THE FIRST AMENDMENT: A WEATHERVANE FOR FREEDOM

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The First Amendment is a weathervane and there are ominous signs everywhere that the values it embraces may be in for stormy weather. Decisions concerning the depth and scope of First Amendment rights have been momentous since the 1930s when these rights were made applicable to the States by reason of the Fourteenth Amendment. Various forces since World War I have worked to curtail First Amendment rights in the interest of "states' rights" and of "national security." As a nation our federalism cannot allow disparate treatment — for literature, movies, public debate, speech, and press — dependent on the whims or prejudices of local groups. So far as basic freedoms are concerned there must be national standards, lest the most illiterate and the least civilized factions lower us to their prejudices and condition the mass media and national publications to the lowest common denominator.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The word "no" does not seem to be ambiguous, though many judges read the words "Congress shall make no law" to mean "Congress may make some laws."

The word "freedom" may to some have elasticity. The word "speech" to others may mean something less than — or different from — the word "expression"; and the word "press" to others means only the conventional type of newspaper and does not encompass television or radio.

The word "freedom" in terms of speech or press had no restrictive meaning when the First Amendment was ratified in 1791; but the idea persisted at the local or state level that "offensive" ideas should be punished. And, at that time, so far as the First Amendment was concerned, "offensive" or any other ideas could be punished, for the First Amendment was a part of the Bill of Rights, which at the beginning applied only to the federal regime.[1]

The instrument necessary for change came in 1868, shortly after the Civil War, when the Fourteenth Amendment was adopted. Section One of the Fourteenth Amendment guaranteed against state action "the privileges or immunities of citizens of the United States" and it forbade the States from denying any persons "liberty" without Due Process of Law. It was not until 1931, however, that the Speech and Press Clause of the First Amendment was held to restrict

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1. Barron v. Mayor and City Council of Baltimore, 7 Pet. (32 U.S.) 243 (1833).

the States. Thus, it has only been during the last 45 years that the States have been compelled to live up to First Amendment requirements, and it is understandable why the folklore and tradition of states rights have stood in the way of reordering state laws to conform with the federal standard.

Today, however, any discussion of the Speech and Press Clause of the First Amendment must proceed on the assumption that what is denied the Federal Government is likewise denied the States. A provision of the Bill of Rights applicable to the States by reason of the Fourteenth Amendment is not "watered down."[2]

It has long been stated as dictum that obscenity is not a part of "speech" or "press" guaranteed by the First Amendment, but that premise has no foundation in our legal history. The justification used for banning "obscene" publications is that they are "offensive" to many people.[3] No one, however, has been able satisfactorily to define "offensive" in a neutral or objective fashion. What one person, or group of people, finds offensive might not be at all offensive to another person or group of people. With this thought in mind I started compiling a list of themes, topics, and exegeses that were "offensive" to me. The list grew and grew. What if a community's list of "offensive" utterances equaled mine? What if the community's standards, not the national standards, determined whether a speaker or publisher or merchant is sent to prison for an "obscene" publication?[4] If a community can make criminal one "offensive" idea, what bars it from making criminal another "offensive "idea? The First Amendment says nothing about "speech" or "press" that is inoffensive. It allows all utterances, all publications to be made with impunity.

All ideas are potentially inciting. The purpose of the freedom of speech and freedom of the press clauses in the First Amendment is not merely to enlighten or comfort people, but to offer challenging and provocative and annoying ideas as well. One gets the impression from reading conventional discussions of the First Amendment that the frame of discourse and debate must be within the framework of the existing system and compatible with its basic tenets. That, of course, is the Russian philosophy. Our First Amendment is designed to protect our dissenters. Ideas have a market place, and it was assumed by Jefferson and Madison that that market is open to all ideas. That has not, however, been the direction in which judge-made law has evolved.

Beliefs under our system are sacrosanct. What one believes is beyond the reach of government. "Do you believe in God?" "Do you believe in socialism?" These are not permissible questions for House or Senate committees to ask a witness on pain of contempt. The First Amendment's broad philosophy was stated by Chief Justice Warren in *Watkins v. United States,*[5] where he wrote: "There is no congressional power to expose for the sake of exposure." *Watkins*, however, was the most advanced position taken; later decisions suggested a retreat.

The battle to preserve individual liberties under the First Amendment is

2. Malloy v. Hogan, 378 U.S. 1, 10 (1964) (Brennan, J.); *see also* Johnson v. Louisiana, 406 U.S. 356, 384 (1972) (Douglas, J., dissenting).
3. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).
4. Miller v. California, 413 U.S. 15 (1973).
5. 354 U.S. 178, 200 (1957).

not new. In 1887, Charles B. Reynolds — an ex-Methodist minister who renounced the Bible and started preaching the gospel of free thought — was indicted, tried, and convicted under a New Jersey blasphemy statute. Robert Ingersoll was Reynolds's attorney. Ingersoll told the jury:

> . . . This statute, under which this indictment is found, is unconstitutional, because it does abridge the liberty of speech; it does exactly that which the Constitution emphatically says shall not be done.
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> . . . If every man has not the right to think, the people of New Jersey had no right to make a statute, or to adopt a Constitution – no jury has the right to render a verdict, and no court to pass its sentence.
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> . . . In other words, without liberty of thought, no human being has the right to form a judgment. Without liberty there can be no such thing as conscience, no such thing as justice. All human actions – all good, all bad – have for a foundation the idea of human liberty, and without Liberty there can be no vice, and there can be no virtue. Take the word Liberty from human speech and all the other words become poor, withered, meaningless sounds – but with that word realized, with that word understood, the world becomes a paradise.
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> . . . Gladly would I give up the splendors of the nineteenth century – gladly would I forget every invention that has leaped from the brain of man – gladly would I see all books ashes, all works of art destroyed, all statues broken, and all the triumphs of the world lost – gladly, joyously would I go back to the abodes and dens of savagery, if necessary to preserve the inestimable gem of human liberty.
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> . . . Thomas Jefferson entertained about the same views entertained by the defendant in this case, and he was made President of the United States . . . I sincerely hope that it will never be necessary again, under the flag of the United States – that flag for which has been shed the bravest and best blood of the world, under that flag in defense of which New Jersey poured out her best and bravest blood – I hope it will never be necessary again for a man to stand before a jury and plead for the Liberty of Speech.[6]

Ingersoll's words, spoken 90 years ago, are as valid today as they were when uttered. Nevertheless, when ideas have been perceived as too threatening or too dangerous or too "offensive," courts and juries have knuckled under to the hysteria of the times. No nation made up of mature, integrated people should allow that to happen. Perhaps, as some profess, the First Amendment is too strong a doctrine for us. Perhaps those who read it as containing only "admonitions of moderation"[7] are politically more acceptable to middle-America. But the theory of law under a Constitution is to raise the level of conscience and

6. *See* Shapiro, "Blasphemy Trial," in At East (Sunday magazine of the Bergen, N.J., *Evening Record*), May 20, 1973, at 20.
7. L. Hand, *The Spirit of Liberty* 278 (Dillard ed. 1960).

conduct, not to cater to the lower passions and prejudices of the uninformed among us.

There is a growing tendency of an increasingly powerful government to make the citizen walk submissively to the rightist philosophies now in the ascendancy. It may be that those pressures plus the easy use of electronic surveillance and the invasion of privacy will combine to end an era that brought us close to the Jeffersonian ideal.