

reason because in their hearts they believed that no measures ought to be taken against the Communists at all. And the anti-McCarthyites knew that the McCarthyites, for all their willing talk of clear and present danger, had good reason for carrying the persecution of the Communists further, at every opportunity, than the clear and present danger doctrine called for; they believed in persecuting the Communists not because they were dangerous but because, from the standpoint of the consensus, their doctrines were wrong and immoral. Each group understood the other perfectly, and each was quite right in venting upon the other the fury reserved for heretics because each was, in the eyes of the other, *heretical*.

It is I repeat unfortunate for us all that the issue, once joined, did not stay joined, and that the question became so confused that each of the two groups emerged from the McCarthy period under the impression that it had won—the McCarthyites because they got the persecution of the Communists that their understanding of the American consensus demanded, the anti-McCarthyites because the persecution went forward with the incantations appropriate to the clear and present danger doctrine. Why unfortunate? Because until that issue is decided we no more understand ourselves as a nation than a schizophrenic understands himself as a person—so that, again in Murray's words, the American giant is likely to go lumbering about the world in ignorance even of who and what he is. And because—dare I say it?—next time around, people are going to get a whole lot madder.

## Chapter 4

### Freedom of Speech in America

I am often asked whether I am "for" or "against" freedom of speech, or what I understand to be the Conservative position on freedom of speech, or whether in my view freedom of speech is "defensible," and should be defended, "on principle." They are not "happy" questions, because I doubt whether the freedom of speech "issue," as Mill for example stated it in the *Essay*, is a genuine, non-spurious, issue. Rather, it seems to me that most arguments about freedom of speech are really arguments about some prior question, which once resolved to the satisfaction of the disputants would be the end of the matter. But if I must answer the foregoing queries, my answer would have to take the following shape:

Temperamentally, like most Conservatives, I happen to be a man who in any given situation would always favor letting everybody have his "say"—temperamentally, I repeat, which is to say, *not* on principle but partly out of a selfish wish to satisfy my curiosity about what there is *to* say on whatever question happens to be up. This is partly because of some terrible anarchic thing 'way down inside me that always puts me, instinctively, on the side of the pillow-throwers and against the umpire, on the side of the freedom-riders (even though I disagree with them) against the Mississippi sheriff, on the side of George Washington against George III—and therefore on the side of the let-'em-speak contingent against the censors and silencers. In that sense, I am "for" freedom of speech.

Again, where what is in question is freedom of speech in a

certain kind of community, where people have in some sense contracted with one another to conduct their affairs on a freedom-of-speech basis or to treat each other as equals, I am "for" freedom of speech—in the United States or England, for instance. In such a community, I recognize, *other things being equal* (recognize not just "temperamentally" but, to some extent as a matter of principle), a *presumption* in favor of the let-'em-speak contingent and against the shut-'em-up contingent. But only in that kind of community. As regards communities-in-general, situations-in-general, there is and can be no such presumption; and there are other kinds of communities, the present-day Dominican Republic, for instance, or contemporary Spain, where the presumption for me would be very distinctly against the conduct of affairs on a freedom-of-speech basis.

I strongly feel, in other words, that the classic attempt to defend freedom of speech as a *compelling* principle applicable to all communities, that is, Mill's famous *Essay on Liberty*, is bad political theory (see p. 107, *et seq.*), and has done great harm—so that the less heard of any general principle of freedom of speech the better. In addition, the fact that most American intellectuals are under the contrary impression, and think that Mill settled *that* argument once and for all (so that even if they do not know Mill at first hand they yet feel sure that the day they need conclusive arguments for freedom of speech they will have only to go to Mill and look them up) is merely a sad commentary on most American intellectuals. In short, there is no reason, in theory, for saying that freedom of speech is a principle that should be defended; or, perhaps I should say that if it is a principle that should be defended, someone should get busy and find a better defense for it than Mill was able to find.

Now, I have already said that in a certain kind of community, where people have in some sense contracted with one another to conduct their affairs by freedom-of-speech procedures, I should hold, to some extent on principle, that there is a presumption, other things being equal, in favor of freedom of speech. And I have said that for me the United States is such a community. But you will notice that I have stashed into my aircraft a great many

verbal parachutes that would enable me, if and when that seemed advisable, to bail out. I stress, a "certain kind" of community, people having "in some sense" contracted to practice free speech, a "presumption" only in favor of free speech. Let me clarify all that:

The sense in which the American people have contracted together to conduct their affairs by freedom of speech procedures is this, and only this: The First Amendment to our Constitution says that Congress shall make no law impairing freedom of speech, and I do think it can be argued that that Amendment in some sense constitutes a contract among Americans to conduct their affairs according to freedom of speech procedures. *But:*

A. The First Amendment, along with the rest of the so-called Bill of Rights, was not written by the Philadelphia Convention but rather, as sort of an afterthought—like painting the front stoop after the house is built—by the First Session of the Congress, then ratified by the amendment process specified in the Philadelphia Constitution. Now, that does not make the First Amendment any the less part of the law of our Constitution, or any the less, for me at least, a contract amongst Americans. But it does perhaps create as many difficulties about freedom of speech as it solves, and for this reason. The Philadelphia Constitution was not intended to have a Bill of Rights; the most brilliant statement we have against a Bill of Rights is Alexander Hamilton's statement about freedom of the press in the *Federalist Papers*, where he argues in effect, What good will it do to write it into the Constitution? If Congress sees fit to violate freedom of the press it will certainly go ahead and do so; the Bill of Rights in fact changes the whole character of our constitutional system; and the authors of the Bill of Rights were, for my money, extremely careless about tidying up after painting the front stoop. Concretely, while the First Amendment forbids Congress to impair freedom of speech, the body of the Constitution seems to empower Congress to do certain things that it may feel it cannot do without impairing freedom of speech—especially if, like me and unlike the Supreme Court, you regard the Preamble to the Constitution as the essence of the contract among

the American people. For the Preamble announces an intention on the part of that people to do quite a number of sweeping things—e.g., to secure the ends of justice, to promote the general welfare—and the First Amendment invites the question, Ah! What if Congress be strongly convinced that enactment *x* is needed in the interest of justice, or for the general welfare, and yet that same enactment *x* impairs freedom of speech? There is no simple answer, except to say that under our Constitution one can always argue, and argue legitimately, that this may seem to some people an impairment of freedom of speech, but it is necessary in order to accomplish the very purposes of the Constitution, and *therefore* we are going right ahead and do it because the Constitution authorizes us to. Most particularly it is not a simple answer to say, Let the Supreme Court decide. By the time it gets around to deciding, free speech will already have been impaired, and Congress, as Hamilton foresaw, will have had its way.

B. In any case, the First Amendment does not, properly speaking, require what I have called freedom of speech procedures in the United States. Still less, for all that we speak of a Bill of Rights, does it confer on anybody a "right" to freedom of speech. At most, it confers a right not to have your freedom of speech impaired by the Congress—that is, by the Federal Government. In its original form, the amendment did not even confer on anybody a right not to have his freedom of speech impaired by his state and county and municipal governments (*ut infra*). And it certainly did not confer upon anybody a right not to have his freedom of speech impaired by a whole series of non-governmental authorities—by, most especially, the persons most likely to impair it, who are one's neighbors.

C. The state of affairs I have just described, where the First Amendment leaves our state and local governments at liberty to impair freedom of speech, has been greatly complicated by a line of Supreme Court decisions which "read" the so-called Bill of Rights "into" the Fourteenth Amendment. These decisions, that is to say, seek to apply the limitations on the Federal Government involved in the first eight amendments to the states and localities, and they are so applied by the Supreme Court today. Now,

I have, I confess, never been much impressed by the constitutional logic by which that particular bit of juggling was accomplished, but that is not the main point I want to make about it. My main point is simply this: By the time we have moved away from the solid structure of the Constitution through the jerry-built lean-to of the Bill of Rights to the remote tool-shed of a mere Supreme Court decision, we may have left far behind us the kind of freedom of speech that the American people may be said to have contracted with one another not to impair. I would still be willing to say that the presumption under the Constitution is, for me, against impairment, even when the latter is by a state legislature or a city council. But the presumption now begins to wear a little thin; and I no longer feel so sure of myself, when I defend it, that I can do so on principle. That is why I speak of defending the presumption "to some extent" on principle.

D. In any case there is always one further difficulty, which I personally find rather more amusing than the all-out defenders of freedom of speech seem to find it. The place to go to learn about it, the *locus classicus*, is a very favorite book of mine that I like to call *Sam Stouffer Discovers America*, though it was published under the title *Civil Liberties, Communism, and Conformity*. Mr. Stouffer and his team of researchers asked a representative sample of Americans a number of questions calculated to find out whether they would permit (a) a Communist, or (b) an atheist, to (1) speak in their local community, or (2) teach in their local high school, or (3) be represented, by means of a book he had written, in their local public library. And consider: some two-thirds of the sample answered "Nothing doing" right straight down the line; they would not permit any of the things in question—nor was there any evidence that they would have been much disturbed to learn that the Supreme Court says that the Fourteenth Amendment says that the First Amendment says they can't do anything legally to (e.g.) prevent the Communist from speaking. Mr. Stouffer was appalled at the America he had discovered—as I am sure the Ford Foundation, or whatever foundation it was that gave him all that money to ask all those ques-

tions of all those people, must have been appalled too. Of course, anyone who had ever got off the Harvard campus long enough to visit America should have known what answers he would get, but the "of course" is not my point. My point is, quite simply, that Stouffer's statistics clearly enjoin upon us a certain caution when it comes to pressing the idea that the American people have in some sense contracted with one another to maintain freedom of speech procedures. If they have made such a contract they appear not to have heard of it; and the obligation of a contract of which the contracting parties seem not to have heard is not, perhaps, the most pressing kind of obligation one can imagine. One begins to suspect that the true American tradition is less that of our Fourth of July orations and our constitutional law textbooks, with their cluck-clucking over the so-called preferred freedoms, than, quite simply, that of riding somebody out of town on a rail.

Enough by way of explaining my verbal parachutes. Except for temperamentally, it is for me, and has got to be, a matter of "in some sense," of "other things being equal," of a "presumption," etc. But the temperamentally still stands. My own instinct would be to let (e.g.) Gus Hall speak freely pretty much anywhere—until such time as the American people have the good sense to deport him to the Soviet Union.

## *Chapter 5*

### The Social Contract: The Ultimate Issue between Liberalism and Conservatism

The present chapter has two purposes: First, pursuant to earlier references in this book to a sort of continuity on the part of contemporary American Conservatism with the conservatisms of the past (and an "overlap" between its ideas and a tradition reaching back through the entire history of the West), to show where that continuity and that overlap are greatest, where contemporary American Conservatism is most at one with the past. Second, to explicate the issue at stake in the area of the overlap, an issue not in my opinion generally understood, and carry the reader, however sketchily, through the history of that issue. The second of these tasks, let me warn him, will necessitate my "working" him somewhat harder than I have done in earlier chapters; the issue is not an easy one to grasp, and the history of it not precisely exciting—besides which the inquiry will involve my taking him to remote times and places that he is not accustomed to think of as having any bearing on America or on American politics. But I perhaps have no right to do that unless I can explain to him beforehand why he should accompany me on such an inquiry. Let me, to that end (before launching myself on the inquiry proper), get busy on the first of the two purposes.

The problem is this: We have all been brought up to believe that the Framers of the Constitution and the Bill of Rights were