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# The First Amendment and the Judicial Process: A Reply to Mr. Frantz

Wallace Mendelson\*

*The author continues a debate with Mr. Laurent Frantz on the meaning of the first amendment and the "balancing of interests" in free speech cases. He suggests that every judicial decision involves a balancing approach, and concludes that it is desirable that this balancing be clearly articulated.*

In a wide-ranging debate, Mr. Laurent Frantz and I have singled out two key issues on which we—and perhaps activists and anti-activists generally—are divided.<sup>1</sup> One concerns the meaning of the first amendment; the other the "balancing of interests" in free utterance cases.

## THE MEANING OF THE FIRST AMENDMENT

To come at once to the heart of the problem: Mr. Frantz assumes that the first amendment incorporates Meiklejohn's book, *Political Freedom*.<sup>2</sup> This wise little study suggests that

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment . . . is directed.*<sup>3</sup>

Surely no one dedicated to democracy and human decency could fail to find inspiration in these words. But philosophy is one thing, and history another. Dean Levy and others have shown that at best (in the libertarian view) the historic meaning of free utterance is found in Blackstone.<sup>4</sup> In short it permitted prosecution for seditious libel.

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1. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963).

2. *Id.* at 735. See also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878, 916 (1963).

3. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960).

4. LEVY, *LEGACY OF SUPPRESSION* (1960). For further evidence, see Mendelson, *supra* note 1, at 822-24.

This view stands unrefuted; even Chafee ultimately accepted it.<sup>5</sup> Mr. Justice Iredell—appointed to the Supreme Court by President Washington—gave the gist of the matter in charging a grand jury with respect to the Sedition Act of 1798:

That objection is, that the act is in violation of this amendment of the Constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the 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 question then is, whether this law has abridged the freedom of the press?

Here is a remarkable difference in expressions as to the different objects in the same clause. They are to make no law *respecting* an establishment of religion, or prohibiting the free exercise thereof, or *abridging* the freedom of speech, or of the press. When, as to one object, they entirely prohibit any act whatever, and, as to another object, only limit the exercise of the power, they must, in reason, be supposed to mean different things. I presume, therefore, that Congress may make a law *respecting* the press, provided the law be such as not to *abridge its freedom*. What might be deemed the freedom of the press, if it had been a new subject, and never before in discussion, might indeed admit of some controversy. But, so far as precedent, habit, laws, and practices are concerned, there can scarcely be a more definite meaning than that which all these have affixed to the term in question.<sup>6</sup>

....

It is believed that, in every State in the Union, the common law principles concerning libels apply; and in some of the States words similar to the words of the Amendment are used in the Constitution itself, or a contemporary Bill of Rights, of equal authority, without ever being supposed to exclude any law being passed on the subject. So that there is the strongest proof that can be of a universal concurrence in America on this point, that the freedom of the press does not require that libellers shall be protected from punishment.<sup>7</sup>

Of course, we are not inevitably obliged to honor the purposes of those who gave us the Bill of Rights. What then of judicial precedent? I suggest that in first amendment cases pure and simple no decision of the Supreme Court goes beyond Blackstone (though perhaps some of its language does). Indeed, no act of Congress has ever been held invalid on first amendment grounds.

What kind of law is it that was never enacted by the political processes, nor adopted by the judges? By what authority does Mr. Frantz get Mr. Meiklejohn into the First Amendment? Both history

5. Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

6. See WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATION OF WASHINGTON AND ADAMS 477-78 (1849). For a similar view see the Report of a House Committee, 38 ANNALS OF CONG., 5th Cong., 3d Sess. 2985-93 (1799).

7. WHARTON, *op. cit. supra* note 6, at 479.

and judicial precedent (federal and state) are overwhelmingly against him—to say nothing of the other agencies of government. And surely he can claim no social support remotely comparable to the forces that put Herbert Spencer's *Social Statics* into the fourteenth amendment. Law cannot support itself by its own bootstraps, or thrive on the dreams of a few idealists. Moreover, even so ardent a libertarian—and so competent a lawyer—as Chafee found Meiklejohn's approach judicially unworkable.<sup>8</sup>

Of course, on his *philosophic* premise much of what Mr. Frantz says would have to be accepted. And only on that premise can he ask such paradoxical questions as "Is the First Amendment Law?" and why does the Court not enforce it?<sup>9</sup> The answer is that the amendment *is* law, and (insofar as it goes) *is* judicially enforced. It is Meiklejohn's book that is not law and not enforced.

In effect Mr. Frantz is chiding the Court for not legislating Meiklejohn into, and something else out of, the Constitution. This, perhaps, a court may do when it "feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation."<sup>10</sup> Meanwhile, "it must be content to lag behind the best inspiration of its time"—as reflected in men like Alexander Meiklejohn.<sup>11</sup>

#### BALANCING AND FREEDOM

Mr. Frantz rejects the "balancing of interests" as a general approach in utterance cases. He let go of the cat when he confessed about Meiklejohn. I now confess that (except perhaps in simple cases which seldom reach the Supreme Court) balancing seems to me the essence of the judicial process—the nexus between abstract law and concrete life. Lawmakers cannot anticipate all the combinations and permutations of circumstance. What Cardozo called "the great generalities of the Constitution" are no more amenable to mechanistic application by liberals than they were by Mr. Justice Roberts in his famous squaring analogy.<sup>12</sup> Moreover, balancing would seem to be implicit in an adversary system which inevitably contemplates at least two sides to every case—the lopsided ones being weeded out in law offices and the lower courts. As T. R. Powell observed long ago, "It will ever remain a mystery to me how intelligent jurists can make . . . professions of nonparticipation in the judicial process."<sup>13</sup> Surely the choice is

8. Chafee, Book Review, 62 HARV. L. REV. 891 (1949).

9. FRANTZ, *supra* note 1, 51 CALIF. L. REV. at 738.

10. HAND, THE SPIRIT OF LIBERTY 15-16 (2d ed. Dilliard 1953).

11. *Id.* at 15.

12. See *United States v. Butler*, 297 U.S. 1 (1936).

13. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 28 (1956).

simply this: shall the balancing be done "intuitively" or rationally; covertly or out in the open? Of course, it should always be done in the light of accepted legal principles<sup>14</sup>—and obviously the light of Meiklejohn is quite different from that of Blackstone.

*Di Santo v. Pennsylvania*<sup>15</sup> is a classic example of covert, and probably "intuitive," balancing. There the old Court held invalid a state regulation of commerce as a "direct burden"—and that is virtually all there was in the opinion. No observer could tell what interests were weighed against what. Ostensibly the Court merely applied a well-known rule of law. But who outside the Court could know, and thus appraise, the decisive considerations that marked the burden in question as "direct" rather than "indirect"? Mr. Justice Stone, joined by Holmes and Brandeis, observed in dissent:

In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me to be too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.<sup>16</sup>

What a world of difference between the Court's approach in *Di Santo*, and its approach in *Southern Pacific Co. v. Arizona*<sup>17</sup> There Stone gave the positive side of his earlier dissent, revealing in detail factors considered on each side of the judicial scale. Appraisal of the process could then proceed rationally. Perhaps even more important, the open balancing operation itself tends to focus the attention of all concerned on actualities and away from the never-never land of private, and perhaps unconscious, preconceptions.<sup>18</sup>

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14. How much weight should be given to congressional judgment is another matter. Apparently modern, overt balancers find that the step from a general and ancient constitutional precept to the problems of modern life is largely legislative. Hence, presumably, their special deference (via the reasonable man approach) for legislative policy. Learned Hand put it briefly: "If a court be really candid, it can only say: 'We find that this measure will have this result; it will injure this group in such and such ways, and benefit that group in these other ways. We declare it invalid, because after every conceivable allowance for differences of outlook, we cannot see how a fair person can honestly believe that the benefits balance the losses.'" HAND, *THE SPIRIT OF LIBERTY* 179 (2d ed. Dilliard 1953).

15. 273 U.S. 34 (1927).

16. *Id.* at 44.

17. 325 U.S. 761 (1945).

18. It is noteworthy that Mr. Justice Black, who in first amendment cases believes in absolutes and repudiates balancing (see *Komigsberg v. California*, 366 U.S. 36, 65-76 (1962); Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962)), dissented in *Southern Pacific*. There too he repudiated the Court's balancing technique, and thought the case should have been decided by an absolute rule which the Court had never accepted as law.

It seems a fair guess that if in *Di Santo* the Court had felt compelled to reveal the ingredients of its decision, there would have been less Herbert Spencer in the scales, and more of the real-life considerations mentioned in the Brandeis dissent. In short, the Court might have been compelled either to reach a different result, or reveal for all to see a vulnerable exercise in the accommodation of law and life.

Mr. Frantz does not like the balancing that occurred in *Barenblatt*.<sup>19</sup> The Court could easily have reached the same result via the *Di Santo* route. But in balancing openly, it gave Mr. Frantz an opportunity for *reasoned* criticism of the proffered weighing process. The *Di Santo* technique hides the inevitable balancing behind a verbal, and often Platonic, barrier. Strictly followed, it means a Mr. Frantz must argue that the burden on commerce "taint," while the Court holds "tis," direct (whatever that means). Our debt to Holmes, Brandeis, and Stone is that they cut through the net of formality, and encouraged us to "think things, not words." This, I believe, is the crux of the open balancing approach. It is not foolproof and certainly will not make a great judge of a little man. But it offers hope of progress for inquiring minds. What Walter Lippmann said in another context is relevant here: "When men act on the principle of intelligence, they go out to find the facts. . . . When they ignore it, they go inside themselves and find only what is there. They elaborate their prejudice instead of increasing their knowledge."

Dean Griswold has suggested that the balancing approach is misnamed, that it might better be called the "comprehensive" or "integral" approach.

Instead of focusing on a few words, and ignoring all else, including the effect and meaning of those words, as distinguished from their apparent impact when isolated from everything else . . . the comprehensive or integral approach accepts the task of the judge as one which involves the effect of all the provisions of the Constitution, not merely in a narrow literal sense, but in a living, organic sense, including the elaborate and complex governmental structure which the Constitution, through its words, has erected.<sup>20</sup>

In any event, the essence of balancing is realism—a repudiation of the modern activists' rhetorical, or magic phrase, technique. The latter characteristically begins with an honored phrase or doctrine—the clear and present danger rule, for example; knocks the brains out of it, by stretching it so broadly as to deprive it of any ascertainable meaning;<sup>21</sup> and then uses it in talismanic fashion to "resolve" all manner of difficul-

19. *Barenblatt v. United States*, 360 U.S. 109 (1959); Frantz, *supra* note 1, 51 CALIF. L. REV. at 746.

20. Griswold, *Absolute Is in the Dark*, 8 UTAH L. REV. 167, 172 (1963).

21. See Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 317 (1952).

ties—from non-utterance by moppets in their classrooms,<sup>22</sup> to trial by newspaper,<sup>23</sup> to a struggle between lunatic fringe hate groups for what Hitler called “the conquest of the streets.”<sup>24</sup> Paul Freund gave the epitaph for this cycle of activist word-play when he wrote

No matter how rapidly we utter the phrase “clear and present danger,” or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedom which the judge must disentangle.<sup>25</sup>

Or, as Mr. Justice Jackson observed in the *Terminiello* case (after his conversion at Nuremberg), the activists reverse

this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of *Terminiello*'s speech and judging it as if he had spoken to persons as dispassionate as empty benches, or like a modern Demosthenes practicing his Philippics on a lonely seashore.<sup>26</sup>

Cut loose from its foundation in the distinction between discussion and incitement, the clear and present danger test lost its rational meaning and became a cloak for “vague but fervent transcendentalism.”<sup>27</sup> In short, the activists destroyed it as an intelligible guide to decision—and then abandoned it about a dozen years ago.<sup>28</sup> Meanwhile they have tried, and apparently discarded, one “new” verbalism after another. The latest is Mr. Justice Black's absolutist concentration on two untroubled words in the first amendment: “no law.”<sup>29</sup> This gambit—“no law means no law”—again begs all the difficulties simply by ignoring them. As Dean Griswold has suggested, it reminds one of the fundamentalist church sign which proclaimed, “God said it. We believe it. That's all there is to it.”<sup>30</sup>

#### CONCLUSION

The need for judicial balancing, I suggest, results from the imperfection of mundane law. In a better world, no doubt, clear and precise legal rules would anticipate all possible contingencies. No wonder,

22. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

23. *Bridges v. California*, 314 U.S. 252 (1941).

24. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

25. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949).

26. 337 U.S. at 13.

27. Mendelson, *supra* note 21, at 322.

28. Mendelson, *Clear and Present Danger—Another Decade*, 39 TEXAS L. REV. 449 (1961).

29. Cahn, *supra* note 18.

30. Criswold, *supra* note 20, at 172.

then, that idealists are impatient with the balancing process. Mr. Frantz' solution has a familiar ring. He suggests that law precedes, and apparently even transcends, politics.<sup>31</sup> Here is our old friend "the brooding omnipresence"—"the higher law"—that Holmes and Brandeis among others fought so hard to kill. Surely *in a democracy* law is a creature of the political processes, constitutional and legislative. Judges, of course, cannot avoid legislating in some degree, but to repeat Holmes' much quoted phrase they must do so only interstitially—lest they rather than the people govern. For judges now to treat Meiklejohn's book as "higher law" seems at least as far from mere gap-filling as was their predecessors' treatment of Herbert Spencer.

If libertarians are convinced that the Court is wrong, and that Meiklejohn's views reflect the community consensus, surely a constitutional amendment would be a feasible and proper remedy. If there is no such consensus, how could we justify imposing a minority view upon the people? The old Court tried that in the 1930s and destroyed itself. Obviously most of the "nine old men" and their supporters were just as certain as libertarians are today that their values were "fundamental" and indeed indispensable to freedom—as well as inherent in "higher law." Holmes' answer was that "certitude is not the test of certainty."<sup>32</sup> Another response was the Brandeis brief with its invitation to open balancing as a substitute for word-play and Platonic abstraction in court opinions.

I end where I began, amused yet troubled by the continuing activist-idealist pretense that all answers to all problems are in (or above) the Constitution—and that the judicial process for extracting them is largely mechanical or automatic.

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31. Frantz, *supra* note 1, 51 CALIF. L. REV. at 754.

32. HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310, 311 (1920).



