

The First Amendment Right to Political Privacy, Chapter 8 – A Postscript on The Individual and Social Costs of Compelled Disclosure

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This series has attempted to illuminate the legal principles at stake through the real experiences of the people who, at great personal expense, forged the First Amendment right of political conscience. That they suffered profound invasions of personal liberty guaranteed to them by the Bill of Rights is established by the court decisions. But they suffered severe personal pain too. Some were arrested and went to prison. Even those who ultimately prevailed in the legal system did so at great personal, financial, and psychological cost.

These kinds of individual experiences impose a collective injury to the democracy at large. John Stuart Mill in his treatise *On Liberty*, published in 1859, articulated the concept of a collective social cost to society that results from the loss of individual freedom in thought and speech.^[1] When the cost of participating in the exchange of ideas becomes so high that individuals choose not to participate, to censor themselves, everyone is poorer collectively. They are poorer because they are denied the freedom to hear or even to think the ideas that might otherwise have enriched democratic debate, society, and themselves personally.

Thus, when compelled exposure causes individuals to refrain from speaking or joining associations, or funding a cause, because exposure carries too high a price in the form of stigma, boycotts, ignominy, harassment, law enforcement, or other official or social retaliation, the deterrence of individuals becomes a collective problem. There is a cost to democracy and society at large when individuals speak or associate less and share fewer ideas.

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Regrettably, the censorship of ideas and the banishment of certain speakers often has been the specific purpose of public exposure campaigns and the transparency policies that facilitate those campaigns. And, indeed, such initiatives have been ecumenical throughout history, being employed by all parts of the political spectrum. New Deal Democrats harassed Edward Rumely's Committee on Constitutional Government for the better part of a decade in the 1940s. Southern government officials exposed NAACP donors through various registration requirements in order to deter their political participation. In the 1980s, a persistent Assistant School Superintendent doggedly pursued Margaret McIntyre to embarrass her in the local community, penalize her, and punish her for opposing the school funding referendum he favored.

In his book *Naming Names*, the definitive liberal treatise on the Red Scare, author Victor Navasky documents the painful personal toll suffered by hundreds of Hollywood artists when "informers" complied with formal government demands to "name names" in the 1940s and 1950s.^[2] The personal consequences ranged from boycotts, unemployment, and economic ruin to deep personal traumas and suicide.^[3] But "the state did more than bring misery to the lives of hundreds of Communists, former Communists, fellow travelers, and unlucky liberals," Navasky observes.^[4] "It weakened American culture."^[5] Navasky records the collective experiences and consequences of hundreds of American citizens as the "social cost" to government-compelled naming of names.^[6]

The excesses of the Red Scare in the 1940s and 1950s were defended by conservatives of the day as an ordinary incident of democracy setting cultural and political norms.^[7] But Judge Edgerton, the dissenter in the *Barsky* decision, saw the enterprise as something more insidious. He saw compulsory "exposure and publicity" as a weapon of ideological warfare against ideological opponents to accomplish what could not be done by direct legislation – censorship.^[8]

The New Left of the 1960s responded with its own counter-speech theories and tactics that have been taken up by a new generation of Americans determined to censor right-leaning speakers and even left-wing speakers perceived as out-of-step with new progressive orthodoxy.^[9]

The modern censorship movement extends to college campuses where "de-platforming" non-conforming viewpoints is commonplace,^[10] to boycotts against advertisers on certain media outlets and news shows,^[11] to affirmative efforts to block former government officials from employment at any corporation in America.^[12] At the same time, official governmental discrimination against certain viewpoints and speakers appears to be as active as ever.^[13] Two recent books, Kim Strassel's *The Intimidation Game* and Kirsten Powers' *The Silencing*, document the new political strategy in action.^[14] And compulsory exposure is identified, like it was in the 1940s and 1950s, as a key tool of the conscious political strategy to drive ideological competitors out of the public square.^[15]

Meanwhile, several books and studies document the rising intolerance in civic discourse and social cost in terms of the censorship of ideas and facts from public dialogue.^[16] The intensity of protests and the severity of the intolerance that characterizes debate over even mundane political subjects today have pushed many citizens out of the public dialogue. Others have sought to participate anonymously not for the purpose of

corrupting politicians but to protect their families, reputations, and careers. That in turn has spawned the most expansive and intrusive compulsory exposure laws and legislation, often justified, like historical precursors, in the name of transparency and national security.^[17]

All forms of compelled exposure necessarily chill free speech and association. Public exposure chills some, while the risk of government abuse chills others. Although the risk can be more acute if the subject is controversial, or the viewpoint is unorthodox, or if the times, like the 1940s *and today*, are deeply polarized culturally and politically, all forms of government-compelled disclosure visit a chill upon citizens who otherwise would prefer to maintain their privacy while speaking or associating. As observed by Judge Edgerton at the height of the Red Scare, “There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure. But nothing turns on this question of fact. The views of timid people are not necessarily worthless to society. No one needs self-expression more. The Constitution protects them as it protects others.”^[18]

The courts have the responsibility to referee the modern ideological and cultural wars waged with the cudgel of government-compelled exposure and to draw boundaries upon compelled disclosure. The real consequences for individuals’ lives and liberties, as well as the collective social costs to society, of compelled exposure must figure into a jurisprudence that seems to have forgotten or underrated these costs. Perhaps the courts in these turbulent and intolerant times will fulfill the hope of Justice Black, who at the height of the Red Scare longed for “calmer times, when present pressures, passions and fears subside” to afford the privacy of political conscience appropriate constitutional protection.

[1]John Stuart Mill, *On Liberty* (Dover Publications 2002).

[2]Victor S. Navasky, *Naming Names* (Viking Press 1980).

[3]*Id.* at pp. 340-350.

[4]*Id.* at 334.

[5]*Id.*

[6]*Id.*

[7]See William F. Buckley, Jr., L. Brent Bozell, “The New Conformity,” *McCarthy And His Enemies* (Henry Regnery Co. 1954) at pp. 308-330.

[8]*Barsky v. United States*, 167 F.2d 241, 256 (D.C. Cir. 1948) (Edgerton, *dissenting*).

[9]For the New Left’s ideological origin, see Herbert Marcuse, “Repressive Tolerance,” *A Critique of Pure Tolerance* (Beacon Press 1969) at pp. 95-137. The chapter was first published in 1965 and it forms the foundation for today’s strategy of affirmative intolerance to free speech by the New Left. For a response to the theory and a documentation of the social cost in the form of heightened levels of intolerance in a generation of Americans, see April Kelly-Woessner, *The End of the Experiment* (ed. Stanley Rothman) (Routledge 2017) at

pp. 187-200. For examples of New Left attacks on out-of-step liberal speakers, see Edward Schlosser, "I'm a Liberal Professor, and My Liberal Students Terrify Me," *Vox.com* (June 3, 2015); Jeremy Bauer-Wolf, "ACLU Speaker Shouted Down at William & Mary," *Inside Higher Ed* (Oct. 5, 2017).

[10]Paul Bedard, "Efforts to Blacklist Conservatives at UVA Persists, Trump Aide Hiring Defended," *The Washington Examiner* (Aug. 3, 2018); Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (Encounter Books 2012); Foundation for Individual Rights in Education (FIRE) "Disinvitation Database" (available at: <https://www.thefire.org/resources/disinvitation-database/>).

[11]Itay Hod, "Tucker Carlson and Laura Ingraham Boycotts Have Cost Their Fox News Shows Millions, Data Shows," *TheWrap.com* (Feb. 5, 2019).

[12]See Gideon Resnick, "We're Not Finished, Dem Groups Want to Make Kirstjen Nielsen a Post-Trump Pariah," *TheDailyBeast.com* (Apr. 8, 2019) ("Restore Public Trust and nearly 40 immigration and progressive advocacy groups had formed a coalition to implore corporate leaders to avoid hiring a slew of Trump officials involved in implementing the family separation policy including Nielsen, former Attorney General Jeff Sessions and former White House Chief of Staff John Kelly.").

[13]See, e.g., Emily Cochrane, "Department of Justice Settles With Tea Party Groups After I.R.S. Scrutiny," *The New York Times* (Oct. 26, 2017); Bradley Smith, "A Lesson on Abuse of Power by Obama and His Senate Allies," *The Hill* (Oct. 10, 2017); Karl Rove, "Dick Durbin, The IRS, and Me," *Wall Street Journal* (Mar. 29, 2013); Editorial, "Smart-ALEC Durbin Targets Another Conservative Group," *Investor's Business Daily* (Aug. 12, 2013); Laura Vozella, "McAuliffe Camp Erupts Over Business PAC's Choice of Cuccinelli for Virginia Governor," *Washington Post* (Sept. 15, 2013) (reporting on state senator's email to business association: "I urge you to stop any endorsement of Cuccinelli. The ramifications of his being endorsed will be huge within the Senate Democratic caucus.... The response [from legislators] will be frigid and doors will be closed [when the council seeks help with its legislative agenda]. Achieving the goals of NVTC will be difficult to impossible."); John Cushman, Jr., "Think Tank With Fossil-Fuel Ties Subpoenaed in AG's Climate Inquiry," *Inside Climate News* (Apr. 8, 2106).

[14]Kimberley Strassel, *The Intimidation Game; How the Left is Silencing Free Speech* (Twelve, The Hachette Book Group 2016); Kirsten Powers, *The Silencing: How the Left is Killing Free Speech* (Regnery Publishing 2015).

[15]Strassel, *The Intimidation Game* at pp. 64-65; see also Matt Miller, "Privacy And The Right to Advocate: Remembering *NAACP v. Alabama* and its First Amendment Legacy on the 60th Anniversary of the Case" (The Goldwater Institute Jan. 17, 2018) at pp. 8-9.

[16]April Kelly-Woessner, *The End of the Experiment* (ed. Stanley Rothman) (Routledge 2017) at pp. 187-200; Greg Lukianoff, *The Coddling of the American Mind* (Penguin Press 2018).

[17]See, e.g., Honest Ads Act (S. 1989, 115th Congress); Maryland Online Electioneering Transparency and Accountability Act (Md. Code Ann., Elec. Law § 13-405.2); New York Democracy Protection Act (N.Y. Elec. Law § 14-107(5-a)); 13 N.Y.C.R.R. 91.5(C)(3)(1)(a); California Supervision of Trustees and Charitable Trusts Act (Cal. Govt. Code § 12584).

[18]Barsky, 167 F.2d at 255 (Edgerton, *dissenting*).