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TRANSPARENCY AND *THE FIRST*

*Mark Fenster**

Despite the Supreme Court's repeated and summary rejection of the claim,[1] transparency advocates argue that the First Amendment provides both a logical reason and a legal basis for a right to information.[2] We can find a right to information embedded in the press's right to publish and the public's right to speak without government interference,[3] so the claim goes, or encompassed within the public's right to receive speech.[4] After all, what is secrecy but a form of censorship, and how can a marketplace of ideas and a free means to communicate exist if the press and public lack key facts that the government withholds? A rights-based claim hopes to elevate transparency's status to that of speech and the press by granting it the blessings that the First Amendment offers.

Stanley Fish neatly reverses the polarity of this effort.[5] Transparency and free speech ideals are indeed related, he concedes, because they share a political vision and conceptual grounding in the notion that robust conceptions of free speech carry a commitment to increase the flow of information. But this is not a good thing, Fish argues—rather, the relationship between the two merely compounds a fundamental error and creates bad consequences. A fundamentalist conception of free speech simplifies the nature of communication by fetishizing the individual's speech-act, ignores the conflicts and contradictions internal to the free-speech ideal, and disregards the institutional context in which speech occurs. A fundamentalist conception of transparency similarly fetishizes information flow, ignores the contradictions internal to the concept, and overlooks the social context of information's production and reception.

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1 *See* McBurney v. Young, 569 U.S. 221, 233–34 (2013); Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (plurality opinion).

2 *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489–93 (1985); Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 24 (2011); Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 11 (2012).

3 Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 517–18 (2007).

4 Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 5–15 (1976).

5 *See* STANLEY E. FISH, THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP, 153–92 (2019).

Speech and transparency may belong together, then, but they do not belong at the forefront of democratic values, at least as conceived of by their staunchest proponents. When promoted and enforced in absolute form, they can destabilize a democratic public that relies on those "traditional vehicles of authority and legitimation" like courts, the press, and higher education that form the basis of civil society.[6] We suffer our current predicament—debased, hyper-partisan political discourse, dysfunctional political institutions, and a former president who exacerbated and took advantage of both—in great part because of the dynamic created by absolutist conceptions of free speech and transparency.

Fish's project will be dismissed by those who do not like how it refuses to fit neatly within political positions. Libertarian conservatives have come to view speech as both a right and a means to free discourse from social and political constraint, but devotion to the principle on most of the left and right seems faint-hearted; meanwhile, the democratic left views access to information as an essential means to inform the public and hold government accountable, while the Trumpian right did not protest (and often applauded) as the Trump administration proved disrespectful of its obligations to disclose information, especially to Congress. Fish challenges these positions and could ultimately be accused of appearing insufficiently attentive to both individual rights and democracy, as well as of privileging the institutional context of speech and transparency over the identities and sensitivities of audiences. His independence challenges all sides of a series of stalled debates and enables a deeper and more compelling explanation of our current predicament, even as he can offer no simple or easy solution.

While I agree with much of his argument about transparency,[7] allow me to offer a few friendly amendments. The legal connection between free speech and "transparency" is both stronger and weaker than Fish asserts. Those who claim free speech and transparency violations sometimes neglect that state action—whether via censorship or a refusal to disclose information upon demand—is a necessary component for a legal challenge.[8] A private social media company bears quite limited responsibility to allow free speech on its platform or to disclose its algorithms or internal procedures for

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6 *Id.* at 161.

7 *See generally* MARK FENSTER, THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION (2017). I am sympathetic to Fish's arguments about the First Amendment, but I do not consider myself sufficiently expert to comment on them extensively.

8 *See, e.g.*, Andrew Marantz, *Facebook and the "Free Speech" Excuse*, NEW YORKER (Oct. 31, 2019), https://www.newyorker.com/news/daily-comment/facebook-and-the-free-speech-excuse (quoting Republican members of Congress as praising Facebook for protecting citizens' First Amendment rights); @BadLegalTakes, TWITTER (Dec. 28, 2019, 7:19 PM), https://twitter.com/BadLegalTakes/status/1211079344048812032 (reproducing screenshot of tweet stating, "I hope @JudicialWatch sends a FOIA to Twitter over this.").

removing content or de-platforming users, for example. By considering free speech and transparency together, Fish helps explain this simplistic tendency to see free speech and disclosure violations everywhere. But speech and disclosure depart from each other in important ways that Fish does not discuss. Unlike the constitutional right to free speech, a limited right to information is created by statute—and in the Freedom of Information Act (FOIA),[9] that right has been frequently amended, usually in an expansive direction.[10] FOIA serves as an administrative law intended to constrain, albeit imperfectly, the executive bureaucracy from hoarding information. This lower status renders the law of "transparency," such as it is, quite unsacred, even if its cultural status might rival that of free speech.[11]

Finally, President Trump may not have been transparent in a traditionally legal or normative sense, but he was "transparent" in a populist sense.[12] He regularly presented openly, even nakedly (note again the free-speech connection in his willingness to speak profanely and mockingly): on Twitter above all, but also on Fox News and in his incessant political rallies that cable news networks covered and sometimes simulcast. He announced his public self to the world by appearing to speak his mind and calling out his enemies. He declared himself the most transparent President ever, and his followers agreed (and continue to agree). We will be struggling with this right-wing populist sense of transparency for a generation to come, and Fish's work will continue to aid us in this effort.

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9 5 U.S.C. § 552 et seq.

10 Some state constitutions establish broad rights of access, see, for example, FLA. CONST. art. I, § 24 (creating a right of access to public records and meetings), while the federal Constitution establishes more limited rights of access, see FENSTER, *supra* note 7, at 85–88.

11 *See* Mark Fenster, *FOIA as an Administrative Law*, *in* TROUBLING TRANSPARENCY: THE FREEDOM OF INFORMATION ACT AND BEYOND 52–70 (David Pozen & Michael Schudson eds., 2018).

12 *See* Mark Fenster, *Populism and Transparency: The Political Core of an Administrative Norm*, 89 U. CIN. L. REV. 286 (2021).