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AFFIRMATIVE ACTION FOR IDEAS

*Charles A. Reich**

GUESTS AT Tom Emerson's home in North Haven have sometimes found themselves playing a game called "Murder in the Dark." One person, unknown to the others, would be given the role of Murderer. The living room lights would be turned off and everyone would stumble around until a scream was heard and a victim lay on the floor. The person with the role of Detective would then question everyone and all were required to tell the truth about their movements, except the Murderer, who was allowed to lie.

I have always been surprised at how frequently the Detective was able to point out the true culprit. Once more, truth and "Emersonian" reason had prevailed against untruth in the marketplace of ideas. Tom would bring to these festivities his usual calm and optimistic faith that reason was the best way to solve all problems. He was every bit the first amendment scholar—except when *he* was the murderer.

Tom's first amendment scholarship stretches over forty years. He has never been satisfied with mere abstract theory, but has always taken a tough look at social reality. Tom's exceptional sense of social reality is no doubt derived from his experience in public administration. He occupied a series of important positions in government which gave him a first-hand view of bureaucracy and the struggle for power within government ranks. When he joined the Yale faculty, he was under no illusion that government, or other powerful institutions, would always be motivated by the public interest.

Beginning with his 1948 article *Loyalty Among Government Employees*¹ Tom described with unwavering clarity the nature and the strength of the forces opposed to free speech—the forces of repression. He showed how people who work for government or other

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1. Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948).

large institutions can be tested and searched to ensure that they unquestioningly accept the dominant ideas of their employer and reject any countervailing ideas.² Despite Tom's warnings,³ the ideological screening of public, and often private employees, has become so deeply institutionalized that even liberals have ceased to protest. For example, FBI "background checks" are routinely accepted as preconditions to federal appointment.⁴

In his books, Tom has been a leader in stressing the importance of institutional settings in the contemporary struggle for freedom of expression.⁵ He has called attention to such issues as: denial of benefits,⁶ positions⁷ and professional and occupational licenses to persons because of their views;⁸ the role of the armed forces⁹ and the FBI in the subversion of free expression;¹⁰ the misuse of the investigative power of Congress;¹¹ the tendency of state legislatures to regulate expression;¹² and the danger of ideological decision-making concerning academic tenure and students' rights.¹³ We must, he has demonstrated, look at academic freedom, the military, the FBI, termination of employment and congressional investigations as areas of indirect pressure on people to conform. We must look across an entire spectrum of public activity in order to see all the ways in which expression is threatened.

Tom has also stressed the "dynamics of limitation"¹⁴—the strong forces constantly pressing to shut down the free exchange of ideas. He recognizes that free speech is not an easy or natural concept for people to accept when the speech involves ideas that they

2. See generally *id.* (for a comprehensive discussion of the tension between the evolution of modern government and the maintenance of individual freedoms).

3. *Id.* at 143 ("If we succumb to the fears and passions of those who shun the new ideas and seek to postpone inevitable change by repressive measures, we shall deal a crippling blow to all democratic institutions and values.").

4. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 219 (1970) [hereinafter *THE SYSTEM OF FREEDOM OF EXPRESSION*].

5. See, e.g., T. EMERSON, N. DORSEN & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (N. Dorsen, P. Bender & B. Neuborne 4th ed. 1976); *THE SYSTEM OF FREEDOM OF EXPRESSION*, *supra* note 4; T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1957) [hereinafter *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT*].

6. See *THE SYSTEM OF FREEDOM OF EXPRESSION*, *supra* note 4, at 161-76.

7. *Id.*

8. *Id.* at 176-91.

9. *Id.* at 55-95.

10. *Id.* at 219, 572-73.

11. *Id.* at 247-84.

12. *Id.* at 97-160.

13. *Id.* at 593-626.

14. *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT*, *supra* note 5, at 16.

consider dangerous.¹⁵ As Justice Holmes said, repression of the ideas you fear is the far more natural response.¹⁶ Realism about the fact that free expression is a fight that we may lose—this has been one of Tom's lasting contributions.

In 1988, we may indeed be losing the battle for freedom of expression. It has become possible to nullify the first amendment by systematically discriminating against certain ideas so as to exclude them from the decision-making process. Vitaly important ideas, ideas that contain the explanations and answers to our most dire social problems, can be effectively denied access to the marketplace. A few powerful voices, which endlessly repeat a highly ideological picture of reality, can gain a degree of market domination enabling them to shut out their competitors, silencing them instead of having to debate them. One appropriate way to honor Tom Emerson is to take note of this growing danger of discrimination against ideas.

Even if *individual* freedom of expression is well protected, an individually expressed idea must compete with a mass-marketed idea for the very limited attention of the public. Funded with the money necessary to sustain a long-term campaign, the mass-marketed idea has every advantage of gaining and holding attention that the latest advances in technology and communications can provide. Regardless of the relative merits, the mass-marketed idea has the strongest chance of achieving a dominant position and shutting out its competitors.

While one branch of first amendment doctrine allots traditional protection to the speech of individuals, another branch of first amendment doctrine has given vast, new powers to the speech of corporations.¹⁷ Corporations can use the money of shareholders or customers to disseminate a mass-produced idea, and can promote an idea through newspaper or television advertising or through gifts to academic institutions for support of research and scholarship. Although corporations have many shields against the full moral responsibilities that individuals must bear, they enjoy virtually the same first amendment privileges as individuals.

15. *See id.* at 17.

16. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems . . . perfectly logical.").

17. *See, e.g., Federal Election Comm'n v. Massachusetts Citizens for Life*, 107 S. Ct. 616 (1986) (corporation organized exclusively for ideological purposes need not obey federal law which requires that corporations spend money on elections exclusively through independent political action committees); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (privately owned utility is not required to include in its billing envelopes the speech of a third party with which the utility disagrees).

Corporations that own mass communication enterprises such as newspapers, television stations and national magazines can use these outlets to promote their own ideas or ideas they favor.¹⁸ At the same time, such enterprises may deny access, or even an opportunity of reply, to competing ideas.¹⁹ They can charge high fees to let others use their facilities and refuse access to those who cannot pay.²⁰ Furthermore, there is no limit to how often an idea can be repeated, or to the budget that can be spent in support of an idea.

Public and private employers have a great deal of power over the ideas that their employees are allowed to express. Employers may indoctrinate their employees by using institutional loyalty as a criterion for hiring, promotion, and dismissal²¹ or by invading employees' beliefs with drug testing.²² The Supreme Court, in cases involving free expression claims by high school students²³ and public employees,²⁴ has fashioned doctrines that give the individual within an organization or institution substantially less freedom than the unattached individual. These doctrines force a great majority of individuals, who must have some organizational position in order to survive, into giving precedence to the institution's ideas. The one-sidedness of first amendment rights within an institution or organization, as exemplified by judicial approval of a high school's determination to indoctrinate or "inculcate" students,²⁵ demonstrates the fervor with which organizational expression has been exalted over individual expression.

18. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249 (1984) ("[N]ational news organizations provide syndicated 'interpretive reporting' . . . which can serve as part of the new school of 'advocacy journalism.'").

19. See, e.g., *id.* at 250.

20. See, e.g., *id.* at 247-54.

21. Compare *Connick v. Myers*, 461 U.S. 138 (1983) (holding that petitioner's dismissal for distribution of an inter-office questionnaire did not offend the first amendment) with *Rankin v. McPherson*, 107 S. Ct. 2891 (1987) (balancing public employee's interest in commenting on public issues against the state's interest in running an efficient public service, the Court held that firing of plaintiff from county constable's office for remarks made to a third party, overheard by a fellow employee, violated plaintiff's first amendment rights).

22. Compare *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 178 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3582 (U.S. Mar. 1, 1988) (No. 86-1879) (drug testing of Customs Service employees who sought promotion was reasonable) with *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 592 (N.D. Ohio 1987) ("reasonable individualized suspicion" is required before forcing police academy cadets to submit to drug testing).

23. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 571 (1988) (holding that "[public high school] educators do not offend the First Amendment by exercising editorial control over style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

24. See, e.g., *Myers*, 461 U.S. at 138. *But see, e.g., McPherson*, 107 S. Ct. at 2891.

25. See, e.g., *Hazelwood*, 108 S. Ct. at 562.

Corporate power to dominate speech exists at a time when the country is deeply divided along lines of wealth and power. A small minority holds a vastly disproportionate amount of wealth and power, while a large majority, including an impoverished, powerless underclass and a hard-pressed middle class, finds its security eroding with the loss of economic ground. There is an overwhelming temptation for the ruling minority to use the power of market domination for the self-interested purpose of rationalizing existing unequal arrangements while denying access to ideas that urge reform. For example, the corporate-promoted idea that the loss of many jobs may be necessary to promote a healthy economy is heard more often than the idea that one's job deserves protection as a property right or as a human right.

The power to dominate ideas is the power to prevail in a struggle between competing views of social reality. In a complex society, social reality is not directly verifiable by the individual. Rather, a picture of social reality must be developed based on secondary information. This makes social reality subject to manipulation and misrepresentation. Must we support troops stationed around the world instead of giving priority to domestic needs? The answer depends upon an overall view of social reality. In 1988, it is very possible and quite tempting for the corporate ruling elite to maintain its power through the perpetuation of a dominant world view and the exclusion of differing ideas. Success in doing so would effectively nullify the first amendment.

Examples of great issues not adequately debated are easy to find. One massive democratic failure is our inability to debate America's forty-year obsession with communism and the concurrent rivalry with the Soviet Union. With armed forces stretched around the world, we are waging a war that may be entirely unnecessary. There may be a way for America to see its global position differently and thus free our energies for urgent domestic needs. But there is no freedom of debate. From first hand experience as a dedicated consumer of television news I can testify that revisionist views do not get a fair hearing. Even a respected program like the "Mac-Neil/Lehrer Newshour" holds debates only between various establishment figures who all accept a similar belief in the value of military force. The 1988 Democratic and Republican candidates for President of the United States are, from my perspective, all members of the "party of war," differing only in tactics and degree. In this crucial area of American life the first amendment has been a near-total failure.

An equally important issue concerns the commitment of our entire leadership to "growth" as a solution to problems rather than a cause of problems. There is a fundamental question whether what we call "growth" is not in fact impoverishment.²⁶ We may, in reality, be engaged in self-destruction by forcing out the last drop of profit to maintain the impression that we are growing. In order to support the extreme waste of resources by a privileged few, we may be destroying our environment beyond repair, mortgaging our future and condemning millions to unemployment and poverty. There should be a national debate as to what constitutes "growth." But, here again, democracy has failed. The people, who must make a decision, do not understand the question.

A third crucial national issue is whether social pathology is best addressed by repression. An industrial society like ours produces, in addition to the things people want, many forms of social illness, such as crime, unwanted pregnancy, family breakups, drug addiction and alcoholism. Every person in public life seems to insist that repression is the only way to heal these problems. But repression fails to deal with the source of social problems. There is an urgent need to debate whether to cure the causes instead of punishing the symptoms, but I have not seen a single person on television who has argued the case *against* the use of repression.

We are told on both sides of the political spectrum that national and state budgets must be balanced and that there is no money available for many social needs. We are not told that this condition is a choice rather than a fact. The money is there, but is being used for something else. Perhaps that "something else" deserves a higher priority than social justice, but where are the spokesmen and women who can argue this question before the American people so that the latter can decide? Day after day the media allows only one side of this essential national debate to be heard.

The first amendment is just a few words while the forces against it are great organizations which have money, power, employees—even weapons and armies. If the first amendment has been institutionally protected at all, it is only through civil liberties organizations, a small civil liberties bar, a selective few in our society who are devoted to first amendment principles and, when they choose to

26. See generally S. BOWLES, D. GORDON & T. WEISSKOPF, *BEYOND THE WASTE LAND* (1983); E. MISHAN, *THE ECONOMIC GROWTH DEBATE* (1977); A. WOLFE, *AMERICA'S IMPASSE: THE RISE AND FALL OF THE POLITICS OF GROWTH* (1981) (critical analyses of the traditional economic assumption that an increase in production necessarily entails an increase in social welfare).

act as guardians, the courts. Tom Emerson's realistic approach and his emphasis on system suggest that there must be greater practical support for first amendment values.²⁷ Perhaps there should be more institutional first amendment guardians, more public funds appropriated for education in free speech values, more professorships that specialize in civil liberties, and increased support for related scholarship. We must create a *system* of freedom or suffer an erosion of democracy.

In the case of minorities, we have found it essential to take affirmative steps to ensure equal rights under the law.²⁸ However, the distribution of power remains so lopsided that racial minorities, the poor, children, women and the aged have no power to be heard adequately, and are therefore still subject to unequal treatment. Repression of minority ideas results in repression of the minorities themselves. If minorities need special care in order to survive, so too do their ideas which have been drowned out, discouraged, or given no support. We forget how extraordinarily expensive it has become to communicate an idea. Only the mighty can afford to do it. A democracy cannot survive such imbalance. The forms which aid to neglected ideas can take may be debated, but the need for such help should be accepted.

I believe television, radio, urban newspapers and national magazines have achieved a position of so much power over the ideas that are heard, or not heard, that they should be required to air all the important ideas of the day. I offer as illustrative of an idea in need of better discussion a relatively narrow, but vitally important, question of criminal procedure: may a defendant's assets be seized or frozen before trial so that he or she lacks the funds necessary to employ defense counsel? This scenario is the drastic consequence of federal forfeiture laws,²⁹ aimed at drug traffickers and racketeers,

27. See THE SYSTEM OF FREEDOM OF EXPRESSION, *supra* note 4, at 3-20; see also Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 848 (1981) ("Grave distortions in the system cannot be eased or eliminated without measures that go beyond the traditional safeguards . . .").

28. See, e.g., *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1457 (1987) (employer properly considered employee's sex as a factor in promoting female employee over a male employee under voluntary affirmative action plan); *United States v. Paradise*, 107 S. Ct. 1053 (1987) (50% of Alabama state trooper promotions reserved for blacks permissible under the equal protection clause); *United Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979) (voluntary affirmative action plan upheld in which employer reserved 50% of all openings in an in-plant training program for black employees until the percentage of blacks with training approximated the percentage of blacks in the total work force).

29. 21 U.S.C. § 853(a), (e) (1986) (the United States shall forfeit property used in, or

which were recently upheld by the Second Circuit.³⁰ To deprive a defendant of his or her choice of counsel by seizing assets, before there has been any finding of guilt, may be consistent with a war on crime, but it also wages war on the constitutional guarantee of a fair trial.

Perhaps we do want to sacrifice fairness in our zeal to convict those who threaten social values. Yet has the issue been submitted to the American people? Do people understand that a precedent has been set enabling the government to disable an accused person from making a defense? I believe the public has heard only one side of this story. Repeated voices, given full access to the media and carrying the full weight of authority, have told people that we must use every means to fight against drug trafficking. But the media refuse to convey the information that this fight concurrently destroys the pillars of our justice system.

I have said that there is a need for affirmative action where important ideas, such as the one above, cannot be heard. Accordingly, I believe it would be perfectly reasonable to demand affirmative action in the form of coverage of the threat that repression poses to the Bill of Rights:

- Ten discussions on "Nightline";
- Ten special segments on the evening news;
- Ten debates on the "McNeil/Lehrer Newshour";
- Ten full-page newspaper advertisements prepared by the Advertising Council;
- Police roadblocks where the officer shines a light in the driver's face and says: "Do you know that your civil liberties are in danger?";
- Ten cover stories in *Time* and *Newsweek*; and
- Appearances by ten prominent athletes throughout the country who warn impressionable audiences that we are losing our freedom.
- Ten episodes of dramas and sitcoms in which the dangers to civil liberties are pointed out to appealing heroines and heroes;
- Maybe corporations should add a constitutional rights testing program for employees. They would be subject to random constitutional rights tests. Failure would result in the employee's being asked to participate in a constitutional rights rehabilitation program for three to six months. A second failure might result in dismissal. Private as well as public employees could be given

derived from, violation of Title 21 or Title III of the Comprehensive Drug, Abuse, Prevention and Control Act of 1970, which is punishable by imprisonment of more than one year).

30. See *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987) (freezing a defendant's funds under 21 U.S.C. § 853(e), thus restricting defendant's ability to hire the counsel of his choice, does not violate the sixth amendment).

such tests. A workplace free of constitutional ignorance would be the goal decreed by the President and corporate executives.

Tom Emerson has always viewed law as a means, not an end.³¹ The performance of law, in his view, should be measured by its social consequences.³² If actual freedom of speech in America has been so discouraged or drowned out that democracy is not working, then the first amendment is failing to perform its function and justice is not being served. If there is no national debate on militarism, growth, or repression, then we should not be satisfied to leave first amendment protections where they are. Indeed, we must do whatever it takes to promote a debate in the crucial areas where future choices lie. Tom Emerson's work shows that the very life of democracy depends not on first amendment theory alone, but on an *effective system* to protect free expression.

31. See, e.g., TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT, *supra* note 5, at 16.

32. See *id.*