approximately 6% expressed personal fears about the lack of freedom, specifically freedom of speech and religion.[2]

A number of surveys have focused on the attitudes or opinions toward free speech of a more limited sample, high school and college or university students. Studies such as those conducted by G. P. Rice, H. H. Remmers, A. Barbour, and W. J. Osborne and W. I. Gordon,[3] reveal that many high school students and a "significant minority" of university students in their particular samples held attitudes unsupportive of specific rights guaranteed by the U. S. Constitution. This same general predilection is supported by several related findings summarized in a recent article by A. Barbour and A. Goldberg.[4]

Concurrent with these investigations, and perhaps not unrelated to them, there has been a concern about effectively teaching or "changing" free speech attitudes. In 1955, R. E. Horton reported that for the students he studied,[5] no high school course seemed to have any influence on attitudes toward the Bill of Rights. More recently as reported in the 1969 and 1970 Free Speech Yearbook, the research of C. M. Rossiter, Jr. indicated "slightly liberalizing," though not statistically significant, shifts in attitude toward free speech issues from exposure to lessons about freedom of speech.[6]

*In the fall of 1972, Mr. Hilpert began his teaching duties at the University of Illinois at Champaign-Urbana. However, the research for this article was done at the University of Oregon.

Purpose

The purpose of this investigation follows directly from the concern expressed in the review of the literature. Specifically, it focuses on a sample of undergraduate and graduate university students and their attitudes toward particular free speech issues. In addition, the research is designed to assess what influence the completion of a university course in "Ethics and Free Speech" might have on students' attitudes toward these issues. Two hypotheses are stated for testing:

Hypothesis #1: The university students constituting the sample investigated will significantly indicate attitudes approving of free speech.

Hypothesis #2: As a group, those students completing the designated class in "Ethics and Free Speech" will manifest a significant change in attitude indicating increased approval of free speech.

Though the second hypothesis is not directly supported by the findings of Rossiter, it is believed that the stimulus provided by an extended class in "Ethics and Free Speech" will have a more salient influence than that described in previous research. Usually, the lessons in free speech have covered but two or three class periods.

The word "attitude" as used in this study is generally defined as "an individual's enduring syndrome of response consistency with regard to a set of social objects."[7] More specifically, "attitude" is operationalized in this study as an individual's response on a Likert-type rating scale to a particular free speech item; a question or assertion about a free speech issue. "Free speech" is conceptualized as "those matters having to do with public expression and protected by the U. S. Constitution and U. S. Supreme Court decisions dealing with the First Amendment."[8] A more detailed consideration of the operationalization of "free speech" will be offered in the subsequent procedures section.

General Characteristics of the Course

The "Ethics and Free Speech" course at this university is taught by a senior faculty member in the Department of Speech. A lecture/discussion approach is utilized. The class meets two days a week (Tuesdays and Thursdays) for a two-hour period. The meeting place itself is a rather small classroom arranged in a conference table manner. The students who usually register for the class are upper-division or graduate students. Though the class is normally composed of a majority of speech majors, there are usually a few students from other departments who have elected to enroll. Broadly, the topics covered in the ten-week session are divided into two five-week phases. The first five weeks focus on ethics of persuasion. Selected readings from Richard L. Johannesen's Ethics and Persuasion as well as other assigned essays provide a background for specific lectures and extended class discussions. At the conclusion of this

phase, each student subjects an essay explicating his personal ethic of persuasion. The second five-week phase deals with a review and summary of various free speech issues and cases. Franklyn S. Haiman's Freedom of Speech text is used for reference with the instructor detailing specific landmark cases and current Supreme Court rulings in lectures. Students are responsible for learning the various rulings and applying them to two hypothetical cases involving particular conflicts centered around specific free speech issues. Briefly stated, the student renders a decision which is then discussed by the rest of the class.

Procedures

Subjects: The experimental group for this investigation was constituted by those students taking the described "Ethics and Free Speech" course. Twenty-six out of the twenty-seven students enrolling in this course Winter and Spring terms 1971 (twelve during Winter term and fourteen during Spring), agreed to take part in an undisclosed Speech-Communication research project. All students in the experimental group were either upper-division or graduate students at the University of Oregon. The age range of the students extended from nineteen to thirty years.

The control group was composed of thirty upper-division and graduate students enrolled in three other classes offered in the Department of Speech. During the Winter term, eighteen of twenty-three students enrolled in two classes, "Functional Speech Disorders" and "Language and Communication," volunteered to participate in the research project, the purpose of which was unknown to them. Spring term another complete class of twelve students studying "Logic of Argument" agreed to participate. The age range and general characteristics of the control group appeared to be homogeneous with that of the experimentals.

Attitude Instrument: The attitude instrument used in this study was one developed by Alton Barbour. The attitude items dealt with a wide variety of free speech issues, legal and practical, and were developed from two sources; Constitution of the United States, Analysis and Interpretation (1964) and Constitutional Law, Cases, and Other Problems, Vol. II. (Freund, et. al., 1961). The instrument was entitled "Contemporary American Issues Attitude Scale" and consisted of forty-nine questionnaire items. Of this number, twenty-five were free speech items focused in the topical areas of political heresy and national survival, provocation and preserving the peace, artistic expression and public morality, and association, assembly, and petition. The other twenty-four items were masking items related to various contemporary issues. A seven point, Likert rating scale was used in scoring. A raw score was obtained by taking into account whether the item was positive or negative, and counting each position on the scale as a single point running from one on the low end of the scale to seven on the high end of the scale. Approximately half of the scales were reversed, polarity was not always in the same direction, to minimize response set and bias. A "summated rating" was obtained by simply adding the total of the scores from twenty-four items. Thus, the highest potential score is 168 and the lowest is 24. A score of 97 to 168

generally indicates mild to strong approval of "free speech." A score of 95 to 24 conversely indicates mild to strong disapproval of "free speech." A score of 96 is interpreted generally as indicating neutrality or no opinion.

In operationalizing "free speech" Barbour constructed items which "attempted to describe the free speech issue inherent in the case in which the U. S. Supreme Court had decided the constitutionality." In the free speech questionnaire, then, there was no "right" answer. However, the plus (+) and minus (-) answers represented varying degrees of agreement or disagreement with the corresponding legality or illegality of the item. As a further point of clarification, it should be noted that the focus here is Federal Constitutional Law. In this sense, state laws and local ordinances may be discrepant and are not contained within the parameteres of "free speech" as conceptualized and operationalized here.

The items were validated through the use of expert judges and "known groups." A pro-censorship group, the Board of the Denver Citizens for Decent Literature, and an anti-censorship group, the Board of the American Civil Liberties Union of Colorado, were tested for this purpose. Test-retest reliability was also established.[9]

Test Administration: On the first day of the quarter that each class met, with the instructor's permission the researcher asked for student volunteers in a communication research project. No disclosure of the purpose of the project was made other than that it would require approximately twenty minutes of in-class time completing an attitude scale. Only one student in the "Ethics and Free Speech" classes and two students in the control group classes chose not to participate. Those students who did volunteer were read standardized instructions by the researcher, and then completed the questionnaire. All classes participating in the project for that quarter were tested within a two-day period. Approximately ten weeks later, on one of the last two days in which the class met, the experimental and control groups were again administered the questionnaire. Upon completing the test they were asked to state in writing on the back of the test what they thought the purpose of the research was. Just one student detected the purpose, and he felt this had no influence on the manner in which he answered the questionnaire. The researcher then de-briefed each class, explained the purpose for the study and answered any questions they had about the project. No hostilities were expressed toward any of the procedures employed in the research. Most students indicated an interest in receiving copies of the results.

Results

Testing of the first hypothesis, "The university students constituting the sample investigated will significantly indicate attitudes approving of free speech," was carried out by calculation of the X^2 (Chi-square) test for "goodness of fit." The results are presented in Table I.

TABLE I

CALCULATION OF X^2 FOR TESTING GOODNESS OF FIT BETWEEN OBSERVED AND THEORETICAL (NORMAL) DISTRIBUTIONS OF 56 SUBJECTS' ATTITUDE SCALE SCORES

Scores	Frequencies		$(f_o - f_t)$	$(f_o - f_t)^2$	$\frac{(f_o - f_t)^2}{f_t}$
	f_o	f_t			
24 to 72	5	9	- 4	16	1.78
73 to 96	11	19	- 8	64	3.37
97 to 120	18	19	- 1	1	.05
121 to 168	22	9	13	169	18.78
Totals	56	56	00.0	...	23.98*

df=3, *X^2 significant at beyond .01 level.

As indicated in the table, the observed frequencies deviate from the expected distribution of the norm at beyond the .05 level selected for significance. Though chi square does not indicate the direction of departure, inspection of the observed distribution does show a marked skewedness toward the high (approval of free speech) end of the scale. Therefore, the null hypothesis is rejected, and the stated hypothesis that the sample will manifest attitudes approving of free speech is supported.

Based upon the considerations that the experimental and control groups were intact classes, and the preliminary inspection of pretest attitude data showed marked differences among the various groups, an analysis of covariance was used in testing the second hypothesis.[10] In this analysis, the pretest attitude scores served as the covariant for the post-test attitude data. The results are contained in Table II. From the table, it is evident that there is a significant difference, at the .05 level, between the mean post-attitude free speech scores of the experimental and control groups. The experimental group shows a significant increase in attitudes approving of free speech. Thus, the stated hypothesis, "those students completing the designated class in 'Ethics and Free Speech' will manifest a significant change in attitude indicating increased approval of free speech," is supported, and the null hypothesis is rejected. Some

TABLE II

ANALYSIS OF COVARIANCE BETWEEN
MEAN SCORES OF EXPERIMENTAL AND CONTROL GROUPS

Group	N	Mx	My	Myx (adjusted)
Experimental	20	118.90	126.45	119.94
Control	26	106.04	106.77	111.77
GEN MEANS		111.63	115.33	115.85

df = 1 (numerator), df = 43 (denominator), F = 4.49*

*p = .05.
**The analysis of covariance is based on pre- and post-test measures for 46 students. There were 6 subjects from the experimental class and 4 subjects from the control groups who were not available for the post-test administration. Most of these had discontinued enrollment in the classes.

additional statistics highlight the extent to which attitudes were changed. Fourteen of the twenty experimental subjects showed a mean increase of 13 (thirteen) relative scale points. Of the six students who did not show an increase, all but one were well above the scale mid-point of 96 and showed a decrease of only a few points. There was but one student who initially scored below 96 on the scale who did not show an increase in approval of free speech.

Though no hypothesis was stated and no inferential statistical tests were carried out related to the four individual topical areas of free speech covered by the questionnaire, the group mean scores are provided for inspection in the following table. Several observations are pertinent to the data contained in this table. First, the mean scores for each group in column six show a high agreement with the one-item statement, "I believe in freedom of speech." Second, the mean scores contained in column four show more relative approval of free speech in the area of artistic expression and public morality than in the other three areas. These finds, in addition to the earlier results, have implications which will be considered in the following section.

TABLE III

GROUP MEAN SCORES BY TOPICAL AREA

Class	Political Heresy & Nat. Survival	Provocation & Preserving the Peace	Artistic Expression & Pub. Morality	Assoc. Assembly & Petition	Attitude toward F. S. Item
Column 1	2	3	4	5	6
Exp/Win/Pre	29.6	29.8	34.4	30.3	6.6
Exp/Win/Post	35.2	32.8	26.1	33.3	6.7
Exp/Sprg/Pre	29.4	27.4	32.5	25.4	6.4
Exp/Sprg/Post	28.0	27.5	33.6	26.4	6.9
Cont/Win/Pre	26.8	24.5	28.6	25.3	6.4
Cont/Win/Post	26.4	24.7	29.9	26.1	6.3
Cont/Sprg/Pre	26.5	25.9	29.9	25.6	6.5
Cont/Sprg/Post	25.4	25.4	30.5	24.8	6.6

Exp=Experimental, Cont=Control, Win=Winter, Sprg=Spring, Pre/Post=Test Administration

Discussion

Several relevant questions can be raised to the finding in support of the first hypothesis. The assumption that accumulated responses to the attitude scale will form a "normal distribution" (bell-shaped curve) may be challengable. However, the earlier findings of several opinion polls considered in the review indicate a lack of concern about the state of civil liberties, and a surprising percentage of Americans who would prohibit some people from making public speeches. In addition, Barbour's findings with a sample of high school students, utilizing the same questionnaire, showed "that in all four topical areas, the opposition to free speech was strong and pervasive."[11] This implies a marked skewedness toward the "disapproval" end of the scale. Based upon these considerations, the "normal distribution" assumption is probably a conservation one.

The finding for the first hypothesis that these particular college students as a sample show significant approval of free speech is not as surprising as the observation

that 29% are below the median scale score of 96. Of this total number, 9% were in the experimental group and 20% in the control group. Examining the data by group, this means that of the 26 experimental subjects, 5 members, or 19%, indicated attitudes disapproving of free speech. The control group of 30 subjects had 11 members, or 38%, who manifest disapproving attitudes. Though no inference is drawn about the generalizability of this sample, the finding should stimulate further investigations of comparable samples. This is directly related to the finding in support of the second hypothesis.

As a group, those students completing the class in "Ethics and Free Speech" did show a significant increase in attitudes approving of free speech. This does contradict some of the earlier reported research. Though the design does not control for the overall effects of "testing sensitization" indications are that this is not the case. The first five weeks of class after the pre-test were devoted to a consideration of ethics of persuasion and not the study of free speech. Thus, immediate linkage between the questionnaire and course content is not likely. In addition, a post-test-only measure was obtained from a limited available sample of five students having completed the "Ethics and Free Speech" course in the Fall Quarter of 1970. This test was administered at approximately the same time as the Spring, 1971, experimental subjects completed the post-test. Though no test of significance was performed because of the small N, inspection does indicate generally comparable means scores of 115.20 (Fall) and 115.50 (Spring). Moreover, the control groups showed no significant score increase, and as reported earlier, the purpose of the research did not appear to be salient to the subjects based on post experimental self reports.

Alternative explanations for the divergence from earlier findings might be differences in sample characteristics, and subject selection bias. University students obviously do manifest some normative differences from high school students, and enrolling in the "Ethics and Free Speech" class probably bears a positive relationship to motivation or commitment to learn about the subject. These are questions needing further research study. The inference drawn here, however, is that attitudes toward free speech were taught and changed in this particular setting. In this regard, it should be emphasized that there was a marked, though not significant, difference in the relative degree of attitude change between the two experimental groups. The well known implication here is that the influence of the course is related to such variables as individual personality, group characteristics, and "surround" factors such as campus activities for that term.

Though inconclusive, there are indications that the area of artistic expression and public morality finds more approval from college students than any of the other three areas. This would appear to be at variance from other findings with high school populations. More study is needed in making finer empirical distinctions between these areas, assessing attitude complexity, and making applications to the educational setting. For these purposes, it is suggested that future researchers utilize such attitude assessment instruments as Fishbein's A-B scales or Triandis' extensions of the behavioral dimension of social distance scales. Also the applicability of normative

measurement techniques such as that of J. Jackson[13] can be employed in more refined studies of free speech issues related to time, place, and action.

A concluding point of interest is that these groups, as did those studied by Alton Barbour, show high agreement of belief in the principle of free speech. The problem, as with many of our democratic principles, is making applications to specific instances. Hopefully, through more concentrated research and enlightened application, the choices for free speech will be made clearer.

FOOTNOTES

[1]Samuel A. Stouffer, Communism, Conformity, and Civil Liberties (New York: John Wiley and Sons, Inc., 1955).

[2]Lloyd A. Free and Hadley Cantril, The Political Beliefs of Americans (New York: Simon and Schuster, Inc., 1968).

[3]Cf., G. P. Rice, "Student Attitudes Toward Free Speech and Assembly," The Speech Teacher, 8 (January, 1959), 53-7; H. H. Remmers, Anti-Democratic Attitudes in American Schools, (Evanston: Northwestern University Press, 1963); Alton Barbour, "Free Speech Attitude Consistency" (unpublished doctoral dissertation, University of Denver, 1968); Wilbur J. Osborne and William I. Gordon, "A Freedom of Speech Survey of Student Opinion in a Basic Speech Course," Free Speech Yearbook: 1970, ed. by Thomas L. Tedford (New York: Speech Communication Association, 1970), pp. 52-62.

[4]Alton Barbour and Alvin Goldberg, "Survey Research in Free Speech Attitudes," Free Speech Yearbook: 1971, ed. by Thomas L. Tedford (New York: Speech Communication Association, 1971), pp. 28-35.

[5]Roy E. Horton, "American Freedom and the Value of Youth" (unpublished doctoral dissertation, Purdue University, 1955).

[6]Cf., Charles M. Rossiter, Jr., "Teaching About Freedom of Speech in the Basic Course," Free Speech Yearbook: 1969, ed. by George P. Rice, Haig A. Bosmajian, and Alvin A. Goldberg (New York: Speech Communication Association, 1969), pp. 56-61; Idem, "The Effects of Various Methods of Teaching About Freedom of Speech on Attitudes About Free Speech Issues," Free Speech Yearbook: 1970, ed. by Thomas L. Tedford (New York: Speech Communication Association, 1970), pp. 44-51.

[7]Bert F. Green, "Attitude Measurement," in Handbook of Social Psychology, ed. by Gardner Lindzey, I (Reading, Massachusetts: Addison-Wesley Publishing Company, Inc., 1954), p. 336.

[8]Barbour, p. 29.

[9]Barbour, pp. 27-55.

[10]For a more detailed explanation of the rationale for using analysis of covariance see, Fred N. Kerlinger, Foundations of Behavioral Research (San Francisco: Holt, Rinehart and Winston, Inc., 1964), pp. 347-51.

[11]Barbour, p. 65.

[12]Martin Fishbein, Readings in Attitude Theory and Measurement (New York: John Wiley and Sons, Inc., 1967.

[13]Jay Jackson, "A Conceptual and Measurement Model For Norms and Roles," Pacific Sociological Review, 9 (Spring, 1966).

SOME HISTORICAL ESSENTIALS OF TEACHING FREEDOM OF SPEECH

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> It is thanks to historical development and the common possession of basic values resulting from this development, that such a large measure of agreement exists in the western world on the value of democracy and, included therein, of freedom of speech.
>
> --Frede Castbert, 1960[1]

On the 6th of September, 1901, President William McKinley was shot by an anarchist. For several decades anarchists and other radical militants had been advocating murder as a necessary tool of political change. "Kill or be killed is the alternative. Therefore massacres of the people's enemies must be instituted," declared Johann Most in 1884.[2] Such speech, and the bullets and blood of countless strikes and riots, created a hysteria, which, soon after the assassination of McKinley, provided the climate in which New York adopted a criminal anarchy statute, the first modern American sedition law. The conviction of Benjamin Gitlow under this statute in 1920 was the occasion for the U. S. Supreme Court in 1925 to declare casually but explicitly that First Amendment liberties are, through the due process clause of the Fourteenth Amendment, protected against state as well as federal action. Thus was established the precedent that later would be used to end a century and a half of nonassertion of federal protection of free speech against state suppression.

But what the Court gave with one hand, it took back with the other by granting primacy to legislative determination of prohibitable speech, by limiting Court jurisdiction to that of judging merely the constitutionality and not the application of statutes, and by ruling out the recently articulated clear and present danger test for a return to a fuzzy rewording of the eighteenth-century bad tendency test. Such retrogression prompted Justice Holmes to initiate for the first time in Supreme Court history a real discussion of the fundamental philosophy of the First Amendment.[3] His dissenting opinion, along with certain other opinions that he and Justice Brandeis had delivered in cases prior to 1925, contribute arguments for free speech which, according to Zechariah Chafee, Jr., "may fitly stand beside the Areopagitica and Mill's Liberty."[4]

What in this chain of interacting events is essential to teachers of free speech? Is it the psychological and sociological conditions that led some men to urge violence and other men to practice suppression? Is it the interplay of legal concepts such as

state versus federal jurisdiction, bad tendency, and clear and present danger? Is it the philosophical arguments for free speech for which the case served as a stimulus? Surely all of these are essential. We must understand and teach the philosophy of free speech, the best thought as to what free speech should be. We must understand and teach the law, the decisions of legislatures and courts as to what technically free speech can be. And we must understand and teach the historical forces that condition how free speech actually is.

I

In the teaching of free speech in the field of speech communication, unequal emphasis is given to law, philosophy, and history. A survey of our course syllabi and teaching materials reveals that our essential thrust is to introduce students to case law. The philosophy of free speech, especially the history of that philosophy, receives a secondary emphasis; and social and cultural history of dissent and suppression receives little attention.[5] Our courses are devoted largely to contemporary issues and twentieth-century law. As Franklyn S. Haiman points out, ". . . ultimately we must face and resolve the /free speech/ issues in their contemporary context," and in doing this "most of the law we need to know has been made since 1917."[6] Such focus on current issues increases the immediate relevancy of our courses, and the applicable case method of teaching offers special pedagogical advantages.

Contemporary free speech issues and the concepts employed in legal interpretation of free speech since 1917 have historical depth, of course. Whatever is significant philosophically or legally is also significant historically. At issue is what emphasis is to be given to the historical dimension. Pre-twentieth-century philosophical works are infrequently cited in our present course materials, with the exceptic of John Stuart Mill's mid-nineteenth-century On Liberty.[8] Moreover, precisely when characteristic libertarian or anti-libertarian philosophers spoke or wrote does not seem to be essential if judged by their citation in the legally oriented writings of authorities like Chafee, Thomas I. Emerson, or Haiman. More emphasis is given to the chronology of legal developments, however. The historical essentials seem to be the common law of seditious libel as it developed in Great Britain and the colonies from 1275 to the Revolutionary War, with special attention to the Wilkes case in England and the Zenger trial in the colonies; the framing of the Constitution and the Bill of Rights; testing of the First Amendment by the Alien and Sedition Acts, and finally the post 1917 U. S. Supreme Court tradition, with focus on the various concepts used to define the First Amendment. Although much else of relevance to free speech took place from 1275 to 1972, it is not legally significant because it did not get into court, or if it did get into court, it did not serve as a precedent. Thus it is interesting, but unessential, that a free Negro who had advocated an armed, violent slave revolt was released by the Alabama Supreme Court in 1837 because his was merely speech rather than action inherent in carrying out an actual revolt.[9]

Focus on contemporary legal problems is probably the best approach in this infancy period of teaching free speech in the field of speech. Most instructors are limited to a single course or a portion of a course, and time is not available for adequate treatment of the history of free speech. Yet, perhaps greater historical breadth and depth do have a contribution to make as our work is expanded. Indeed, historical research and historical approaches to course content may make an extremely important contribution if one of our purposes is to promote greater public acceptance of free speech.

II

Whether it be in 1972, 1925, 1633, or 399 B.C., the most serious threats to freedom of expression come from intolerance and fear of criticism and change. These forces need not have the sanctity of philosophy or law to be repressive. Numerous studies reveal that our federal courts are even today far in advance of public support of free speech. Not long ago about 90,000 persons were presented a group of simple, unpopular statements, such as, "It is not necessary to believe in God," and were asked whether or not they would allow Americans to hear these statements on radio or television. Ninety-four percent of thirteen year olds, seventy-eight percent of seventeen year olds, and sixty-eight percent of adults between twenty-six and thirty-five indicated that they would not permit such statements to be broadcast.[10] With such attitudes prevalent, it is awful to contemplate the loss to society from those who, like Mark Twain, reluctantly censor themselves. With such attitudes prevalent, bad tendency, use-abuse, presumptive intent, and criminal sedition can continue to be re-invented; and anti-libertarian arguments thought refuted long ago will be offered in support of new efforts of suppression.

Lack of public understanding and approval strikes at the heart and soul of free speech. "Liberty lies in the hearts of men and women," we are fond of quoting from Judge Hand; "when it dies there, no constitution, no law, no court can save it . . . ."[11] As Thomas I. Emerson has pointed out, the essential premises of free speech cannot be proven. They must be accepted on faith.[12] Indeed, the natural law doctrine of inalienable rights that originally supported the philosophy of individual self-expression fell into disrepute long ago; and the premises of revealing truth through discussion, of stimulating democratic participation, and of increasing social adaptability are pragmatically questionable if viewed solely in the light of contemporary concepts of the relativity of truth, the prevalence of bias and intolerance, the unequal distribution of opportunities for communication through the mass media, and the realities of how public questions are resolved by the operation of factors other than rational, open discussion of the merits of the issues. The instability of these premises is evident in the failure in this century of any guiding philosophical or legal concept to stabilize the Supreme Court's interpretation of the First Amendment. The Court merely reflects the vacillation of the public in its acceptance of the premises of free speech, however; and public indifference to free speech as well as governmental and private perversions of the system of freedom of expression merely strengthen those who would replace the

ideal of a neutral system of free expression with the partisan ideal of counter-discrimination, counter-censorship, and counter-suppression in the name of the "truth" of the Left, perfectionist humanism, and the dictatorship of the intelligentsia.[13]

Would free speech remain a viable concept today if its premises were not deeply rooted in a long, bitterly fought historical tradition? Can the free speech faith be more securely established in the hearts of modern men and women by utilizing more fully the historical dimensions of the theory and practice of freedom of expression? These are difficult questions for many defenders of the faith who view reverence for tradition suspiciously as the basic characteristic of conservatism and who have seen law-office reviews of history used to justify refurbishing antiques such as the English law of seditious libel. Yet, even after the assumptions upon which free speech was initially premised have been discarded, free speech will remain viable because it exists in history. Law is history; legal authority is historical.[14] Although it was once common, and is still possible, to frame historical arguments and cite precedents for repressive legal concepts such as "reasonable or inherent tendency," arguments and precedents to the contrary can and frequently have prevailed. Moreover, since the classic formulation of libertarian history by Justice Brandeis in Whitney v. California, it has been increasingly the trend to defend free speech by appeals not only to its legal and philosophical history but also to the social history of the practice of free speech.[15] Wrote Justice Fortas in Tinker v. Des Moines, ". . . our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."[16] Wrote Justice Erby Jenkins in a March, 1972, Tennessee Supreme Court decision: "The struggle for freedom of speech has marched hand in hand in the advance of civilization with the struggle for other great human liberties. History teaches that human liberty cannot be secured unless there is freedom to express grievances. . . ."[17] Lists of such appeals to history could be expanded indefinitely; defense of free speech depends mightily upon the history of free speech.

If free speech is not to perish, a knowledge of its historical development must live in the hearts of men and women. "The law," David M. Hunsaker has written, "probably more than any other institution, is a product of history; and only by studying that history can the student become fully aware of the nature of the society he lives in."[18] One of the oldest and most familiar of the definitions of history is that it is "philosophy teaching by examples." In accepting the challenge of analyzing just what such examples teach, Henry Steele Commager has so eloquently summarized the effect of the study of history in general that his statement can stand as a defense for what is essential in teaching the history of free speech:

> History teaches tolerance--tolerance with different faiths, different loyalties, different cultures, different ideas and ideals. It instructs us that over the centuries there have been so many of these, so many faiths, so many cultures,

> so many nations, so many parties, so many philosophies, that each people has been guilty of supposing, "Lo we are the people and all wisdom dies with us:" that each sect, each party, has indulged in the vanity of believing that it, somehow, represented the larger purposes of history and the will of God. It teaches tolerance of alien peoples and opposing interests, and of ideas which, in the words of Justice Holmes, we think "loathsome and fraught with death." It teaches, therefore, the necessity of freedom--freedom for inquiry, freedom for heterodoxy and dissent--for it makes clear that freedom is the only method mankind has thus far found for avoiding error and discovering truth.[19]

All of us have taken enough dry, uninspired history courses to realize that history's lessons may be lost in the teaching. But history can also be fascinatingly taught; and, indeed, we need not limit teaching to the classroom but may extend it to film, television, popular literature, and the other media through which cultural norms are reinforced.

Unfortunately, materials for the study and teaching of the full history of free speech are incomplete. Emerson, for example, begins his work, Toward a General Theory of the First Amendment, with the listing of broad historical conclusions about the social effects of suppression; but his generalization must remain tentative because, as he explains, "we lack adequate studies of the dynamics of limiting freedom of expression at various times and places throughout our history."[20] Indeed, much of the history of this limiting of expression is not covered at all in present works. In legally oriented histories there is commonly a jump from the Alien and Sedition Acts at the end of the eighteenth century to the Espionage Acts of the early twentieth century, omitting significant aspects of the American experiment of testing the limits of expression in four highly controversial wars and in bitter domestic conflicts: including not only the abolitionist movement but also the nativist agitation, farm protest and the rise of populism, the labor movement, the anarchist revolution, various and sundry free love, communistic, and anti-capitalistic endeavors, continuous wrangles over religious dissent, and ubiquitous battles over literary censorship.[21] Explication of the parameters of symbolic expression and repression in these areas and determination of their influence on American values is a field for essential historical research. A major contribution of such research must be the accurate tracing of specific causes and effects of dissent and suppression. Court decisions and theoretical discussions of free speech are filled with conclusions about the effects of the practice of free speech. Largely based upon inadequate, unscholarly, or partisan historical analysis, these conclusions need to be explicated and tested by the most modern and precise historical methods. In the words of Chief Justice Hughes, ". . . the protection both of the rights of the individual and of those of society rests not so often on formulas . . . , but on a correct appreciation of social conditions and a true appraisal of the actual effect of conduct."[22]

In the infancy of teaching free speech courses in the field of speech communication, the polite fiction has been maintained that we do not advocate free speech as an end but merely teach the "literature" of free speech. This fiction is not only psychologically unsound but also may ultimately be positively harmful if it keeps us from studying and

teaching the full, accurate history of expression. The Supreme Court has seldom been reluctant to use the historical essay as a means to school the nation in democratic values, and we must not be slow to recognize that, pedagogically, the results of detailed historical research will provide materials to nourish a public that might choke on the philosophical niceties of John Stuart Mill or the legal hair-splittings of a court decision. Would citizens be so terrified of flag burnings, the threats of Black Panthers, or the antics of Jerry Rubin if they had burned the Constitution with William Lloyd Garrison, tried to overthrow the establishment with Albert Parsons, or flaunted Christianity with Robert G. Ingersoll? Would our moralists be so shocked at open sexuality in communication if they were familiar with the candidness of sexual advertisements in the "Victorian" nineteenth century?[23] Would our patriots be so fearful of antiwar protest if they were well schooled in specific instances of the social utility of dissent in wars past?

III

In 1832 Pope Gregory XVI wrote that "experience has proved from earliest times that states distinguished for wealth, for power, for glory, have perished from this single evil, unrestrained freedom of thought, freedom of speech, and the love of novelties."[24] Many today might agree with Gregory's view of history and that the criteria of wealth, power, and glory are more important than the criteria of civil liberties. Indeed, the harsh realities of an overpopulated, polluted, technologically complex world may direct a verdict against liberty. Wrote one of the newly won admirers of Red China recently, "granted, such organization is . . . to an extent . . . dehumanizing . . . but how many of us really appreciate our freedoms, and do not abuse them? It is my opinion that a great many of us need that sort of organization to solve our problems of joblessness, welfare, the ghettos, and all that."[25] Will the philosophical, legal, and social heritage of free speech, well studied and well taught, sustain us against such pressures for tyranny, for conformity, and for dreariness? We will have to "let history answer this question."[26]

FOOTNOTES

[1]Frede Castberg, Freedom of Speech in the West (Oslo, Norway: Oslo Univ. Press, 1960), p. 426.

[2]"The Beast of Property," The Agitator in American Society, ed. by Charles W. Lomas (Englewood Cliffs, N. J.: Prentice-Hall, 1968), p. 39.

[3]Gitlow v. New York 268 U.S. 652. For interpretation, see Zechariah Chafee, Jr., Free Speech in the United States (1941; rpt., New York: Atheneum, 1969), pp. 318-325; Thomas I. Emerson, The System of Freedom of Expression (1970; rpt., New York: Vintage, 1971), pp. 101-105.

[4]Chafee, p. 325.

[5]Conclusions re the emphases of teaching of free speech in speech communication are based upon Free Speech newsletter (Speech Communication Association, Commission on Freedom of Speech, 1961 -); the 1970 and 1971 editions of the Free Speech Yearbook (Speech Communication Association, Commission on Freedom of Speech); Franklyn S. Haiman, Freedom of Speech: Issues and Cases (New York: Randon, 1965); Robert M. O'Neil, Free Speech: Responsible Communication Under Law (New York: Bobbs-Merrill, 1966); and Haig A. Bosmajian, ed., The Principles and Practice of Freedom of Speech (Boston: Houghton, 1971). Works borrowed from cognate fields frequently reveal the same emphases.

[6]Haiman, Freedom of Speech, p. xv. Emphasis added.

[7]See Franklyn S. Haiman, "Why Teach Freedom of Speech?" Free Speech Yearbook: 1970, ed. by Thomas L. Tedford (New York: Speech Communication Association, 1970), p. 4; David M. Hunsaker, "Syllabus for Freedom and Responsibilities of Speech," Yearbook: 1970, pp. 28-29.

[8]See note 5 above. Excluding Mill, little attention is given to Plato, Milton, "Cato," "Junius," Tunis Wortman, and others who should be covered in a thorough history of the philosophy of free speech. Bosmajian's anthology contains selections from Milton and "Cato" as well as Mill. And Leonard W. Levy's philosophically rich work, Freedom of Speech and Press in Early American History: Legacy of Suppression (1960; rpt., New York: Harper, 1963), is frequently used in free speech courses.

[9]See Clement Eaton, The Freedom-of-Thought Struggle in the Old South (1940; rpt., New York: Harper, 1964), p. 142.

[10]The research was conducted by the Education Commission of the States. Slightly different answers were obtained when each of the three statements used in the research were presented separately. "Task Force Says Most Young People Confuse Free Speech," The Knoxville Journal, November 18, 1970, p. 13. See also, Franklyn S. Haiman, The First Freedoms: Speech, Press, Assembly (New York: ACLU, n.d.), pp. 4, 15, 27; Haiman, Freedom of Speech, p. xiv.

[11]Bosmajian, p. xi, quoting Emerson quoting Judge Learned Hand. See also Haiman, The First Freedoms, p. 27. The original source is The Spirit of Liberty, Papers and Addresses of Learned Hand, ed. by Irving Dilliard (New York: Knopf, 1959), p. 144.

[12]Emerson, System, pp. 7-8.

[13]The traditional premises of free speech are delineated by Emerson, System, pp. 6-9. Re the decline of the original ideological justifications, see Castberg, pp. 421-433; Edward G. Hudon, Freedom of Speech and Press in America (Washington, D. C.: Public Affairs Press, 1963), pp. 37-43. The major attack from the Left is epitomized in Herbert Marcuse, "Repressive Tolerance," A Critique of Pure Tolerance, by Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (Boston: Beacon Press, 1965), pp. 81-117. See also Emerson, System, pp. 723-728.

[14]"There is, after all, a fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship. When a court ascertains the nature of the law to be applied to a case through an examination of a stream of judicial precedent, after the time-honored Anglo-American technique, it plays the role of historian." Alfred H. Kelly, "Clio and the Court: An Illicit Love Affair," The Supreme Court Review, 1965, ed. by Philip B. Kurland (Chicago: Univ. of Chicago Press, 1965), p. 121.

[15]See Hudon. pp. 67-68, 97-98. The standard authority on the uses and abuses of history by the Supreme Court is Charles A. Miller, The Supreme Court and the Uses of History (Cambridge: Harvard Univ. Press, 1969). See esp. pp. 71-99. Also see Kelly.

[16]393 U.S. at 508-509. Emphasis added.

[17]Quoted in Bart Pittman, "State High Court Upholds Press Right to Criticize Government," The Knoxville News-Sentinel, March 5, 1972, p. B-2. Emphasis added. The case, as yet unreported, upheld a Circuit Court decision unfavorable to Johnson City, Tennessee, which had brought libel charges against Look, The Kingsport Times-News, and Mrs. Joan Roesgen, a Times-News staff writer.

[18]Hunsaker, "Syllabus," p. 29.

[19]The Study of History (Columbus, Ohio: Merrill, 1966), pp. 91; 93.

[20]Thomas I. Emerson, Toward a General Theory of the First Amendment (New York: Random, 1966), pp. 22-25; 22. He summarizes his six generalizations as follows (pp. 24-25): "The lesson of experience, in short, is that the limitations imposed on discussion, as they operate in practice, tend readily and quickly to destroy the whole structure of free expression. They are very difficult to keep in hand; the exceptions are likely to swallow up the theory." Cf. Emerson, System, pp. 9-11.

[21]Examples of works which make the abrupt jump from the Alien and Sedition Acts to the First World War include Castberg and Hudon. Emerson's conclusions (see preceding note) are based primarily on histories of the Alien and Sedition Acts and the Espionage Acts.

[22]Charles Evans Hughes, The Supreme Court of the United States: Its Foundation, Methods and Achievements: an Interpretation (New York: Columbia Univ Press, 1928), pp. 165-166.

[23]The following, for example, ran in Pomeroy's Democrat (New York City) in 1871:

> FOR GENTLEMEN ONLY.--Best French rubber PROTECTORS, only 25 cents; 3 for 50 cents; $1.25 per dozen. Skin protectors (splendid article), 35 cents; 3 for 75 cents; $2.25 per dozen. All goods sent postpaid, and warranted to give perfect satisfaction. "E. J. & Co.," Lock Box D, Ashland, Mass.

See Pomeroy's Democrat, July 29, 1871, p. /8/, col. 6.

[24]Mirari vos, quoted in Harry Emerson Fosdick, Great Voices of the Reformation (New York: Random, 1952), p. 247.

[25]Warren E. Parker, "Much About Chinese Americans Should Emulate, He Says" /letter to the editor/, The Knoxville News-Sentinel, March 12, 1972, p. F-9. The ellipsis marks are in the published text, and there is a paragraph break between the two sentences herein quoted.

[26]"Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question." Thomas Jefferson, "First Inaugural Address at Washington, D. C.," Inaugural Addresses of the Presidents of the United States (Washington, D. C.: GPO, 1961), pp. 14-15.

THE SPEECH COMMUNICATION CLASSROOM AND THE FIRST AMENDMENT: TWO VIEWS

I. TOWARD A LATITUDE OF SOCIAL RESPONSIBILITY

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Among teachers of speech communication there are those who flatly forbid their students to advocate what they--the teachers--define as "immoral causes" in their classrooms. Within the past few years on many of our college campuses, these "immoral causes" have been defined with increasing frequency as anything not approved by our growing numbers of radical activist faculty members. Like their ideological leader, Herbert Marcuse,[1] many of these instructors believe that the universities, including the performance classes in speech communication, should serve as training schools for the cadres of the counter culture. The only views to be tolerated in such an environment are those which favor the overthrow of the existing Establishment.

My thesis is that free expression--including the freedom to disagree with the prevailing climate of ideas and customs in the classroom dominated by the young radical instructor--is vital to the practice of speech communication. When freedom to dissent dies, meaningful speech communication dies. It becomes a mere ornament, as it became in the twilight of the Roman Empire and remained throughout the Dark Ages until the restoration of democratic forms of government.

As I see it, free expression is the reason for the very existence of a discipline of speech communication. As teachers of speech communication, we have, I believe, two fundamental obligations to our profession, our students, and to the kind of society which fosters our existence.

I define our first fundamental obligation as that of maintaining an open, objective forum for the free expression of all points of view in our speech performance classrooms. Webster defines objectivity as operating "without distortion by personal feelings or prejudices." Of course objectivity can no more exist in pure form than democracy can, but I believe that objectivity in the classroom should be our goal and that we should strive for its achievement.[2] The teacher who is too undisciplined to control a gut reaction is, in my opinion, too undisciplined to be in the classroom in the first place.

Within the open, objective classroom forum it should be possible for the Black supermilitant to argue that all white people should be killed. It should also be possible for the son of the South African ambassador to defend apartheid.

But what about the instructor's freedom of speech to disagree with his student? I contend that by virtue of his position, the instructor has assumed an institutional role in the classroom. This role creates a power relationship in which the instructor controls the situation--including the amount of free expression afforded the student. In my opinion, the instructor who imposes a moral code or a political ideology upon the range of topics and positions available to the student has abused his position. The speech communication performance course is one of the few places in a student's educational career where he has the opportunity to express his own views on public issues. To deny the student this right is to deny him his very identity! I view the instructor's use of the speech communication performance course as his own platform for the ideological or moral indoctrination of his students as itself morally, professionally, and legally reprehensible! Our first obligation, then, as I see it, is to guarantee our students' constitutional right of free expression in our classrooms.

But what about evaluating these performances? This brings me to our second fundamental obligation as teachers of speech communication, which I define as using principles of effective speech communication--not the instructor's own political ideologies--as criteria for evaluating our students' speeches. Some of us may have noticed that our published course descriptions frequently designate these principles as the subject matter of our performance courses.

Whether grounded in traditional rhetorical theory or the most recent experimental investigation or both, the two most important principles of speech communication, in my opinion, are audience adaptation and rhetorical invention.

Audience adaptation does not mean merely telling an audience what it wants to hear! It is possible to adjust effectively to an audience by telling it that it is dead wrong! Patrick Henry, Wendell Phillips, William Lloyd Garrison, Abraham Lincoln, Martin Luther King, Malcolm X, and John F. Kennedy, to name a few, were not in the habit of simply telling their audiences what they wanted to hear.

Audience adaptation does include selection of topics from among those current public issues which are socially significant. But it does not preclude advocacy of the unpopular side of these issues in any given context. A speaker must have the right to adjust to his audience by dissenting from its views if he so chooses. The principles of speech communication, as we know, do include effective methods for the expression of dissent. In my opinion, the student's freedom to exercise these rhetorical methods of dissent must be maintained regardless of the political views of the classroom audience or the prejudices of the instructor.

Earlier, I identified rhetorical invention as one of the two most important principles of speech communication. I view logical validity as the heart of rhetorical invention. The student in my classroom is free to advocate any point of view he wishes, but he knows that he will be held accountable to the tests of logic and evidence in his presentation. Of course it is possible to think of exceptions to anything, but I believe that in general the tests of logic and evidence impose what I call a latitude of social

responsibility upon the speaker. Most of the extreme positions that could be presented cannot meet the usual tests of logical validity found in our textbooks.[3] This does not mean that the extreme positions cannot be presented. In my classroom they can be. But my students know that they must be reasonable--which is my way of imposing social responsibility upon them. If they do not meet these tests, their performance will be downgraded, but not necessarily failed. I believe that the principle of logical validity can be handled objectively and does permit reasonable support of a wide spectrum of views.

In addition to logical validity, two other aspects of rhetorical invention operate to impose a latitude of social responsibility upon the speaker who effectively uses the principles we teach. Researchers in the area of ethos, or source credibility, have isolated a number of "source characteristics" which can be effectively used in speech communication.[4] These characteristics are broadly reflective of the values and morality of the speaker's culture. Presented as an effective principle of speech communication, then, ethos serves to provide a further latitude of social responsibility for the speaker.

A third aspect of rhetorical invention which imposes a moral or social latitude upon the speaker is that of pathos or motivation. The principle of motivation usually includes the use of social goals and values as means of affecting the speaker's audience.[5]

In my opinion, all three dimensions of rhetorical invention--logical, ethical, and emotional proof--can be handled objectively and can locate effective speech communication within a broad framework of social responsibility. I also make it clear to my students that they will be expected to adhere to all the other principles of effective speech communication which constitute the subject matter of our performance courses.

In summary, then, our two fundamental obligations, as I see them, are to maintain an open, objective forum for the free expression of all points of view in our speech performance classrooms and to evaluate our students' speeches according to the principles of effective speech communication which we teach, rather than according to their conformity to our own political ideologies.

In brief, I view our principal responsibility not as that of indoctrinating our students with what they should think and what they should say. Instead, I believe our responsibility is to teach them how to communicate effectively within the free and open atmosphere legally guaranteed them by their federal constitution. In my opinion, those teachers among us who are unwilling to accept this responsibility should be prosecuted in the courts for violating their students' civil rights!

FOOTNOTES

[1]See Herbert Marcuse, Counter-Revolution and Revolt (Boston: Beacon Press, 1972), pp. 54-57 for a discussion of the universities as training bases for the counter-revolution.

[2]One contemporary and influential opponent of objectivity is Theodore Roszak, The Making for a Counter Culture (New York: Doubleday, 1969), pp. 205-238. After debunking the "myth of objective consciousness" Roszak advocates adoption of the "poetic vision" of the old tribal shaman as a solution to the ills caused by the "technocracy," pp. 241-268.

[3]One typical set of tests of evidence and reasoning is found in James C. McCroskey, An Introduction to Rhetorical Communication, 2d ed., (Englewood Cliffs: Prentice-Hall, Inc., 1972), pp. 161-163. McCroskey also insists upon a union of argument with moral values, pp. 150-161. This is not so typical in our textbooks, but is suggestive of a broadly "moral" rhetoric.

[4]Gary Cronkhite, Persuasion: Speech and Behavioral Change (Indianapolis: Bobbs-Merrill, 1969), pp. 172-178.

[5]Ibid., pp. 178-186.

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II. FREEDOM OF SPEECH, COMMITMENTS, AND TEACHING PUBLIC SPEAKING

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The relationship of the First Amendment to the teaching of public speaking is truly unique among disciplines in higher education. One can hardly imagine that people would object to an historian for teaching an economic or Marxist or "Great Man" theory of history. It is practically unthinkable to suggest that a psychologist be reprimanded for "advocating" a Freudian interpretation of man's psyche to the exclusion of behaviorist or Jungian interpretations. Yet, questions--serious questions--about the delicate relationship between the student's right to speak on various subjects and the teacher's commitments to certain ideas continue to arise. We should remember that such questions are as old as our profession, dating as they do from the time of Plato, Aristotle and Isocrates. In the early days of our National Association Everett Lee Hunt debated Charles Woolbert and James O'Neill about what stance a teacher should take vis-a-vis the content of student speeches.[1]

Now, Professor Hendrix has presented us with an affirmation of the student's right to speak on any subject he chooses, and a condemnation of any professor who would "impose a moral code or a political ideology upon the range of topics and positions available to the student . . . ." At first glance, the essay is very appealing. However, on a closer reading one sees that he does not mean precisely what he says. For the First Amendment to be taken literally, as Professor Hendrix argues, requires that no sanctions or punishment be visited upon one who exercises this right. But Professor Hendrix would grade speeches (which may be considered by some as a form of sanctions or punishment) according to a criteria that has nothing to do with the First Amendment. In sum, Professor Hendrix has already placed external restraints on the right to speak freely, but he would impose them after the speech has been delivered.

At this point we realize that the problem is more complex. It is not simply a matter of a student's right to speak freely. Rather, the question involves a conflict between a teacher's commitment to freedom of speech and his commitment to teach effectively, between legal rights and pedagogical responsibilities. The two can be in conflict. When the issue is cast in this way, I believe the differences between Professor Hendrix and me are more clearly seen. My argument rests on two premises: (1) the traditional image of a professor as an objective evaluator is neither desirable nor real in some cases; (2) a professor has the right--indeed, the responsibility--to limit the range of topics for student speeches.

In past years when professors lived in academic Ivory Towers often far removed from the political turmoil of the day, the image of the teacher as a detached, objective evaluator may have been shared by faculty and students alike. But with the rise of the activist professor that image has changed, and the problems created by the conflict between personal commitments and teaching responsibilities is no more acutely presented than in the public speaking classroom. How can one expect a professor, fresh from delivering a condemnation of the Vietnam War at a protest rally, to listen dispassionately to a defense of that war and then to grade it fairly? How can one expect a militant Black professor to evaluate cooly a call for moderation, waiting, and supplication to the White community for relief from oppression? To expect such objectivity from someone firmly committed to a cause is to deny the fallibility of the professor. To expect students not to be cynical under these circumstances is to deny them their humanity.

To take a different tack, let us turn to the example Professor Hendrix has used. How can one expect a white person--teacher or student--to sit quietly by as a "Black supermilitant" argues "that all white people should be killed"? To expect such a reaction is to admit that speeches are only academic exercises unrelated to the real world; or that words are not to be taken literally but as psychological cartharsis; or that speeches and actions have, at best, a tenuous relationship.

In the examples I have cited, personal commitments may be in conflict with sound pedagogical methods and with fair grading of students. Professor Hendrix would have us resolve this conflict by repairing to objective criteria: audience adaptation and

logical validity as standards for grading speeches. But I deny that these are objective. To clarify my point, let us turn to another example used by Professor Hendrix. He believes "extreme" speeches will not stand the tests of logic and evidence. Thus, in an exercise in Catch 22 logic, the student is allowed to speak to these subjects but will be punished for doing so. On the other hand, I believe that "extreme" positions, which more often than not are ideological positions, are logical. The essence of ideology is internal, logical consistency.[2] Conversely, those who employ a democratic rhetoric have to appeal to diverse, conflicting groups and ideas, often causing internal, logical inconsistency. To see the differences one has only to compare the logical works of an ideologue, a Herbert Marcuse, to the illogical speeches of democratic politicians. (I would not want my argument here misunderstood as an endorsement of ideological principles or a condemnation of democratic principles, but as an attack on logical validity as an "objective" standard for judging speeches.) In sum, I would argue that audience adaptation and logical validity instead of being objective criteria are often interpreted subjectively by teachers who possess consciously or unconsciously deep political commitments. To recognize this fact and to bring it out in the open is to recognize the humanity and fallibility of teachers.

Now to the second premise: I believe the professor has a right to limit the range of topics (but not positions) available to students for speeches. Most of us already limit the topics about which students speak. Few teachers committed to the idea of a liberal education believe that demonstration speeches are worthy assignments or that speeches on trivial topics are suitable subjects. The question is not whether topics ought to be limited, but how far the limitations should extend?

Subjects for speeches in a public speaking classroom should be limited to public issues or what Everett Lee Hunt has called "persistent questions in public discussion."[3] But I also believe that some issues are not debatable, that every public question does not have two or more "sides" to it. I am old fashioned enough to still believe in right and wrong, good and evil. For example, the "issue" of the systematic extermination of six million Jews by the Nazis does not have two sides to it. That action, that policy was wrong, unreasonable, evil. To debate two sides to it is to engage in the rankest sophistry and demagoguery.

At this point Professor Hendrix and I agree that a teacher should not use his classroom as a pulpit to preach his political sermons or require his students to hue a particular ideological line. How then is one to reconcile his personal commitments with his belief in freedom of speech and his dedication to effective teaching? My resolution is to tell students that certain public questions are off-limits as topics for speeches because I support or oppose certain policies so vigorously that I cannot grade speeches on those subjects fairly. Students seem to find enough problems in our society and in the world to provide subjects for an entire term, despite my limitations on certain subjects. They appear also to welcome this kind of openness.

The difference between Professor Hendrix and me is not so much over freedom of speech. Each of us places some restraints on the right to speak freely. The real

difference lies in our image of a teacher. Professor Hendrix desires a professor who either has no political beliefs or who can suppress them as he steps into the classroom. He desires an objectivity from teachers bordering on scientism. My view is quite different. I do not believe that teachers who hold compelling beliefs on current political issues can suppress them or that they can treat students who speak for or against those views fairly. I would have the professor admit to his beliefs and then eliminate those subjects as topics for speeches. This course of action, I believe, represents another definition of the "latitude of social responsibility."

FOOTNOTES

[1]For a summary of these arguments. see my essay, "Everett Lee Hunt on Rhetoric," in the September, 1972 issue of The Speech Teacher.

[2]Henri Lefebvre, The Sociology of Marx, trans. by Norbert Guterman (New York: Pantheon Books, 1968), pp. 59-88.

[3]Cf. Alexander M. Drummond and Everett Lee Hunt (eds.), Persistent Questions in Public Discussion (New York: The Century Co., 1924).

THE SUPREME COURT AND THE FIRST AMENDMENT: 1971-1972

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I. The 1971-72 Term in Review

President Nixon has kept his election year (1968) promise to give the country a rightward leaning "strict constructionist" high court. The past term offers compelling evidence that liberal tendencies which were interpreted by many as usurping the prerogatives of Congress and the state legislatures will be contained.

The Supreme Court had a busy and record breaking term which left the justices testy with each other and caused the Chief Justice to reflect that getting through the term was "a triumph of sorts." The Court cleared 3645 of 4533 cases docketed. The justices delivered 129 opinions, the greatest number ever in one term; and they did this with only seven justices until Powell and Rehnquist joined the Court in January.

The composite result of the term and the resultant general trends forbode ill for those who favor for the First Amendment a broad and liberal interpretation which will produce greater tolerance of even freer expression. Protection from attack is being offered those social, political, and economic forces of the moderate-conservative middle class and its allies--the Justice Department, state and local authorities, federal departments and agencies, and private interests and business properties. The new losers, who had been winning cases before the Warren Court, are the anti-establishment liberal forces, blacks, environmentalists, accused criminals, aliens, welfare recipients, and newsmen. Individual rights which were expanded tended to be in areas considered as acceptable to the President's "middle America" constituency.

The rapid transformation of the Court has resulted from the unanimous bloc-voting patterns of the four Nixon appointees. Of the thirty cases decided by only one vote, the Nixon four voted together in twenty-five of them. Nineteen of these thirty cases involved the Bill of Rights and on these the Nixon four voted together all nineteen times, winning fifteen and losing only four.

Since there is a message to be found in those cases which the Court decided not to hear and thus not overturn, these will be reviewed along with those which are pending and those which culminated in written opinions. Worthy of special attention among the decisions handed down are several which are a distinct departure from the way the Warren Court would likely have reacted: Laird v. Tatum--where without Constitutional support, the right of the military to investigate civilians prevailed over claims of

inhibition to free expression; Cole v. Richardson--where an oath was not voided for vagueness because it was "no more than an amenity"; Lloyd v. Tanner--where the property rights of a shopping center owner were allowed to override any Constitutional right of demonstrators to communicate; Grayned v. City of Rockford--where an ordinance prohibiting grievances from being voiced was upheld and regarded as not being a broad invitation to discriminatory enforcement; and Kleindienst v. Mandell--where denial of a Marxist speaker's entry into the country was upheld despite the likelihood that the real reason for his exclusion was disapproval of the speaker's ideas.

II. Opinions Handed Down

Armed Forces

Laird v. Tatum, 408 U.S. 1

This case is bound to be of far reaching significance and provides clear indicators about how the Nixon court appointees will react to First Amendment traditions. Chief Justice Burger delivered the opinion of the Court in which Justices White, Blackmun, Powell, and Rehnquist joined.

The Department of the Army prior to assisting local authorities in 1967 to quell civil disorders operated with only a general contingency plan in connection with its limited domestic mission. As a result of the Army's experience, when called on to help control various civil disorders in 1967 and 1968, a data-gathering system was developed purportedly to enable more intelligent direction of Army force based upon having reliable information. The respondents brought a class action suit seeking injunctive relief from what they called the unlawful surveillance of lawful civilian political activity.

The District Court found "that respondents failed to allege any action on the part of the Army that was unlawful in itself and further failed to allege any injury or any realistic threats to their rights growing out of the Army's actions." However, a divided Court of Appeals reversed the District Court citing Army surveillance as presenting a "chilling" effect on First Amendment rights where such effect results not by any specific action by the Army against civilians, but only by the existence of the surveillance system inhibiting full expression and utilization of First Amendment rights.

The Supreme Court in granting certiorari acknowledged that the Court of Appeals properly isolated the issue as

> whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and

data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

Although the Court granted that the issue was properly identified, they concluded that the Appeals Court decided it incorrectly. The Court speculated about a number of reasons why the respondents might allege a "chilling" effect on their rights. None of these--an inappropriate role for the Army under our form of government; inherent danger for the military to probe civilian activities; apprehensiveness that the gathered data might later be misused--impressed the Court. The Court majority took the position that "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." The Court shunned the role that would make it a "continuing monitor of the wisdom and soundness of Executive action . . . absent actual present or immediate threatened injury resulting from unlawful governmental action." The majority opinion concluded on an optimistic note that "judicially cognizable injury" resulting from unlawful military activities were certain not to go unnoticed and unremedied.

Of the two dissenting opinions which were filed, the Douglas-Marshall position deserves comment. This dissent claimed that one can search the Constitution in vain for any expressed or implied authority for surveillance over civilians. The power of the military to establish such a system, Douglas commented, is less than the power of Congress to authorize it and that power is limited by the terms "to make rules for the government and regulations of the land and naval forces (Art. I, sec. 7)." This authority, Douglas claimed, allows the armed services to govern only themselves, not civilians. He continued by citing numerous examples in support of the charge that military surveillance of civilians constitutes a "gross repudiation of our traditions." In a parting salvo, Douglas called this case

a cancer in our body politic. It is a measure of the disease which affects us. Army surveillance, like Army regimentation, is at war with the principles of the First Amendment. Those who already walk submissively will say there is no cause for alarm. But submissiveness is not our heritage. The First Amendment was designed to allow rebellion to remain as our heritage. The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of the objective than Army surveillance.

John Thomas Flower v. U.S., 92 S. Ct. 1842

For violati. g a federal law the defendant was convicted in the District Court for unauthorized reentry upon the Fort Sam Houston military reservation in Texas. Flower, "Peace Education Secretary of the American Friends Service Committee," was arrested on New Braunfels Avenue within the limits of the military reservation while quietly distributing leaflets. The lower courts acknowledged the authority to restrict general access to a military facility.

The Supreme Court with Justices Blackmun, Rehnquist, and Burger dissenting, was impressed with the dissent of a lower court judge who held Fort Sam Houston to be an open post and New Branufels Avenue a completely open street. The military was held to have abandoned any claim to control over who "walks, talks, or leaflets" on the avenue. The base commander was held to have no more authority to order the defendant off this street than the police have to order any leafleteer off any street. "Streets are natural and proper places for the dissemination of information and opinion" according to the Court majority who extended First Amendment protection to the defendant and reversed the lower courts.

The dissenting opinion urged that because a portion of a military base is open to the public such portion need not be treated like a public square in a city or town. "The unique requirement of military morale and security may well necessitate control over certain persons and activities on the base, even while normal traffic flow through the area can be tolerated.

Civil Rights

Lloyd v. Tanner, 407 U.S. 551

In this case the Court considered the same question taken up in the Logan Valley Plaza case, 391 U.S. 308 (1968): Does a privately owned shopping center have the right to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operation?

Respondents distributed handbills in the interior mall area of the Lloyd Center shopping facility in Portland, Oregon. The handbills were invitations to a meeting of the "Resistance Community" to protest the draft and the Vietnam War. Since the petitioner had a strict no-handbilling regulation, petitioner's security guards requested respondents under threat of arrest to cease handbilling and suggested that they resume their activities on the public streets and sidewalks adjacent to but outside the center. The respondents complied but later claimed that petitioner's action violated their First Amendment rights and brought action for injunctive relief.

The District Court stressed that the center was "open to the general public" and "the functional equivalent of a public business district." Consequently the District Court then ruled that Lloyd's regulation against handbilling violated First Amendment rights. The Court of Appeals, feeling bound by Marsh v. Alabama, 326 U.S. 501 (1946) and the Logan Valley case affirmed the District Court decision.

In a 5-4 decision Justices Powell, Burger, White, Blackmun, and Rehnquist reversed the lower courts by entering into some fine distinctions to free Lloyd v. Tanner from the precedent of the Marsh and Logan Valley cases. The Court majority found there had been no dedication of petitioner's privately owned and operated shopping center to public use so that respondents could claim First Amendment rights. The center did not lose its private character because the public used the center for the purpose of doing business with its tenents. The facts were found to be sufficiently different from those in Marsh which involved a company town with "all the attributes" of a municipality and Logan Valley which involved picketing of a store "so located in the center of a large private enclave as to preclude other reasonable access to store patrons." The courts below were held to have erred because in Lloyd v. Tanner the handbilling was unrelated to any activity within the center and respondents had adequate alternative means of communication.

Justice Marshall wrote a dissenting opinion which is tinged with distrust for the rationale offered by Justice Powell for the majority. Marshall claims that the distinction made between the instant case and that of Marsh and Logan Valley does not exist. Lloyd Center, he alleges, is the equivalent of a public "business district" within the meaning of both Marsh and Logan Valley. Marshall asks, "Why a different result here?" He does not agree that the factual difference between topics--the Vietnam War and the draft as opposed to activities of a store in a shopping center (Logan Valley)--should have differing constitutional dimensions. What troubles Marshall is that he perceives "no basis for depriving respondents of the opportunity to distribute leaflets inviting patrons of the center to attend a meeting in which different points of view would be expressed than those held by the organizations /Salvation Army, Volunteers of America, American Legion, etc./ and persons privileged to use Lloyd Center as a forum for parading their ideas and symbols." Marshall concludes that the Logan Valley case is really what the Court is reacting to; and although that decision is only four years old "the composition of this Court has radically changed in four years." Nevertheless, Marshall notes that since Logan Valley is binding until overruled, there is no valid distinction between that case which upheld First Amendment rights and this one which does not grant them.

Criminal Law and Procedure

Rabe v. Washington, 405 U.S. 313

In the Rabe case a Richland, Washington, drive-in theatre operator was convicted for exhibiting an X-rated picture on a screen visable to passersby and nearby

residents. A police officer twice viewed the film from outside the theatre fence and arrested the appellant under a statute which made criminal the knowing display of "obscene" motion pictures.

Curiously, the Supreme Court of Washington admitted that it was uncertain if the movie, Carmen Baby, was offensive to local sexual standards and if the Roth test (354 U.S. 476) were applied, the film probably would pass the definitional obscenity test. Nevertheless, the Washington high court upheld the conviction, reasoning that in "the context of its exhibition" the film was obscene.

In a brief opinion the Supreme Court reversed the conviction noting that as a minimum necessity to avoid the charge of vagueness a statute must g. e fair notice that certain conduct is proscribed. The Wash'ngton statute made no mention that the location of the exhibition was an "element of the offense somehow modifying the word obscene."

Without deciding broader constitutional questions the Court held simply that "a State may not criminally punish the exhibition at a drive-in theatre of a motion picture where the statute, used to support conviction, has not given fair notice that the location of the exhibition was a vital element of the offense."

Chief Justice Burger, joined by Justice Rehnquist, wrote a concurring opinion asserting that First Amendment considerations must not be a bar to conviction where a narrowly drawn statute protects the public from potential exposure "to such offensive materials." Burger elaborated in a footnote on his meaning for "considerations":

> Under such circumstances, where the very method of display may thrust isolated scenes on the public, the Roth . . . requirement that the materials be "taken as a whole" has little relevance. For me, the First Amendment must be treated in this context as it would in a libel action: if there is some libel in a book, article or speech we do not average the tone and tenor or the whole; the libelous part is not protected.

Education

Grayned v. City of Rockford, 408 U.S. 104

In the Grayned case the appellant was convicted for demonstrative activity in front of a Rockford, Illinois, high school. When school administrators took no action on the complaints of black students, demonstrators marched around on a sidewalk abou. 100 feet from the school building. Many carried signs which expressed their grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others made the "power to the people" sign with their upraised and

clenched fists. Contradictory evidence was presented about whether the demonstrators were noisy or whether school procedure was disrupted. Nevertheless, the appellant was convicted for violating separate anti-picketing and anti-noise ordinances. In response to the appellant's challenge the Illinois Supreme Court found both ordinances constitutional.

The United States Supreme Court found the anti-picketing ordinance in violation of the equal protection clause of the Fourteenth Amendment but affirmed the lower court with respect to the anti-noise ordinance.

The appellant claimed that, on its face, the following ordinance was both vague and overbroad:

> No person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such session or class thereof . . . .

The crucial question thus became "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." The further concern was that a vague statute might inhibit the exercise of First Amendment freedoms.

The Court found the ordinance not impermissibly vague and reasoned, based on the cases cited by the lower court, that the Supreme Court of Illinois would allow the ordinance "to prohibit only actual or imminent interference with the peace or good order of the school." The ordinance was not "a vague and general breach of the peace" ordinance because prohibited disturbances could be measured by their impact on the normal school activities and given this particular context the ordinance gives "fair notice to whom it is directed."

The Court distinguished this case from Cox v. Louisiana (379 U.S. 536) and Coates v. Cincinnati (402 U.S. 611). In the Cox case the ordinance permitted punishment for the mere expression of unpopular views and in the Coates case enforcement depended on the completely subjective standard of annoyance. The Court held that the Rockford ordinance did not permit punishment for expressing unpopular views and did not invite subjective enforcement but required "demonstrated interference with school activities" which dispels vagueness and is a fair warning about that which is prohibited.

The Court reinforced the belief that the right to use a public place for expressive activity should be restricted only for weighty reasons, and the nature of the message could not be such a reason. However, reasonable "time, place, and manner" regulations may be necessary to further significant governmental interests. Such an interest is affected and permissibly limited, according to the Court, when boisterous demonstrators "drown out classroom conversation, make studying impossible, block entrances,

or invite children to leave the schoolhouse." Apparently such expressive conduct may be constitutionally protected at other times and other places but next to a school, while classes are in session, it may be prohibited.

Justice Douglas' dissent viewed the facts differently. He found no evidence that the appellant yelled, made noise, or even carried a picket sign. He concluded from the evidence that the appellant marched quietly and once raised his arm in the "power to the people" salute. Most noise, Douglas observed, was produced by the police. Douglas concluded that "the disruptive force loosened at this school was an issue dealing with race--an issue that is preeminently one for solution by First Amendment means," and the expressive activity, on this occasion, including appellant's part, was in the best First Amendment tradition.

Healy v. James, 408 U.S. 169

In the Healy case the Supreme Court reached a unanimous judgment on First Amendment issues. This case deserves close study by college administrators, faculty, and students involved with campus organizations. When justices with views as apparently diverse as our Court now possesses are of one mind on a civil liberties issue, there is undoubtedly an expression of judicial wisdom worthy of close scrutiny.

The petitioners in Healy v. James sought to form a local chapter of Students for a Democratic Society (SDS) at a state-supported Central Connecticut State College. Recognition would have entitled SDS to use campus facilities for meetings and the campus bulletin board and school newspaper for communication. The college president denied SDS recognition because he was unconvinced that the local SDS would be independent of the national organization which he believed possessed a philosophy of disruption and violence in conflict with the college's declaration of student rights and dedication to academic freedom. Subsequently petitioners entered the District Court seeking declaratory and injunctive relief based on their denial of First Amendment rights of expression and association arising from denial of campus recognition. The District Court held that petitioners failed to establish their independence from the national SDS and the college's refusal to recognize a group it found likely to cause violent acts of disruption did not violate petitioners' rights. On appeal the Circuit Court did not take up First Amendment issues because the petitioners "had failed to avail themselves of the due process accorded them and had failed to meet their burden of complying with the prevailing standards for recognition."

The Supreme Court after noting that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" proceeded to reverse the lower courts for (1) discounting the First Amendment associational interests that petitioners had in furthering their personal beliefs and for (2) imposing the burden on petitioners to show entitlement to recognition by the college rather than on the college to justify nonrecognition.

The Court held that nonrecognition violated the petitioners' First Amendment rights insofar as such was based on an assumed relationship with the national SDS, or was a consequence of fear of disruption, or was a result of disagreement with the group's philosophy. However, the Court made it clear that colleges as a condition or recognition can require prospective groups to affirm that they will comply with reasonable campus regulations; and since this willingness could not be established from the record, the case was remanded for further consideration.

Justice Rehnquist concurred only in the judgment because, as he asserted, the language of the Court obscured the distinction that "the government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government on all citizens."

Justice Douglas filed a separate statement acknowledging that the First Amendment authorizes advocacy, group activity, and espousel of change. He found indication of the "sickness of our academic world" because such a case as this has to reach the high court for resolution. Douglas concluded that "without ferment of one kind or another, a college or university becomes a useless appendage to a society which traditionally has reflected the spirit of rebellion."

Board of Regents v. Roth, 408 U.S. 564

In the Roth case David Roth was hired as an assistant professor of political science at Wisconsin State University--Oshkosh for the 1968-69 academic year. During the year he was told that he would not be rehired but he was not told why. Wisconsin state law and University rules provide that no reason need be given for nonretention of a nontenured teacher. There were no specified standards for reemployment.

Although Roth had been rated an excellent teacher, he had publicly criticized the administration for suspending a group of Black students without determining individual guilt. Roth was also critical of the university's administration as authoritarian and autocratic.

Roth brought this action in federal court claiming infringement of (1) his free speech right because the true reason for his non-retention was his criticism of the university administration and (2) his procedural due process right because the University failed to advise him of the reason for its decision. The University claimed that other constitutionally valid grounds and not free speech was the reason for non-retention.

The District Court, later affirmed by the Court of Appeals, ordered University officials to provide Roth with reasons and a hearing. The only issue presented to the Supreme Court was whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him. The Supreme Court majority of Justices Stewart, White, Burger, Blackmun, and Rehnquist focused on whether Roth had been deprived of procedural due process and ignored Roth's protest of

free speech violations. In reversing the lower courts the Supreme Court held that "the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. . . . He did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."

Justice Douglas filed a vigorous dissent which raised issues left untouched by the Court majority. Douglas contended that tenure is not the critical issue when contracts are not renewed: "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution." Douglas feared the assault on academic freedom if school authorities are allowed to succeed in discharging teachers because of their philosophical, political, or ideological beliefs. He declared that summary judgments in this class of cases are seldom appropriate because of conflict between First Amendment rights and the need for orderly administration of the school system. Careful fact finding, according to Douglas, "is often necessary to know whether the given reason for nonrenewal of a teacher's contract is the real reason or a feigned one." Douglas concluded that without a statement of the reasons for discharge and an opportunity to rebut these reasons, Roth would be deprived of his constitutional rights if nonrenewal implicated the First Amendment.

Immigration

Kleindienst v. Mandel, 408 U.S. 753

This action was brought to compel the Attorney General to grant a temporary nonimmigrant visa to a Belgian journalist and internationally famous Marxist scholar. It was undisputed that Mandel's brief trip would involve nothing more than a series of scholarly conferences and lectures. Having been found ineligible under the Immigration and Nationality Act of 1952 barring those who advocate "the economic, international, and governmental doctrines of world communism," Mandel was refused a waiver of his inadmissibility by the Attorney General. The Attorney General alleged that the waiver was denied because of impermissible activities engaged in by Mandel on a previous visit to the United States after a waiver was granted. The illicit activities were that Mandel delivered more speeches than authorized even though he apparently was unaware of the conditions and limitations attached to the issuance of his visa.

The issue in this case is: although Mandel personally had no constitutional right to enter this country, does the action of the Attorney General in refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him? The District Court held in the affirmative and enjoined enforcement of Mandel's exclusion from the country.

The Supreme Court, after discounting two of the Government's arguments designed to circumvent charges of First Amendment violations, recognized the plenary power of the Government "to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." The Nixon four plus Justices White and Stewart concluded that when, as here, the Attorney General decides for a legitimate reason not to waive the statutory exclusion of an alien, "the courts will neither look behind the exercise of that discretion nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."

Justice Douglas' dissent asserts that the Attorney General seeks to bar those whose ideas are not acceptable to him, and Douglas regards this as unwarranted thought control outside "the competence of any branch of government." He claims Congress did not make the Attorney General a censor of ideas but confined him to problems of national security, heroin traffic, or other like matters within his competence. A statement by Justice Jackson in Thomas v. Collins, 322 U.S. 516, 545, is used by Douglas to emphasize that "the very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

Justice Marshall and Justice Brennan joined in a lengthy dissent which regards the Attorney General's action as a "sham." The Government's case had depended on a long line of cases upholding Government power to exclude aliens but none of these old cases, according to Marshall and Brennan, "was concerned with the rights of American citizens. All of them involved only rights of the excluded aliens themselves." The dissenting justices acknowledged the right of the Government to exclude aliens for a compelling national interest but held that where "the only government interest is the Government's desire to keep certain ideas out of circulation this is hardly a compelling governmental interest." Marshall and Brennan concluded with the fear that in blocking Mandel's admission "the Government has departed from the basic traditions of our country, its fearless acceptance of free discussion."

Federal Courts and Procedure

Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 451

Here the regents sought to restrain the defendants from distributing a newspaper on the Austin campus and making certain solicitations contrary to Regents' Rules and Regulations. The defendants brought suit in federal court to enjoin state court proceedings because the rules which the Regents sought to enforce abridged First Amendment rights. A three-judge District Court granted summary judgment in favor of the

defendants, "declaring unconstitutional and permanently enjoining enforcement of rules governing campus distribution of certain kinds of literature and the solicitation of dues from members of political organizations."

The Supreme Court, without a hearing on the merits, concluded that it lacked jurisdiction over this appeal because "a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import." The case was remanded to the Court of Appeals for the Fifth Circuit.

Language

Gooding v. Wilson, 405 U.S. 518

In this case the defendant was convicted by a Georgia Superior Court for using "opprobrius words and abusive language" in violation of Georgia law which assesses a misdemeanor to "any person who shall, without provocation, use to or of another, and in his presence . . . opprobrius words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." The Supreme Court of Georgia upheld the conviction despite the defendant's claim that the statute violated the First and Fourteenth Amendments because it was vague and overbroad. However, the Federal District Court set aside the conviction and held the statute to be unconstitutional on the grounds alleged by the defendant. After the Fifth Circuit Court of Appeals affirmed the District Court, the U.S. Supreme Court in support of the Lower federal courts reaffirmed its position reached in Chaplinsky v. New Hampshire (315 U.S. 568).

The Court with Justices Blackmun and Burger dissenting held that the Georgia statute could only withstand attack on its constitutionality if, as authoritatively construed by the Georgia courts, the statute is inapplicable to speech protected by the First and Fourteenth Amendments. The Supreme Court found the statute vulnerable and agreed with the District Court which concluded that "the fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application" to protected speech.

Enroute to its decision the Court re-emphasized Chaplinsky by noting that "the constitutional guarantees of freedom of speech forbid the States from punishing the use of words or language not within 'narrowly limited classes of speech.'" The Court further cited decisions since Chaplinsky which recognize the state power to punish "fighting" words under carefully drawn statutes providing such statutes are inapplicable to protected expression.

To distinguish "opprobrius" and "abusive" from "fighting" words the Court cited Webster's Third New International Dictionary as providing "greater reach" to the terms contained in the Georgia statute. Before concluding that "the separation of legitimate from illegitimate speech calls for more sensitive tools than Georgia supplied" the Court

cited three decisions of Georgia courts which apply the statute in question to words which fall within "opprobrius" and "abusive" but are not fighting words as Chaplinsky defines them. In Lyons v. State a conviction under the statute was sustained when ten women scout leaders were awakened on a camp-out by "boys this is where we are going to spend the night." "Get the G-- d--- bed rolls out . . . let's see how close we can get to the G-- d--- tents." In Fish v. State a jury question was presented by the words "You swore a lie." In Jackson v. State the words "God damn you, why don't you get out of the road?" became a question for the jury. The Supreme Court reacted to these cases by charging that although conveying disgrace (opprobrius) or being harsh and insulting (abusive) these words were not those "which by their very utterance . . . tend to incite an immediate breach of the peace."

Chief Justice Burger's dissenting opinion found no conflict between the Georgia statute and the Chaplinsky case. He contended that "the statute, as its language so clearly indicates, is aimed at preventing precisely that type of personal, face-to-face abusive and insulting language . . . which the Chaplinsky case recognized could be validly prohibited." Burger's concern was that the victims of verbal assaults would be forced to seek private redress if Georgia were left without the statute in question. Burger charged the majority of the Court with a "mechanical" and "insensitive" application of the overbreadth doctrine.

Loyalty Oaths

Cole v. Richardson, 405 U.S. 676

The appellee in this case was discharged from her job with the Boston State Hospital for refusing to swear or affirm that she would "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." She sought injunctive relief to prevent enforcement of the oath as a condition of her employment. A Federal District Court held the oath unconstitutional because "the 'oppose and overthrow' clause was fatally vague and unspecific, and therefore a violation of First Amendment rights."

The Supreme Court with Chief Justice Burger delivering the opinion reversed the lower courts and found the Massachusetts oath statute constitutionally permissible. The Court acknowledged that governments may not condition employment on taking oaths which conflict with rights granted by the First and Fourteenth Amendments "nor may employment be conditioned on an oath that one has not engaged, or will not engage in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office." However, in this case the Court presumed that such general terms in the oath as "uphold," "defend," and "oppose" were not intended to impose obligations of specific, positive action on oath takers. Rather people in public trust were being asked to swear to live by the constitutional

processes of our system. The oath was not void for vagueness but treated as "no more than an amenity."

Justice Douglas filed a vigorous dissent. Calling unconstitutional that part of the oath which says "I will oppose the overthrow of the government," Douglas contended that "advocacy of basic fundamental changes in government which might popularly be described as 'overthrow,' is within the protection of the First Amendment even when it is restrictively construed." Douglas cited Brandenberg v. Ohio (395 U.S. 444), Noto v. United States (367 U.S. 290), and Yates v. United States (354 U.S. 298) in support of protecting the right to advocacy except for the incitement of imminent lawless action. After stressing a passage from the Yates case that "the First Amendment . . . leaves the way open for people to favor, discuss, advocate, or incite causes and doctrine however obnoxious and antagonistic such views may be to the rest of us," Justice Douglas concluded by lamenting that "this oath, however, requires that appellee 'oppose' that which she has an indisputable right to advocate."

Justice Marshall, with whom Justice Brennan joined in dissent, objected to the intolerable vagueness and over-breadth of the oath because "men of common intelligence must speculate at their peril on its meaning."

The Press

Branzburg v. Hayes; In the Matter of Paul Pappas; U.S. v. Earl Caldwell, 408 U.S. 665

These three cases were taken up by the Court and adjudged in one highly controversial opinion. The lengthy opinion which in its verbosity and redundancy falls short of the articulate tradition of the Court, was written by Justice White and joined in by the Nixon four. Justice Douglas filed one dissenting opinion and Stewart, Brennan, and Marshall joined in another.

Revelation of the detailed facts of the three cases is unnecessary to understanding the essence of the opinion. In the Branzburg case a reporter refused to answer questions that directly related to criminal conduct which he had observed and written about. In the Pappas case the newsman-photographer refused to answer grand jury questions about what had taken place inside Black Panther headquarters. In the Caldwell case New York Times reporter Earl Caldwell objected to producing for Grand Jury examination notes and recordings of interviews given by Black Panther officers and spokesmen.

Branzburg, Pappas, and Caldwell pressed First Amendment claims: "that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from

furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment." However, the petitioners did not claim an absolute privilege against "official interrogation in all circumstances." If the information sought were relevant to a crime under grand jury investigation, unavailable from other sources, and the need compelling enough to override First Amendment interests then the petitioners allowed that disclosure of sources of information could be tolerated.

The simple issue in the case was "whether requiring newsmen to appear and testify before State or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment." The majority of the Court held that it does not.

The Court cited the great weight of authority which does not exempt newsmen like any other citizen from appearing before a grand jury and answering questions relevant to a criminal investigation, and then the Court declined to provide a testimonial privilege to newsmen based on any interpretation of the First Amendment.

Justice Douglas based his dissent on the First Amendment's unyielding nature as compared to the Government's asserted need to know a reporter's unprinted information. Unless the reporter himself is implicated in a crime Douglas found no "compelling need" for a reporter to compromise his sources. Douglas advanced two principles which embrace the essence of his dissent: (1) "people must have absolute freedom of and therefore privacy of their individual opinions and beliefs regardless of how suspect or strange they may appear to others . . . /and therefore/ an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs"; (2) "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." As an impediment to the dissemination of ideas fostered by a free press, Douglas concluded that fear of exposure, causing sources to communicate less openly, and fear of accountability, causing editors and critics to restrain themselves, will be the consequence of forced disclosure of confidential sources of information.

Justice Stewart, with whom Brennan and Marshall joined, called the Court's "crabbed" view of the First Amendment "a disturbing insensitivity to the critical role of an independent press." Stewart viewed the Court's decision as extending permission to state and federal authorities "to annex the journalistic profession as an investigative arm of government." Stewart cited the right to publish as central to the First Amendment and basic to a constitutional democracy but without the freedom to gather information "the right to publish would be impermissibly compromised."

The error of the Court, Stewart contended, was that in the name of advancing the administration of justice they have impaired that goal. "The sad paradox of the Court's position," Stewart concluded, "is that when a grand jury may exercise an unbridled subpoena power, and sources . . . become fearful of disclosing information, the newsman will not only cease to be a useful grand jury witness; he will cease to

investigate and publish information about issues of public import." For Stewart, "the interests protected by the First Amendment are not antagonistic to the administration of justice."

III. Cases Docketed

Disposed

Armed Forces

Ruling below: No federal injunctive relief was available against a naval base commander's order barring certain anti-war ministers from the base. The order was issued only after the ministers publicly solicited the soldiers to go AWOL and take sanctuary in a nearby church and after it was determined that the ministers' behavior was seriously affecting morale on the base. Question presented: Did the order barring civilian clergy from giving religious counsel to military prisoners at their request violate the First Amendment if given in the absence of evidence of clear and present danger to military prison discipline? (Certiorari denied. Bridges v. Davis, 443 F.2d 970).

Ruling below: A lower federal court should not have barred, despite a "chilling effect" on First Amendment rights, the transfer of soldiers who were held responsible for their wives' and friends' protest activities that were potentially harmful to a military unit's public relations mission among pro-war civilian organizations. The military has broad discretion to transfer its personnel free of judicial interference, in all but the most extreme cases. Questions presented: Does an off-duty soldier have the First Amendment right to arrange lawful political demonstrations off base that do not interfere with his military duties? May a civil court review military transfer orders when the purpose allegedly is to halt constitutionally protected speech? (Review denied. Cartwright v. Froehlke, 447 F.2d 245).

Civil Rights

Ruling below: When Indians on Indian ceremonial grounds attempted to circulate printed leaflets critical of the manner in which ceremonials were conducted, their constitutional rights were not violated by action of the state district attorney and ceremonial officials who warned circulators that they would be arrested unless they discontinued distribution of the leaflets. Question presented: Does the mere possibility of disorder at a public gathering constitute such a clear and present danger as to justify public officials in suppressing the exercise of First Amendment freedoms? (Certiorari denied. Benson v. Rich, 488 F.2d 1371).

Ruling below: When the New Mexico National Guard assisted civilian law enforcement officials in dealing with a civil disturbance caused by an organization of citizens of Spanish or Mexican ancestry (Alianza), they were held immune (under the Civil Rights Act) from liability for detaining an Alienza member in good faith and honest belief that the detention was necessary to preserve order. Police efforts to discourage persons from attending an Alianza meeting by setting up road blocks and distributing notices advising persons to return home, were held not to prevent anyone from attending the meetings. Question presented: Did the police efforts deprive Alianza members of First Amendment rights of freedom of speech and assembly? (Review denied. Valdez v. Black, 446 F.2d 1071).

Ruling below: A California anti-littering ordinance that prohibits door-to-door distribution of literature, without prior consent of the property owner, violates the First Amendment. Question presented: Does the First Amendment invalidate an anti-littering ordinance which requires prior consent of the property owner to receive distribution of literature? (Certiorari denied. City of Thousand Oaks v. Van Nuys Publishing Co., Inc., 5 Cal. 3d 817).

Communications

Ruling below: The Public Health Cigarette Smoking Act of 1969, which prohibits electronic but not printed media from advertising cigarettes, does not violate the First Amendment. (Judgment affirmed.)

Criminal Law and Procedure

Ruling below: A trial judge who did not sequester a jury on a murder case was held to violate the First Amendment and the public's right to open judicial proceedings by ordering the news media to refrain from reporting anything concerning what happened outside the jury's presence. Question presented: Does the First Amendment bar a trial judge from limiting the reporting of events that occur in the courtroom but outside the jury's presence? (Certiorari denied. McCrea v. Sperry, 483 P.2d 608).

Ruling below: A trespassing conviction for soliciting signatures to an anti-pollution initiative petition on the Disneyland parking lot was affirmed. Question presented: Does the First Amendment bar the California trespassing conviction for soliciting signatures on a parking lot where the public has unrestricted access? (Certiorari denied. Ball v. California).

Government Personnel

Ruling below: The New York Civil Service Law requirement that a public employees' union, as a prerequisite to certification as the bargaining representative, affirm that it does not assert the right to strike, is neither burdensome nor unreasonable. Question presented: Does the lower court ruling abridge the right to free speech? (Appeal dismissed. Rogoff v. Anderson).

Ruling below: The court dismissed the complaint of a "provisional" employee who refused to change his political party affiliation. Question presented: Did the dismissal of the complaint violate the employee's right of free political association or rights of free speech and assembly. (Certiorari denied. Alomar v. Dwyer).

Ruling below: A Texas law prohibiting payment of salary from funds to employees of a state university who were serving as elected mayor and councilman of a Texas municipality does not violate the First Amendment guarantees of freedom of expression and association. Question presented: Does a state constitutional provision which has been interpreted by the courts as automatically barring payment of state salaries to state employees so long as employees hold state or local elective positions violate rights guaranteed by the First Amendment? (Appeal dismissed. Anderson v. Calvert, 467 S. W. 2d 205).

Libel and Slander

Ruling below: An Air Force colonel's allegedly defamatory remarks about a subordinate officer's dissident activities made on an Air Force base and reported in the press and on television were absolutely privileged under the rule enunciated in Barr v. Matteo, 360 U.S. 564 (1959). Question presented: Does Barr v. Matteo confer an absolute privilege against suit for nearly all federal government officials who make defamatory statements when acting within the "outer perimeter" of their duties? (Certiorari denied. Wanamaker v. Riley).

Ruling below: The lower court denied an Arizona newspaper's motion for a new trial and for judgment notwithstanding a libel verdict against it for publishing an editorial that criticized the state attorney general's people's counsel idea as "Marxist." Question presented: Is proof that the author and publisher of a newspaper editorial criticizing a public official's idea as "Marxist," who did not believe that such official was Communist or actively espoused Communist doctrine, sufficient to support a finding of actual malice in publication of an editorial within the New York Times rule, 376 U.S. 254? (Appeal dismissed for want of a substantial federal question. Phoenix Newspapers Inc. v. Church).

Ruling below: A jury's award of both compensatory and punitive damages to a public official on the basis of defendant's allegedly defamatory statements

(referring to plaintiff as a ringleader, Gestapo leader, and as having illegally constituted a grand jury that had indicted defendant on bribery charges of which defendant had been acquitted) was supported by clear and convincing evidence that the statements were untrue and made with malice and knowledge of their falsity. Question presented: Does the award of punitive damages against a private citizen in an action for libel and slander of public officials violate the First Amendment's free-speech guarantee? (Certiorari denied with Justice Douglas holding that certiorari should be granted. Meister v. Dalton, 188 N.W. 2d 494).

Obscenity

Ruling below: The operator of an establishment featuring bottomless dancers was held in contempt of court for having violated a permanent injunction against featuring bottomless performances of "any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity." Question presented: Was the permanent injunction an unlawful prior restraint upon exercise of free speech, in violation of the First Amendment? (Certiorari denied. Escobar v. California).

Ruling below: Under a Florida indecent exposure statute a dancer was convicted who habitually climaxed her act by going totally nude and exposing her sex organs. Questions presented: Does the Florida statute violate the First and Fourteenth Amendments as applied to performance of "modern dance" routines? Is dance performed for an audience a form of protected expression? Does the First Amendment forbid criminal punishment for any public or private display of the nude body? (Appeal dismissed. Hoffman v. U.S.).

Ruling below: The trial court did not error in finding after viewing the film I Am Curious Yellow, that it was obscene under a Georgia obscenity statute. The state was not required to present any evidence of local, community or national standards. The court was authorized to enjoin the exhibition of the film as an existing or threatened nuisance. Questions presented: Is the film constitutionally protected expression? May exhibition of the film be enjoined under Georgia nuisance statutes without evidence being presented by the state that the film was obscene under national community standards? (Certiorari denied. Evans Theatre Corp. v. Slaton, 227 Ga. 377).

Postal Service

Ruling below: A U.S. postal service stop order entered against incoming mail of a business engaged in fraudulent sales does not violate freedom of speech provisions of the First Amendment. Question presented: Does an otherwise legal stop order against incoming mail violate the First Amendment's free speech guarantee

and deprive a business of property without due process of law? (Judgment affirmed Lynch v. Blount).

Pending

Civil Rights

Ruling below: An Army regulation authorizing the commanding officer of a military post to bar on-base distribution of certain publications upon determining that such distribution "presents a clear danger to loyalty, discipline, or morale of troops," is constitutional. The unique posture and ability of the commanding officer to comprehend internal threats to his command or to loyalty and morale of his troops bars a serviceman's contention that he was denied due process by the military's failure to hold a hearing before upholding the commanding officer's refusal to permit distribution of a paper prepared by the serviceman. Question presented: Did Army regulations establish procedures which unconstitutionally restrain free expression and freedom from prior restraint under the First Amendment? (Schneider v. Laird).

Ruling below: A Durham, North Carolina, ordinance prohibits assemblage of more than 50 persons in a 4,260 square foot downtown park. On two previous occasions when used for a large meeting, the park had been the scene of destructive assemblages. Held: the ordinance does not unconstitutionally abridge freedoms of assembly and speech. Question presented: Is the First Amendment violated by an ordinance which prohibits a congregation of more than 50 in a public park, authorizes police to request all in excess of 50 to leave, and provides that if they do not leave the entire assembly becomes unlawful? (Blasecki v. City of Durham).

Criminal Law and Procedure

Ruling below: A bar owner's conviction for having a dancer perform obscenely on the premises was affirmed. Question presented: Is dancing performed before an audience an entertainment activity that is protected by the First Amendment? Is dancing entitled to the same treatment as printed matter with respect to obscenity determination? (Giamone v. California). Questions presented: (1) May commercial display, to an adult audience, of motion pictures which attempt to portray ideas that contain no explicit scenes of sexual activity, be temporarily enjoined without violating exhibitor's First Amendment rights? (2) Is a temporary restraining order against exhibiting an allegedly obscene film precluded by the absence of statutory procedural safeguards to protect the exhibitor's First Amendment rights, pending a trial determination of the question of obscenity? (3) May display of motion pictures be temporarily restrained in the absence of an affirmative showing that the pictures offend contemporary standards of decency, appeal to prurient interest and contain no redeeming social values? (Paris Theatres v. Slaton, 228 Ga. 343).

Ruling below: The court affirmed a conviction for violation of a California statute prohibiting solicitation for lewd conduct. Question presented: Is verbal solicitation for sexual conduct an activity protected by the free-speech guarantee of the First Amendment? (Baskett v. California). Question presented: May a defendant, consistent with the First and Fourteenth Amendments, be convicted under a state statue for distribution of "obscene matter" solely on the basis of publishing an advertisement that offers to supply sexual materials? Allegedly the materials do not violate contemporary community standards in depiction of sex and do not appeal to prurient interests of the average person in a community. (Wasserman v. Municipal Court).

Education

Ruling below: The First Amendment does not bar suspension of state university students for participating in a peaceful, silent Vietnam moratorium vigil on college premises at a time and in an area expressly forbidden by a reasonable "Student Expression Area" regulation. The regulations permits demonstrations on a centrally located campus area between designated hours and requires that the area be reserved at least 48 hours in advance. Question presented: Is the suspension barred by the First Amendment? (Bayless v. Martine, 451 F.2d 561).

Obscenity

Ruling below: A book, Suite 69, was held to appeal to prurient interest in sex, was beyond the limits of candor within California, and lacked redeeming social importance. The jury was permitted to find that the state assumed its burden of proving the book lacked redeeming social importance even though the state introduced no evidence to counteract defendant's that the book had social importance. A California obscenity statute was upheld in allowing the jury to consider circumstances indicating the book was being commerically exploited for the sake of prurient appeal. State community standards rather than national standards were allowed to control. Questions presented: (1) Does the statute violate the First Amendment and Due Process by authorizing conviction without evidence that the book is utterly without redeeming social importance? (2) Does proof of pandering serve as a substitute for proof that the book is utterly without redeeming social importance, even though no charge of "pandering" was made, the case was not tried, and the jury was not instructed on the "pandering" theory? (3) Does adoption of state community standards, as opposed to national standards, violate First Amendment guarantees? (Kaplan v. California, 100 Cal. Rptr. 372).

Ruling below: An Indiana statute which makes it unlawful to send obscene literature into the state is neither unconstitutional on its face nor as applied. The words "obscene, lewd, indecent and lascivious" adequately convey a description of the evil intended to be prohibited. The evidence enabled the court to find that the

newspaper Screw, sent into the state, was obscene. Questions presented: (1) Was Screw not obscene in the constitutional sense and therefore protected expression? (2) Do Indiana obscenity statutes, on their face and as applied, which authorize conviction without charge or proof of guilty knowledge and unlawful intent, violate First Amendment, Due Process, aand Equal Protection clauses? (3) Are the statutes void for vagueness and overbreadth. (Mohney v. Indiana, 276 N. E. 2d 517).

IV. The 1972-73 Term in Projection

When the 1972-73 Supreme Court term gets underway on October 2, an all-out review of obscenity laws will take place. The review is the result of six different cases before the Court which raise such questions as:

Should a national standard of obscenity take precedence over state standards?

Does a state have the right to close down movie theatres showing adult films?

Is it constitutional for the federal government to allow interstate transportation of obscene information, irrespective of whether it is to be sold or used privately by the shipper?

May the government seize, as obscene, material imported for private use and possession?

What is a "community" against whose standards sexy advertisements, books and movies are to be judged?

The Court will hear another case involving the conviction of Murray Kaplan, owner of a Los Angeles bookstore, who sold a book, Suite 69, to a police undercover agent. Kaplan contends that neither his book nor any book is obscene. The state contends that if the sexual acts were omitted from Kaplan's book, the reader would be left with 180 blank pages.

A qualified analysis of the Nixon Court is taking shape. Until Justice Douglas leaves the Court, this analysis likely will be valid--and Douglas, given his feelings about Nixon, will apparently stay on until he ceases to function.

On most issues the lineup will be three Warren Court liberals (Douglas, Brennan, and Marshall) offset by four Nixon appointees (Burger, Blackmun, Powell, and Rehnquist) with the swing votes held by Stewart and White. This alignment means that there is no automatic majority. But the Nixon four have an advantage over the Warren three since the Nixon group needs only one of the swing judges to form a majority while the Warren group must attract both of them. Thus many five to four and six to three decisions

seemingly will result until the Court make-up again changes.

Until Justices Powell and Rehnquist have been on the Court for a full term, any analysis of the First Amendment's immediate future must necessarily be tentative. Nevertheless, several predictions already seem in order: (1) Because the justices have deep differences in attitude toward the First Amendment, single clear statements of majority and minority positions will be replaced by fragmented opinions representing diverse views (see Cole v. Richardson); (2) the Burger Court, unlike the Warren Court, trusts authority and will not be inclined to be suspicious of people in power (see Laird v. Tatum); (3) rather than overturn precedent set by the Warren Court, differences will be discovered in new cases which justify shifting away from previous liberal commitments (see Lloyd v. Tanner); (4) the Court's treatment of the First Amendment will become more conservative, but not reactionary (see Justice Powell's concurring opinion in U.S. v. Caldwell); (5) the limits of the First Amendment will not be expanded to allow for freer expression (see Kleindienst v. Mandel); and (6) the primacy of the First Amendment will be less often acknowledged as other priority arguments prevail (see U.S. v. Caldwell). In general, the Warren Court precipitated crucial changes while the Burger philosophy appears to be one of adjusting by containment to these changes. This containment will produce frustration in those who believe an unfettered First Amendment is the keystone to a constitutional democracy.

FREEDOM OF SPEECH BIBLIOGRAPHY: JULY 1971-JUNE 1972
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Southeastern Promotions, Ltd. v. City of Charlotte, N.C., 333 F.Supp. 345 (1971). Charlotte, N. C. Authorities deny use of municipal auditorium for performance of Hair.

Southeastern Promotions Ltd. v. City of West Palm Beach, 457 F.2d 1016 (1972). Manager of municipal auditorium refuses to permit Hair to be performed at the auditorium.

Southeastern Promotions, Inc. v. Conrad, 341 F.Supp. 465 (1972). "This Court is accordingly of the opinion that the theatrical production Hair contains conduct, apart from speech or symbolic speech, which would render it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances and statutes of the City and of the State of Tennessee. The defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium or the Trivoli Theater unto the plaintiff."

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United States v. Boyle, 338 F.Supp. 1028 (1972). Unions and freedom of association.

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