Free or Compulsory Speech

Libertarians surely favor freedom of speech, that is, the right to speak without being hampered by the government. But the right to speak implies the right *not* to speak, the right to remain silent. Yet libertarians have themselves been strangely silent on the many instances of *compulsory* speech in our society.

The most flagrant example of continuing compulsory speech takes place in every courtroom in our land: the compulsory bearing of witness. Now, surely each person is the absolute owner of his or her own body; as the owner of his own body, only the individual should decide on whether or not to speak in any given situation, and there should be no compulsion upon him to talk or not to talk. And yet in every court, witnesses are dragged in by force (the subpoena power) and compelled to bear witness for or against other people.

The Fifth Amendment, as we all know, prohibits the government from forcing a person to testify against himself: "nor shall any person … be compelled in any criminal case to be a witness against himself." Excellent. But why should an accused *criminal* possess a right not also granted to admittedly innocent persons? In short, by what right does a government compel someone to testify against *another?* Here is a flagrant invasion of liberty, a flagrant abuse against the rights of the individual, and an initiation of force and violence against an innocent person. Yet where are the libertarians to raise their voices against this practice?

There is also something peculiarly monstrous and antilibertarian about the way in which courts, i.e., judges, move against such "crimes" as nontestimony. In every other criminal case, whether real or victimless, the defendant is duly charged, indicted, and prosecuted, and is allowed to plead his case before third parties: judges or juries who are not involved in the dispute. Yet with the "crime" of failing to testify, all such procedures and safeguards go by the board. The *judge* is the prosecutor — charging the defendant with "contempt of court" — and also the decider of the defendant's guilt (in this "crime" against himself). The judge is the plaintiff, prosecutor, judge, and jury all wrapped into one.

What is more, in all other cases of crime, the conviction and the sentence are punishments *after the fact,* after the crime has been committed. Someone commits a crime, and is then punished. But not so in the case of "contempt of court." In such cases, the judge uses the "punishment" in an attempt to *compel action* on the part of the "criminal." The punishment is before the fact, an attempt to force the defendant to do something the judge wants him to do. And, in theory at least, the judge can keep the victim in jail *for life* until he "purges himself of contempt" by performing the required deed. He can keep the defendant in jail until he agrees to bear witness in court, until he performs the required speech.

A particularly dramatic case involving a clash between compulsory testimony and the First Amendment is the predicament of *New York Times* reporter Myron A. Farber. In 1976, Farber wrote a series of articles in the *Times* which resurrected the mysterious multiple murders committed a decade before in a New Jersey

hospital, in which a number of patients were killed by injections of excessive amounts of *curare.* As a result of Farber's investigations, the surgeon, Dr. Mario Jascalevich, was indicted (and later acquitted) of three of the murders.

During the trial, the court, at the behest of the defense, ordered Farber to turn his notes in the investigation over to the court. Farber refused, citing the First Amendment (which protects freedom of the press as well as speech), and also a New Jersey "shield law" designed to defend journalists against compulsory disclosure of their sources. Farber added that the government must not be able to commandeer a reporter's notes and sources if a free press is to be maintained. And the judiciary, he pointed out, is a branch of the government.

> The court ruled, however, that in this case the shield law and even the First Amendment were overruled by the Sixth Amendment of the Bill of Rights, which guarantees the accused in a criminal trial "compulsory process for obtaining witnesses in his favor." Still Farber refused to turn over the notes. He spent 39 days in jail before Dr. Jascalevich's acquittal won him his freedom. Furthermore, Farber was hit with a $2,000 fine, and the *New York Times* too was fined a flat sum of $100,000 plus $5,000 a day as long as Farber's notes remained outside the judge's custody.
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> While the jailing of Farber was, of course, a far more heinous injustice, the crippling effects of the fine on the newspaper should not be overlooked. Not every newspaper is as affluent as the *New York Times.* As Ken Johnson, editor of the Grand Junction (Col.) *Daily Sentinel* puts it, "there would be no recourse against such an incredible abuse of judicial power. We would have to capitulate to the judge's outrageous and illegal demands, or simply say there no longer will be a free and independent newspaper in this community."

Even a veteran civil libertarian and First Amendment absolutist like Nat Hentoff is nonplussed and disarmed by the Farber case. For Hentoff (and the American Civil Liberties Union as well) feel that they have to balance — and even override — the First Amendment by the Sixth, so that Farber should be compelled to turn over his notes if the defense can show relevance to the case at hand. (See Hentoff, "The Confused Martyrdom of M.A. Farber," *Inquiry* (Oct. 16, 1978), pp. 5–7.)

Well, what does one do if one is a Bill of Rights absolutist — as Hentoff is — and two amendments contradict each other, as they clearly do in the Farber case? What does one do, in general, if one is a Constitutional absolutist and two parts of the Constitution contradict each other, which they do frequently? There is only one way to resolve such contradictions (if one really wants to resolve them, rather than waffle one's way through arbitrary qualifiers piled on each other). And that is to have a noncontradictory set of principles that is held higher than *any* written document, even one as generally beneficent as the Bill of Rights. Libertarians have such a set of principles, and libertarians therefore are particularly well equipped to point the way out of this First Amendment–Sixth Amendment morass.

For libertarians hold that it is ever and always illegitimate to use force against a nonaggressor, against someone who has not himself used force against someone else. That means that *no one,* no innocent person, regardless of his occupation — whether he be newspaperman, lawyer, physician, accountant, or *just plain citizen* — should ever be forced to testify or turn over notes to anyone, whether as witness against himself or for or against anyone else.

In contrast to Bill of Rights absolutism, libertarian absolutism
sheds a pure and noncontradictory light on the issue. The Sixth Amendment must be altered to drop the compulsory process clause. The remainder of the Sixth Amendment provides guarantees for defendants against the *government;* only this clause provides defendants with compulsory powers against innocent people. It must be repealed.

Who then will bear witness in court? Whoever wishes to do so, freely and voluntarily. Conscription of witnesses is no more justified than conscription into the armed forces or into any other service or occupation. Freedom and individual rights must extend to all institutions and all branches of life, even into the judiciary,

the heart of State power.