THE BILL OF RIGHTS AND THE POLICE

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by Melvyn Zarr

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By MELVYN ZARR

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Irving J. Sloan
General Editor

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FOREWORD

The thrust of this small book has been to convey the idea that the guarantees of the Bill of Rights are neither technicalities nor rigid, inflexible rules; that they incorporate fundamental principles basic to the preservation of a decent society, free from the procedures of a police state; and that they are not at war with common sense or the needs of order and security.

The liberties of a people are seldom lost to frontal attack; usually they are destroyed under the guise of attacking a grave national problem. Thus, easy "law and order" solutions destructive of individual liberty must be resisted, for two reasons: 1) it has not been demonstrated that our crime problem is causally related to enforcement of the protections of the Bill of Rights; and 2) even were this so, would not the methods of a police state be too high a price to pay?

The principles incorporated in the Bill of Rights are continually being adjusted to the changing conditions of our society. That task is a delicate and sensitive one, and is ultimately committed to the Supreme Court of the United States. But all of us must be involved in the process. The laws and procedures which test the quality of our civilization must not only be fair and efficient, but they must be appreciated by the citizenry to be so. Local policemen, local prosecutors, local judges and local citizens generally must all understand and respect the protections of the Bill of Rights. Otherwise, they will be only so many platitudes, useless except for filling up academic tracts.

Toward this goal of public understanding and respect, this book is dedicated.

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THE LIBERTY vs. SECURITY BALANCING ACT

There is a real tension in our society between the need for more effective police work to combat the rising tide of crime and our constitutional aversion to a police state. This is a central fact which no amount of simplistic sloganeering can erase. This tension cannot be avoided simply by calling for "law and order," or more aggressive police tactics. This tension is part and parcel of every civilized society; each is obliged to strike its own balance between security and liberty—even one that discharges that function covertly and resolves most issues in favor of public order and security.

Our Bill of Rights—our balance—was struck in reaction to the balance struck in 18th Century England. That society opted for order and security by, among other things, punishing hundreds of crimes by death and by empowering its constabulary to search and seize at will under the authority of general warrants.

To the Framers of our Constitution, liberty was poorly weighted in that balance. They recognized the tendency of even well-meaning officials, once caught up in the excitement of pursuit of suspected criminals, to use whatever short-cut seemed most effective and to ignore the liberties of the citizenry. The police cure, they thought, could often be worse than the social ill.

Accordingly, the Framers built into our Constitution principles to protect the liberties of United States citizens. These devices were hammered out after hard debate and compromise. They were devised as restraints on official action. They were frankly acknowledged not to make crime fighting any easier; other interests in addition to police efficiency were sought to be protected. Accordingly, a Bill of Rights was framed which

embodies a profound national commitment to keep the police within our control.

But the Bill of Rights was not seen as a set of rigid rules to make the task of maintaing order and security unnecessarily harder. The Framers were not insensible to the real need of the citizenry for protection. They recognized that a society unable to protect its citizens encourages each citizen to become his own policeman and fosters a system of private justice. Moreover, a Bill of Rights artificially and unnecessarily obstructive of citizen protection would not command enough respect to be enforced.

Therefore, the Bill of Rights struck a balance which protected fundamental incidents of liberty, while at the same time protecting public order and the citizen's security. The Bill of Rights imposes limits on the power of a policeman to stop a person from speaking or picketing, or arrest his freedom of movement, or search his person or home, or subject him to questioning. That the effect of these limitations may be to restrain policemen in their pursuit of suspected criminals cannot justify their abandonment. In our society, the Bill of Rights settled that.

Let us consider a case in constitutional adjudication. In a small city, a woman called the police and claimed that she has been raped. She could not identify her attacker beyond the general description that he was a Negro youth. The police dusted the window of entry for fingerprints and found some. Guided only by this general description and the set of fingerprints, the police decided to round up all the Negro youths in the area for fingerprinting and questioning. As it turned out, one of the 70 Negro youths rounded up furnished prints which matched those on the victim's window. The boy was convicted. Good police work? A triumph for "law and order"? No, held the United States Supreme Court, condemning the police conduct in the case. Why? The decision would be unexplainable were the sole object of our society for the police to get their man. But this premise is incorrect: our Bill of Rights, specifically the Fourth Amendment, forbids

dragnet arrests of the kind just described. It forbids the police to ignore the rights of the dozens of innocent youths picked up in the dragnet. It protects against this by requiring the police to get a warrant for an arrest, which can only be obtained by demonstrating to a judge that there is probable cause to believe that a particular person is guilty of the crime.[1]

In the case just described, the Supreme Court construed the Fourth Amendment's proscription of "unreasonable searches and seizures." Other provisions of the Bill of Rights impinging upon police conduct are equally general. The First Amendment protects "freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fifth Amendment restrains the police from "compelling" any person to incriminate himself.

These general principles are constantly being applied to new fact situations and adjusted with new conceptions of, and challenges to, our society. At any given time there are always more constitutional questions left open than settled. The responsibility for this process of application and adjustment falls ultimately on the Justices of the United States Supreme Court. Theirs is the most difficult balancing act in our society.

This book will attempt to outline where the balance has been struck in the crucial issues of police power and individual liberty. Constitutional doctrine is never static, and sometimes the rate of change is dizzingly fast. But the closing of the Warren era of the Court gives us an opportunity to assess the situation at a time when future rapid constitutional change seems unlikely.

In the following chapters we shall treat the constitutional limitations on the police power to inhibit free speech activities, to define criminal conduct under vaguely worded criminal laws, to stop or arrest persons, to search persons, homes or businesses, and to interrogate and otherwise investigate persons taken into custody.

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[1] *Davis v. Mississippi*, 394 U.S. 721 (1969).

A caveat must be repeated: the constitutional balance described herein is not graven in stone, but only printed on the pages of the Supreme Court's decisions. These decisions are readable, and should be read, for each generation of citizens and lawyers must take part in keeping the balance true.

Chapter 2

POLICE INTERFERENCE AND FIRST AMENDMENT RIGHTS

The First Amendment

. . . or abridging the freedom of speech, or of the press; or of right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment differs in a very important way from other provisions of the Bill of Rights . . . which restrict police action. These other provisions deal with police procedures: procedures which the police must follow in conducting arrests, searches, and interrogations and other investigative measures. They require, under certain circumstances, a warrant for an arrest or search, certain warnings to be given prior to custodial interrogation, and provision of counsel. And although the Fourth Amendment, as construed, requires in general terms that a policeman not interfere with a citizen unless he has a certain quantum of evidence of crime, it does not direct the policeman to let alone certain citizen conduct.

The First Amendment, on the other hand, is specifically and uniquely directed to insulating certain kinds of conduct from police interference. Because it is generally phrased and offers wide opportunity for interpretation, interpretation has not been static. Indeed, it was not until this century that the Supreme Court recognized that the First Amendment delimits the power of state as well as federal officials.

What freedom is encompassed within "freedom of speech"? What are the limits on the "right of the people peaceably to assemble"? These are some of the questions which have troubled and divided the Supreme Court. It is possible, but not very helpful, to recite various statements taken from Supreme Court opinions as the "law" of the First Amendment. But bare statements do not decide real cases. One must examine where the balance between freedom and order has been struck in the context of real fact situations coming before the Court.

There are many forms of communication which fall under the general protection of "freedom of speech." They may be regulated in different ways according to their nature and

function. The kinds of restrictions which the First Amendment permits to be imposed upon communication fall, generally, into three categories. The individual's interest in communication must be adjusted with the governmental interest in: (1) protecting the rights of others not to listen if they so choose; (2) protecting others from injurious consequences of the communication; and (3) protecting some governmental function.

An illustration of the first category is where the speaker physically restrains his audience in order to make it listen. Whether this involves preventing a college dean from leaving or entering his office in order to make him pay attention or interrupting a church service in order to preach the disrupters' brand of religion, the First Amendment does not insulte this form of communication. The rights of others not to listen must be respected. Thus, for example, the Supreme Court has allowed state prohibitions on the use of sound trucks in residential neighborhoods.

An illustration of the second category is provided by Justice Holmes' famous dictum that the First Amendment does not protect one who falsely shouts "fire" in a crowded theater. Likewise, speech which incites to riot, furthers a conspiracy to commit crimes, invades the privacy of others or maliciously libels another is not protected by the First Amendment. For example, the First Amendment insulates false charges against government officials on the theory "that debate on public issues should be uninhibited, robust and wide-open, and . . . may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." But there is a limit. The Supreme Court has held that this protection does not run to false statements about public officials made with actual malice against them.

A third justification for regulating or prohibiting some kinds of communications is to protect some governmental function. Communication in the form of plotting a revolution, arranging a political assassination or communicating intelligence to the enemy is not protected.

Let us consider *Street v. New York*, 394 U.S. 576 (1969). On June 6, 1966, Sidney Street was sitting in his Brooklyn apartment listening to the radio. He heard a news report that civil rights leader James Meredith had been shot by a sniper in Mississippi. Muttering to himself, "They didn't protect him," Street, himself a Negro, took from his drawer a neatly folded 48-Star American flag, which he formerly had displayed on national holidays, and carried the still-folded flag to a nearby street corner. There, he lit the flag with a match, and dropped it on the pavement when it began to burn. A small crowd began to gather and an approaching policeman heard Street say, "We don't need no damn flag." When the policeman asked Street whether he had burned the flag he replied, "Yes; that is my flag; I burned it. If they let that happen to Meredith, we don't need an American flag." Street was charged not only with burning the flag, but also with casting contempt upon it by his words. He was convicted on both charges. In April, 1969, the Supreme Court reversed his conviction for making derogatory remarks about the flag, on the ground that they were encompassed within the "freedom of speech" protection of the First Amendment, in the absence of any substantial governmental interest in punishing the speech.

The Supreme Court examined four governmental interests which might conceivably have been furthered by punishing Street for his words. First, there might have been an interest in deterring Street from vocally inciting others to commit unlawful acts. But Street's words, taken alone, did not urge anyone to do anything unlawful. They amounted to somewhat excited public advocacy of the idea that the United States should abandon, at least temporarily, one of its national symbols. Such public advocacy of peaceful change in our institutions, the Supreme Court held, is protected by the First Amendment (as made applicable to the States by the due process clause of the Fourteenth Amendment).

Second, there might have been a governmental interest in preventing Street from uttering words so inflamatory that they

would provoke others to retaliate physically against him, thereby causing a breach of the peace. The Supreme Court rejected this rationale on the ground that Street's remarks were not so inherently inflamatory as to come within that small class of "fighting words" which are likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Third, there might have been a governmental interest in protecting the sensibilities of passers-by who might have been shocked by Street's words about the American flag. The Supreme Court rejected this theory on the ground that any shock effect must be attributed to the content of the ideas expressed and held: "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

Fourth and finally, there might have been a governmental interest in assuring that Street show proper respect for our national emblem. Stating that "disrespect for our flag is to be deplored no less in these vexed times than in calmer periods of our history," the Supreme Court nevertheless relied upon an earlier case, decided during World War II, to reject this theory of conviction. In a case striking down a public school regulation requiring unwilling schoolchildren to salute the flag, the Court had held:

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

The Court did not need to reach the question whether the First Amendment protected the symbolic act of burning the flag.

But the Court has answered the question whether the First Amendment protects the burning of draft cards. On March 31, 1966, David Paul O'Brien and three of his companions burned their draft cards on the steps of the South Boston Courthouse. A sizable crowd, including several FBI agents, witnessed the event. O'Brien stated to the agents that he had burned his draft card publicly in order to influence others to adopt his anti-war beliefs. In the Supreme Court, he took the position that his burning of the draft card was a form of symbolic speech which communicated his opposition to the war and the draft. O'Brien was not prosecuted for failing to have his draft card in his possession; rather, he was prosecuted under a 1965 Act of Congress which made it a crime to intentionally destroy one's draft card. O'Brien contended that, since failure to possess the draft card was already a criminal offense, the purpose and effect of the 1965 act under which he was prosecuted could only be to punish the dissent expressed by the act of burning a draft card. The United States Court of Appeals for the First Circuit agreed with this argument and declared the act unconstitutional.

However, in an 8-1 decision of the Supreme Court authored by Chief Justice Warren, the Supreme Court upheld the act. The Court began by recognizing that there was an element of communication in the draft card burning, but held that the punishment of this communication was "incidental" to the punishment of the burning, which the government had a sufficiently important interest in prohibiting. This important interest in deterring men from burning their draft cards was declared to be: "The smooth and proper functioning of the system that Congress has established to raise armies."[2]

Nevertheless, the Court left open several possibilities that might compel a different result. First, if Congress were to legislate against "incidental" speech by measures which did not seek to enforce its interest in the narrowest possible way, then such an act might be unconstitutional. Second, if Congress had passed an act specifically aimed at suppressing communication,

[2]*United States v. O'Brien*, 391 U.S. 367 (1968).

"it could not be sustained as a regulation of noncommunicative conduct." Third, Justice Harlan, in a concurring opinion, stated that a different result might have been reached if O'Brien had had no other means at his disposal—other than burning his draft card—to protest the war and the draft.

Permissible governmental restrictions and regulations of incidents of peaceable assembly like picketing, parading and other protest demonstrations parallel those of free speech.

The classic statement of the general principle of peaceable assembly was stated 30 years ago in a Supreme Court opinion:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembling, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

But this right, as others, is not absolute and may be regulated. The permissible theories of regulation may again be divided into three categories. First, demonstrators may not force anyone to pay attention to their demonstration.

Second, demonstrators must respect the rights of others to be free from unwarranted consequences of them. Demonstrators may not block others' entry or exit from buildings and may not block vehicular or pedestrian traffic upon the streets or sidewalks. Although peaceful demonstrations carried on in locations open to the public may not be absolutely prohibited, they may be subject to regulation. The nature of this regulation was analyzed in an opinion by the Supreme Court in 1965, which reviewed a great many of the free speech and peaceable assembly cases and summarized them in this way:

> From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions and beliefs may address

a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to ensure this necessary order. . . . One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. . . .

Third, states may impose an absolute ban on demonstrations in certain areas reserved for governmental operations which would be interrupted by such demonstrations. In 1966, the Supreme Court held that the state of Florida could validly prohibit and punish any demonstrations in a jail house yard, on the ground that such demonstrations would interfere with the orderly operation of the jail.

One form of regulation is that exemplified by laws requiring permits for parades. In 1963, Rev. Martin Luther King, Jr. and over 1,000 others were arrested in Birmingham for parading without a permit. The Supreme Court, in 1969, threw out these convictions on the ground that the permit-issuing authorities had too much discretion to grant or refuse a permit, in that a city ordinance authorized them to deny a permit if, in their judgment, the public "welfare," "decency," or "morals" required it. These standards were held to be too vague and susceptible to abuse to be constitutional.

Vagueness is similarly prohibited in other kinds of penal

laws. Offenses such as breach of the peace or disorderly conduct sweep in a great variety of conduct under a vague and overly broad definition and leave to the executive and judicial branches too wide a discretion in their application.

An example is given by a civil rights case decided by the Supreme Court in 1963. About 200 Negro high school and college students left a church in Columbia, South Carolina and marched toward the State Capitol. They walked in groups of about 15, in such a way as not to obstruct pedestrian or vehicular traffic. When they arrived at the Capitol grounds, they gathered in a horseshoe area of the grounds open to the public. There they heard speeches, and sang and clapped their hands. After about 15 minutes they were all arrested and charged with breach of the peace. The Supreme Court reversed these convictions, holding:

> We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed.
>
> If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.

The Supreme Court held that the offense of breach of the peace was so vague and indefinite as to allow persons to be convicted for peaceably expressing unpopular views.[3]

In the next chapter we shall deal further with the vitally important requirement that criminal laws be definite and specific and give the policeman only narrowly circumsribed discretion. We shall see that this vagueness doctrine is important not only in the enforcement of First Amendment rights, but in the much broader context of the general right of all citizens to be let alone by the police.

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[3]*Edwards v. South Carolina*, 372 U.S. 229 (1963).