

The First Amendment and Progress

William Smith

THE FIRST AMENDMENT has been explored at great length by legal, constitutional, and jurisprudential scholars. Despite the voluminous nature of the research, critical clarification of this constitutional clause has been hampered by a failure on the part of many commentators to penetrate to principle. Underlying the various legal positions on freedom of speech and the role of religion in public life are various ideas and sentiments with traceable lines of meaning which extend back over the centuries. This paper will attempt to transcend the practical, prudential and legal questions surrounding the First Amendment by extrapolating the general philosophies which motivate the various legal positions.

The two greatest theoretical influences upon interpretations of the First Amendment are found in the older tradition of British common law and constitutionalism and the newer currents of thought brought on by the Enlightenment. Both intellectual traditions could support the existence of a Bill of Rights. Both traditions could agree on some kind of separation of church and state as well as a "right" to freedom of speech and the press. This agreement over wording, however, was not an agreement in principle. The two traditions embodied fundamentally incompatible views on the nature of man and the purpose of government. Owing to the pressing necessities of political events, however, there was no conscious clash between these theories at the Founding. The struggles over a general theory for interpreting the First Amendment would be decided later.

The history of constitutional theory regarding the First

Amendment is marked by the intellectual competition between the Enlightenment view of man and that of an older tradition. In recent decades, the victory of Enlightenment theory has approached completeness. Without an understanding of this intellectual revolution, the theory behind current First Amendment decisions will continue to remain opaque both for those who favor and those who oppose the current state of American jurisprudence in this area.

The intellectual tradition with the greatest influence upon the Founders was that of English common law and constitutionalism. Most Americans understood their Revolution in

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the wider context of British history since the Magna Carta, which affirmed a popular right to check the sometimes arbitrary authority of the Crown. "The history of the present king," wrote Jefferson in the Declaration of Independence, "is a history of repeated injuries and usurpations." These injuries, such as taxing without consent or quartering troops, were some of the very same charges made against the Crown in England itself. In fact, the grandiose opening sentences of the Declaration sometimes overshadow its long list of practical grievances which any educated Englishman would have understood as part and parcel of the debates over British constitutionalism.

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If one looks for a theoretical justification for the First Amendment exclusively in the older tradition of British constitutionalism (and even this is a somewhat artificial exercise since elements of the Enlightenment had crept into the English tradition after the Glorious Revolution of 1688), a relatively clear picture emerges. Freedom of speech, for example, had a very precise meaning in 1776. English common law precedents and especially Blackstone's *Commentaries on the Laws of England* enjoyed widespread influence in colonial courts. In this tradition "freedom of speech" derived originally from the right of a legislator to immunity from sanction for words spoken during parliamentary session. This liberty gradually expanded to prohibit all prior censorship of political tracts. So by the time of the American Revolution freedom of speech was defined in English jurisprudence as an absence of previous governmental restraint upon publication, not a general immunity from criminal prosecution for political commentators.

The historian Leonard Levy has thoroughly demonstrated that even those who would be considered the most libertarian among influential early Americans, such as Jefferson, had accepted the common law principle that words and writings could enjoy criminal status.¹ There is simply no evidence to suggest any substantial support in 1789 for the present-day libertarian view that words, especially those uttered against the government, could not be criminal. Levy quotes from the famous essay "Of Freedom of Speech" by "Cato," whom many libertarians look to as their representative at the Founding. "I do agree," wrote Cato, "when the natural and genuine Meaning and Purpose of Words carry a criminal Intention, that the Writer ought not escape punishment."²

Debates over freedom of speech at the time never questioned the potential criminality of speech. Instead controversy generally revolved around the fine-tuning of common law precedents. Debate was stirred over such practical questions as which courts should try libel cases; whether the press could be taxed; what role the jury should play in attaching guilt; and, remarkably, whether the truth of the libelous words could be accepted as a defense.

I do not cite these precedents to lament over our recent straying from the original intention of our ancestors, nor am I trying to lend their authority to any modern legislative scheme designed to punish libel. Exposition of these older precedents is instead meant to demonstrate that such significant changes in jurisprudence regarding libel over the past two hundred years must have been motivated by an underlying shift in world view. For Blackstone's accepted common law definition of freedom of speech did not merely hang in the air but was linked at a deeper level with a certain view of man and political society which exerted

great influence upon the Western world.³ The shift in world view which changed the definition of freedom of speech also greatly influenced perceptions of the proper role of religion in public life.

The roots of British common law are of course varied and deep. It is not our purpose to distinguish this English tradition from that of the Continent or determine the extent to which Roman or natural law influenced common law. It will be sufficient for our purposes to assert that the mediæval culture in which English common law and constitutionalism grew had a view of man and political society heavily influenced by Hebrew law and Christian morals.

For this older tradition freedom of speech did not create a terribly vexing philosophical problem. Words could be criminal, in this view, because they could be immoral. And they could be immoral when they offended the order of nature and its representatives. Speech, it was believed, had existential content, meaning all words had implicit in them a certain view of the world and of existence. If the view of existence implicit in a particular speech offended what was understood as the proper order of the universe, the state, as one symbolic representative of that order, had an obligation to impose sanction.

Of course what was neat in theory was not always clear in practice where courts had to make determinations about the criminality of particular expressions of speech. Despite these practical complications, the common law affirmed the mediæval view that words had the potential to offend the very order of existence.

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Government, in this tradition, was not looked upon as a neutral institution whose function it was merely to keep the peace. "We have consecrated the state," wrote Edmund Burke, speaking for many of his fellow Westerners, "no man should approach its defects or corruptions but with due caution." The state was considered one of several institutions that reflected and represented the order of being. Criticisms and reforms could take place only within the boundaries of this view of existence. Burke continued:

Each contract of each particular state is but a clause, linking the lower and the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place.⁴

The common law reflected this sacred view of the state by punishing more severely libels against public persons, the very opposite of our current law.

This view of government and of law also implied a certain view of church and state. Government and its laws, although they had a separate jurisdiction from those of the church, nevertheless held a sacred charge. Deriving from mediæval philosophies of ontology and scholastic theories of natural law, this view stressed that government and law, while imperfect, were part of man's attempt to reflect the order of nature in his institutions. Richard Hooker, the Anglican divine who exerted great influence over English churchmen and statesmen, differed little from mediæval scholastics when he wrote:

wherein God hath disposed all lawes, ech as in nature, so in degree distinct from other. Wherefore that here we may briefly end, of lawe there can be no lesse acknowledged, then that her seate is the bosome of God, her voyce the harmony of the world, all thinges in heaven and earth doe her homage, the very least as feeling her care, and the greatest as not exempted from her power.⁵

Political society, therefore, was a lesser partner to the church in providing for the spiritual health of man through the administration of justice. Clearly the church and state had separate jurisdictions, but they were not "separated" institutions in the modern sense of the word. Church and state were not perceived as essentially unrelated institutions, the one catering to man's private spiritual health and the other addressing public, legal and non-spiritual questions. As Hooker continues:

A grosse errorr it is to think that regall power ought to serve for the good of the bodie and not of the soule, for mens temporall peace and not their eternall safetic; as if God had ordained Kings for no other ende and purpose but only to fatt up men like hogges and to see that they have their mash?⁶

This older view of existence had a corresponding view of the human person, who as a microcosm of society, participated in the ontological realms of matter, life, intellect and spirit. Man's cognitive faculties, intellect and spirit, constituted human beings as in the "image of God." Clarifying

these epistemological faculties is essential to our task for two reasons. First the moral and social value attributed to words themselves will be based upon one's views of the cognitive processes of which words are a result. Verbal expressions are always preceded by reasoning, imagining and volitional activities—one's view of freedom of speech and expression will be determined by one's view of these preceding activities. Secondly, all religious and political institutions are designed with a certain view of human nature in mind. The place one puts religion in public life will be determined directly by one's view of the spiritual aspects of man's nature.

In the older, classical Greek, Roman, Judæo-Christian tradition, human nature was of course understood to have possessed certain powers of intellect. Reasoning allowed men to perform logical tasks, to organize their activities to a rational end and to formulate common rules which allow for utilitarian progress. This rationalistic aspect of man's intellect did not however account for the divine element in human nature since animals, albeit at a lower level, could perform certain organizing tasks.

Man's cognitive faculties take on a divine mantle only when spiritual elements are introduced into them. The difference between men and animals is not found in man's ability to think efficiently about utilitarian tasks, but, as Aristotle says, "the real difference between man and other animals is that humans alone have perception of good and evil, just and unjust, etc."⁷ Reasoning in this older tradition was not simply a process of calculation but the interaction of the intellect with the spirit, allowing for moral judgment.

The intellect, it was always understood, could be swayed by the spirit. Richard Hooker wrote that man is always free "to smother the light of naturall understanding." Cold reason, Hooker continued, would never be enough to guide mankind since men will sometimes "not bend their wits to examine, whether things wherewith they have bene accustomed, be good or evill."⁸

A recent thinker, Claes G. Ryn, has tried to revive and rework this older understanding of human nature by recommending that man's higher potentialities in the realm of the spirit be characterized as a quality of will. Strongly influenced by the American philosopher Irving Babbitt, Ryn stresses that the workings of reason will take on moral content in relation to the quality of will which is directing it. To quote Babbitt:

I do not hesitate to affirm that what is specifically human in man and ultimately divine is a certain quality of will, a will that is felt in relation to his ordinary self as a will to refrain.⁹

For Babbitt, the rationalistic and logical side of the intellect is, in a sense, morally neutral. It is a tool that takes on a moral quality in relation to the moral substance of the

person directing it. The selections and judgments of men are profoundly influenced by their character, which in turn is the result of qualitative choices of will. Ryn writes:

Babbitt finds the ultimate criterion of reality in the universal ordering power of the higher will. To know the essence of life man must act to change his character. Without the sense of reality that comes with the exercise of the higher will no adequate perception of life is possible.¹⁰

It will not serve our purpose here to thoroughly analyze the interaction of these various cognitive faculties and potentialities in human nature. But it is essential to recognize that the older tradition by affirming the ability of man to participate in a certain divine spirit assumed that the health of each individual, and therefore of society as a whole, was more than just a problem of "thinking correctly." The realm of the spirit, which is man's ultimate guide, involves a whole host of epistemological problems which have been variously characterized as: God's grace, faith, heart, will, and imagination. As Pascal stated it, "the heart has its reason which reason knows nothing about."¹¹ Hooker wrote that "the light of reason" is not man's greatest guide because of the potentialities "in the vanitie of their minde, having their cogitations darkened, and being strangers from the life of God through ignorance which is in them because of the hardnes of their harts."¹²

This view of existence implied, therefore, that the spoken word was man's way of expressing not only the workings of the intellect but also of the spirit. Of course in areas which were considered peripheral to the human person such as formal logic, mathematics, and the natural sciences, words were less pregnant with spiritual meaning. However in areas such as religion and politics, it was assumed that all words were expressions of various spiritual conditions, ranging from health to disease. Judgments of the spirit were an inescapable part of the human condition.

If we return to the Founding of the United States, the widespread acceptance of the potential criminality of words was part of this older tradition, which viewed the content of all expressions as having the potential of being morally and spiritually corrupt. The state, it was assumed, had been given legal jurisdiction over certain areas of man's nature because man's nature demanded various institutions to help in the formation of moral judgments. (Of course many legal attempts to enforce libel prosecutions, such as those of the infamous Star Chamber in England, were crude attempts to crush political opposition. But we should not mistake these abuses in the system for its essence.)

The state, however, did not claim authority over all aspects of man's nature. There were areas which were considered "private matters" in which institutions such as the church, or even simply one's conscience, laid the claim of authority. But it was assumed that human nature formed

an organic whole in which each aspect had at least some bearing on public life. The health of the spirit, over which the church was the main guardian, was not a private affair in the sense that it carried no public consequences. The success which churches would have in cultivating the spirit would intimately affect the way men thought and acted in their public lives. The separation of church and state was a question of jurisdiction, not a severing of man's nature into essentially unrelated "private" and "public" realms.

The American Founding occurred at a critical historical juncture. The so-called Enlightenment or Age of Reason began to hold sway in educated circles after 1700. Beginning with such thinkers as Voltaire through the encyclopedists and culminating in the progressivists such as Condorcet, progress in political society was no longer defined in terms of the spirit. Instead progress became conditioned upon the ability of the human mind to "roam freely," especially in the areas of mathematics and the physical sciences. This movement, especially in its Continental tradition, sought to establish the "Cult of Reason."

"The Enlightenment was a revolt against the Christian view of man. While Christianity had considered the spirit as the highest authority since it represented man's participation in divine reality, the Enlightenment asserted that knowledge of the physical world constitutes what is 'real.' "

The Enlightenment was a revolt against the Christian view of man. While Christianity had considered the spirit as the highest authority, since it represented man's participation in divine reality, the Enlightenment asserted that knowledge of the physical world constitutes what is "real." Eric Voegelin has written that the principles of the Enlightenment "embody a denial of the cognitive value to spiritual experiences and seek to enthrone the Newtonian methods of science as the only valid method of arriving at truth."¹³

The Enlightenment view of human nature denied to man any point of contact with a spiritually transcendent order. The human faculty which should guide all human affairs was the rational intellect, which had shown so much promise in the natural sciences. Reason of the older tradition, which was subservient to the judgment of the spirit and the callings of conscience, had been replaced by the mechanistic "reason" of science. The deistic God of the Enlightenment had set the physical laws of the universe in motion, but then He had essentially abandoned man in the existential concerns of his daily life. As Eric Voegelin phrases the problem:

The spiritual process, that is the experiential reality which is designated by the symbol 'soul,' had ceased to exist. For Voltaire there exists no anima animi from which man reaches out in the intentio into

the transcendent, the human personality has lost its spiritual center with its phenomena of love, faith, hope, contrition, penitence, renovation and acquiescence. The only human faculty left is thought. . . ."¹⁴

The denial of the authority of the spirit and its replacement by the rationalistic intellect had enormous implications for a theory of freedom of speech. The criteria by which words should be judged shifted from their moral and spiritual content to their utility as objects of science. In effect words corresponded to scientific data. Some data, of course, were more valuable to progress than other data, but as in science the freedom to consider all data was the precondition to progress.

When this philosophy of science was applied to constitutional jurisprudence there could be almost no constitutional justification for the regulation of speech and expression. Even if it appeared that certain expressions were irrelevant, trivial or even immoral, there did not yet exist all the scientific tools by which we could make a definite choice between good and bad data; better to allow almost all speech than to risk eliminating what would be later found as an advancement. Society was transformed into a giant laboratory in which all men were free to consider all things, and, with all these minds working, there was bound to be progress.

At the time of the American Founding, however, the Enlightenment ideas concerning human nature had not yet trickled down to influence jurisprudence. An Enlightenment-inspired theory of the First Amendment would only be formulated later as these ideas gradually permeated the culture. The wholesale abandonment of any regulation of speech and expression and the eradication of any public affirmations of religious symbolisms would have aroused indignation in the early years of the Republic because the older tradition still operated, carrying with it a wholly different set of assumptions.

For this reason we see the appearance, in the America of that time, of such curious figures as Thomas Jefferson. Among the most well read of the early Americans, Jefferson was heavily influenced by the movement of ideas embodied in the Enlightenment. In his theoretical writings he could become the inspiration for a full-blown libertarian theory of the First Amendment. However, in his practical pursuits, Jefferson could arouse the indignation of libertarian historians such as Leonard Levy for in large measure acquiescing to the theory of the older common law definitions of freedom of speech by pursuing prosecutions for verbal crimes.

Enlightenment-Jeffersonian "theory" eventually worked itself out in practice. When these sentiments did take hold in legal circles, they became the most coherent justification for an almost unlimited expansion of the right to freedom

of expression and an almost complete purging of religion from prominent areas of public life.

Religion had to be purged from public life because, with the enshrinement of "reason" as the guide of man, the experiences which inspired religious symbolisms were deemed unscientific. Jefferson's attitude is the perfect expression of the Enlightenment idea that religious symbolisms and Platonic philosophy are "irrational" because they cannot be understood in scientific categories. Religion was valuable not as a force in integrating the personality, but only as a visible device of social utility which compelled men to act in an orderly fashion. Christ himself was described not as, in traditional theology, the divine presence of the transcendent God, but as a wise moralist with some homespun, reasonable advice on how to make peace in society. Discovering what is "true" Christianity, wrote Jefferson, is a matter of "abstracting what is really His from the rubbish in which it is buried."¹⁵ Jesus, he continued, was merely a supplement to Epicurus in his concern for the "charities we owe to others." All of the older discussions of grace, faith, God's will and other theological expressions of spiritual experiences, were a preoccupation with phantasms. From his candid discussions of religion it is apparent that Jefferson's wide-ranging knowledge has blinded many to the breathtaking superficiality of his thought in areas of theology and philosophy.

With the abolition of any spiritual history of mankind, the tales of conversion found in the Bible and lives of the saints were replaced by the "factual" history of the Encyclopedia. Now that science had been unleashed and the cultivation of true "reason" had begun, it was claimed that mankind was entering a new historical epoch. The prejudices, obscurantisms and oppressions which are fostered by man's preoccupation with religion and spiritual concerns would all be worn away by the light of reason. Jefferson himself tried to sound the trumpet:

shake off all the fears and servile prejudices under which weak minds are servilely crouched. Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of god; because if there be one, he must more approve the homage of reason, than that of blindfolded fear.¹⁶

Jefferson has transformed his own intellect into the standard to judge the universe. If, using his "reason," he decides God does not exist, then the matter must be settled—and God wouldn't have it any other way. Of Plato, Jefferson said that he was "eloquent" but dealt "out mysticisms incomprehensible to the human mind."¹⁷ Of course if I cannot understand Plato, says Jefferson, then Plato must be nonsense.

Jefferson's attitude was typical of the continental Enlightenment in its treatment of religion and philosophy. Any attempts to articulate spiritual experiences, such as the

Platonic turning of the soul towards light or the Christian pull of grace, were ipso facto labeled as "rubbish" or "mysticisms." The human mind was to consider all things, except, of course, the spiritual history of mankind.

Jefferson's numerous public statements in support of religion, however, demonstrate that he recognized religion as a tool of social utility in which men could be kept orderly through the fear of God. But as with a marriage that is held together for purely utilitarian reasons, the believers in Enlightenment ideas who came after Jefferson and shared his contempt for the spiritual experiences in which religion is anchored eventually would withdraw support for religious institutions and attack their role in public life. Jefferson, who still had one foot in the old world, could not go where the logic of his thought should have taken him.

The denial of the authority of the spirit and its replacement by the rationalistic intellect had enormous implications when fully developed and gradually applied to the body of jurisprudence surrounding the First Amendment. First, regarding religion, any affirmations of the spirit such as prayer had to be eliminated as a precondition to progress in public life. Any such affirmations were bound to lead backwards to a "darker period" in history when men were at war over phantasms. The thoroughness with which religious symbolisms have been eliminated from American public life demonstrates the degree to which the legal community has accepted the progressivist philosophy of history and affirmed its major tenet—that expressions of religious experience have a disordering and reactionary effect on public life.

Little evidence exists that the Founding Fathers, as opposed to Jefferson, actually shared an Enlightenment view of man. While Madison and Hamilton clearly shared the belief that they were making new "scientific" discoveries about government, they never expressed the pretension that these constitutional insights implied a full-blown progressivist philosophy of history such as one finds in Condorcet. It is also true that the Federalists spoke little of a divine spirit in man and much of his passions and self-interest, but this tells us little more than that they were prudent about the necessities of political life. And because they were advocates of separating church and state or tolerating a multiplicity of sects, we cannot affirm that they viewed religion as antiquated and disordering. The failure to establish religion on a national level tells us only that they had successfully learned the lessons of the previous two centuries: the cultivation of the religious spirit in a multi-religious society is not accomplished by the forced imposition of one particular set of theological tenets.

Even if the Founders had been lucidly clear about the moral and philosophical foundations of the Constitution and the First Amendment, it is in a sense futile to argue

from their authority. The very nature of progressivist jurisprudence regarding the First Amendment relegates the Founders to an historically obsolete period, in which religion clouded the imagination and civil liberties were but a seed planted by “forward-looking” men. Jurists who share such a philosophy of history will not be persuaded by arguments about the intention of the Founders. We must return to first principles.

It may stir resentment among professional academics, but the events of this century have discredited the Enlightenment view of man and the progressivist philosophy of history. We now know, as was demonstrated during the Weimar years, that men do not necessarily become more rational when they are granted legal and constitutional safeguards to speak freely. Evidence also continues to mount that we cannot abolish theological problems of the spirit or abandon moral judgments because we have made gains in areas of science. For when religious symbolisms of the spirit are abolished, they tend to be replaced by ideological symbolisms that entail a vastly different set of moral priorities.

It is part of man’s nature to express the spiritual meaning of his existence through symbols which express his hope in salvation. When this is not done through hope in a “kingdom of God” or participation in the “Covenant at

to religion derives not from any perceived pragmatic threat, but from religion’s role as a competing spiritual symbolism.

The Enlightenment was not a totalitarian movement. It sought to destroy any symbolization of man’s transcendent spiritual nature, but unlike the later totalitarian movements it had not yet served up any replacement symbolisms. The progressive of the Voltairian or Jeffersonian type lived in the in-between state of attacking, satirizing and treating sarcastically the symbols of religion, but offering only clichés about reason and man’s new ability to “think” as the answer to man’s philosophical questions about his existence. Eric Voegelin’s description of this personality type describes well Jefferson’s theoretical support of the French Revolution and his later surprise at the “excesses” it produced:

He lives in the illusion that one can ruin the authority of a church or abolish it, and that things will be settled, he is greatly surprised and frightened when a new variant of the spirit raises its head, one that he likes even less than Christianity, and that clamors for institutionalization in place of the church of which he has just got rid. He cannot understand these problems, because as a man he has not substance enough to be sensitive to spiritual problems and to cope with them adequately.¹⁹

So while abolishing religious symbolisms from public life will not protect us from intolerance, neither will institutionalizing certain legal protections for free speech guarantee progress in human affairs. Progress through a competition of ideas is possible only when the discussants possess a certain temperament and spiritual balance which makes rational analysis possible. Intellectual honesty is a byproduct of a certain health of the spirit which does not gush up spontaneously from man’s nature. A speaker’s words cannot be artificially divorced from his existential substance. In other words, the quality of a discussion is not only linked to the intelligence of the participants but is inextricably linked to the quality of the character of the discussants. This does not mean that all men must swear by a particular set of religious dogmas in order to have a rational discussion. But it does mean that political speech and discussion is not strictly a legal or constitutional problem, but is bound up with certain mysteries—with problems of decay and renewal—that mark man’s relationship with the divine.

This is not to say, however, that there should exist no legal or constitutional distinction between words and actions, or that words which might be considered disorderly by the state should be subject to sanction. But it is to affirm that disorderly words are a symptom of a disorder and it is possible that the legal protections can be the vehicle by which disorderly words gain social acceptance, and later translate into disorderly actions on a large scale. To deny this is to deny the very potentialities inherent in human nature. As Eric Voegelin said of the Weimar Republic:

“The attraction of ideologies such as communism and national socialism cannot be explained by their virtues as intellectually sound theories of economics and politics. Instead their appeal derives from the spiritual meaning that the individual achieves through his membership in a mass movement.”

Mount Sinai,” the replacement symbolisms entail any one of the modern ideological mass movements promising inter-worldly salvation. As Eric Voegelin has noted:

The liberal attack was directed against dogmatism and the authority of revelation. If only these influences on thinking and public life could be removed, then the free human being would order society rationally with his autonomous reason. However, if in practice Christianity is successfully driven out of men, they become not rational liberals but ideologues. The undesirable spiritual order is replaced not by liberalism but rather by one or the other of the emotionally as intensive ideologies.¹⁸

The current attraction to communism and the past attraction to national socialism cannot be explained by their virtues as intellectually sound theories of economics and politics. Instead their appeal derives from the spiritual meaning which the individual achieves through his membership in a mass movement. The hostility of totalitarianism

If the majority of voters are communists and national socialists, they can form a majority bloc which makes the functioning of the constitution impossible.²⁰

My main point of inquiry has not been whether it is prudent or imprudent to restrict certain forms of speech or allow certain types of religious expression in the public arena. Nor has it been to probe the problem of the original intention of the Founding Fathers regarding the First Amendment. Some might infer, however, that by affirming some type of spiritually transcendent order, one has naturally laid the groundwork for regulating speech and propping up religion by state authorities holding back what they consider to be decadent. This inference is itself part and parcel of the Enlightenment view that those who are concerned with spiritual problems are closet authoritarians waiting to physically impose their static view of the world onto others.

My concern with the problems of the spirit is an attempt to explode the Enlightenment pretension, later attached to the First Amendment, that legal protections for freedom of speech and a strict separation of church and state are the guarantors of societal progress. The very purposes of the First Amendment—to reduce religious bigotry and intolerance, and to create an atmosphere of free inquiry—are not simply legal problems but involve philosophical problems and spiritual demands. And using the First Amendment as a club to exclude religious symbolisms from public life can create a favorable atmosphere for ideologies that are neither tolerant nor interested in free inquiry. John Stuart Mill said of certain trivial and immoral actions: “society can afford to bear . . . the inconvenience . . . for the sake of the greater good of human freedom.”²¹ Mill shared the Enlightenment faith that these “inconveniences” could not become so great that they might overwhelm the society and foreclose the freedom he, as a civilized man, cherished.

The Founding Fathers produced a “most wonderful” framework in which social and political progress might occur. The results of their work helped produce a free and orderly society. But the Constitution and in particular the First Amendment can only provide a tendency towards order and freedom. They are not insurance policies against the age-old enemies of civilization: cultural decadence, spiritual corruption, and personal rotteness.

The solutions to these spiritual problems would be simple if the state possessed a legislative formula for personal righteousness. Unfortunately the problems of the spirit are almost never solved through the coercion of the state, since moral substance within an individual is the result of the free acceptance of the authority of the divine spirit. This is something that was not always understood even in the mediæval tradition. The moral and spiritual decadence of certain ruling groups in society can be

reversed only if they themselves find the will to instigate such a reversal. When a significant strata of dominant cultural elites deem that revealing national security secrets or reserving judgment on graphic pornography are parts of a mysterious process that will insure societal progress, we realize that a spiritual disease is at work that will not be cured by the machinery of state. A restoration of moral substance will not be accomplished by those, even if they happen to be in a position in government, who themselves are contributing to moral breakdown.

As in the older tradition, the realm of the spirit is to some degree out of the jurisdiction of the state. While the state can influence moral habit, it cannot ensure the health of the spirit. Those in society who express the cultural condition of the spirit—artists, intellectuals, and the clergy—deal in areas in which the state has little competence. Whether they use their positions to accelerate decadence or affirm human dignity, whether they choose wisdom or foolishness, is a matter which they decide in freedom and which turns on their life in the spirit.

Notes

1. See Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985).
2. *Ibid.*, 110.
3. My characterizations of various intellectual systems should be understood as trends or general tendencies.
4. Edmund Burke, *Reflections on the Revolution in France* (New York: Penguin Books, 1969), 194-95.
5. Richard Hooker, *Of the Lawes of Ecclesiasticall Politie* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1977), 142.
6. *Ibid.*, 352.
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