

brutalize in prisons, execute the poor and the weak. Due process can wait—we want safety! Naked power becomes sovereign. Only force can rise to meet it. The end is violence....

Vast Unrest

Safety can come only from service to others, because until the basic human needs of all are fulfilled, there will be a vast unrest at work that cannot be stilled by force or by admonition to respect the law....

There are degrees of repression. Each demeans the dignity of the individual in its different way. Intimidation of speech or conduct by force or threat of force in essence says the state is supreme, the individual has no rights, he must do as he is told. Stealth and trickery as methods of repression mean that the state has no respect for the individual. It will deceive, lie, invade privacy, steal documents, do whatever it thinks necessary to catch people in crime. By wiretapping, the government says to its citizens: Do not trust us, for we do not trust you. We will hide, overhead, wait secretly for months for you to do wrong. If you do anything to displease us, we may choose to watch your every move.

Denial of bail and preventative detention are essentially premised on the belief that the individual must yield his liberty to the state if he is poor, ignorant, despised—and apparently dangerous. He can be tried later. Society will not presume him innocent. No respecters of human dignity, these measures imply that judges can tell who the bad people—the dangerous ones—are and can say that they should be denied freedom and punished as guilty until proven innocent.

Judicial Impotence

The desire to compel confessions and to repeal the Fifth Amendment admits the impotence of the system of criminal justice to find truth and do justice. Instead, it seeks to crush the individual, to make him bend his knee to its sovereignty, to coerce from his own mouth words that will convict him, to question him—if he is poor, ignorant, and afraid—until he cracks. Frustrated and frightened in its impulse, it ignores the unreliability of the emotional or psychotic response, seeking only conviction.

Finally, repression attacks life itself. We become so terrified we see safety in death imposed by courts and carried out in prisons. When all history says violence begets violence, when reverence for life is essential if life is to be dear, the state kills—encouraging some to do the same.

There is no conflict between liberty and safety. We will have both or neither.... We can enlarge both liberty and safety if we turn

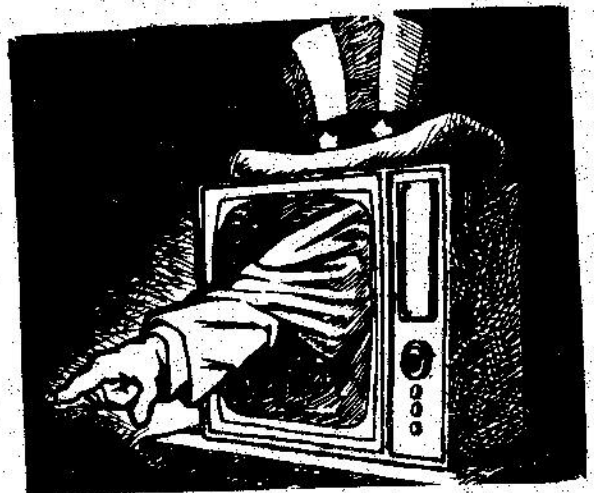
from repressiveness, recognize the causes of crime and move constructively.

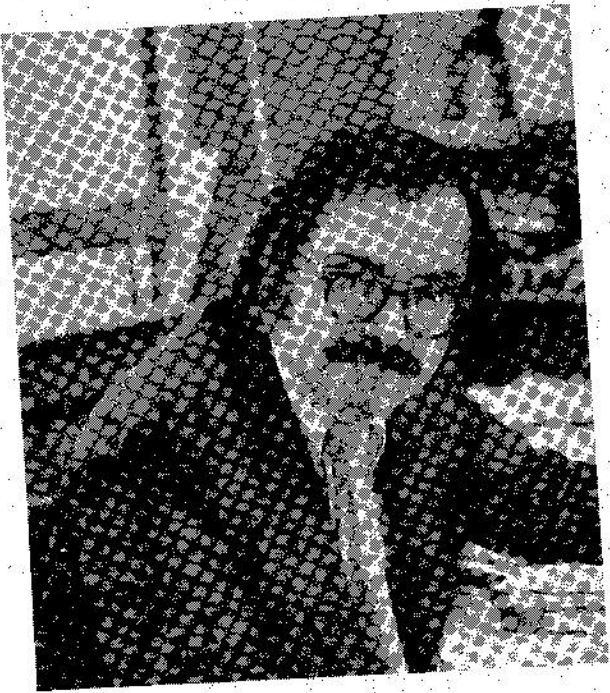
The major contribution law can make is moral leadership. Only then can it hope to permanently influence the conduct of its citizens. The law cannot therefore impose immoral rules or act immorally. The government of a people who would be free of crime must always act fairly, with integrity and justice....

(The following is excerpted from the New Yorker magazine of September 2, 1972.)

The editor of *Nhan Dan*, the leading North Vietnamese newspaper, had told me earlier that this war was not the most important war in history, but that it was the most suffering war in history. I told the audience that I didn't agree that it wasn't the most important war because if it taught us that we couldn't live by war, that we couldn't solve our problems any more by violence on this scale, then it had to be the most important war in history.

[The Administration's attack on me] was an attempt to direct the people's attention from the bombing to my character and to smother questions about our acts under charges that I was a dupe or worse. They were worried about the effects of my trip on the bombing campaign—they don't want anybody to think or talk about it—so they tried to destroy what I might come back and say before I could say it. But if Nixon wants to compare, legally and morally, his bombing policy with my going there to see what it means and to talk about what I saw openly, I'm ready. We have to end this killing and we have to understand what we have done. The only way to do that is to see what we have done. If we're afraid to see that, we'll do it again.





Paul Halvonik

Paul N. Halvonik, 33, received his A.B. (in Political Science) at the Berkeley Campus of the University of California in 1960 and his law degree from Boalt Hall at the Berkeley Campus in 1963. While in law school he served on the California Law Review and was elected to the Order of the Coif, the national legal scholarship fraternity.

Halvonik first practiced law in Carmel, California, where he also managed the successful 1964 re-election campaign of then Senator Fred Farr of Monterey County. After that election, he joined the California Department of Justice, serving first as Deputy State Attorney General in criminal law and later as a civil rights division attorney. In November of 1966 he left the State Justice Department to become Assistant Staff Counsel and Legislative Representative of American Civil Liberties Union of Northern California. In 1968 he was elevated to the position of ACLUNC Legal Director.

In 1972 Halvonik left the ACLU staff to join the San Francisco law firm of Friedman, Sloan and Halvonik. Additionally, he serves as Director of the ACLU's Grand Jury Project, General Counsel of ACLUNC and Chairman of the Constitutional Law Committee of the San Francisco Bar Association.

As an ACLU attorney, Halvonik has been involved in litigation that has:

1. Invalidated the death penalty;
2. Invalidated as unconstitutional the state loyalty oath;
3. Invalidated as unconstitutional California's one-year residency requirement for voting;
4. Established the right of citizens and students to distribute anti-war literature on high school campuses;
5. Invalidated California's abortion laws;
6. Established the right of all persons to service in California business establishments free from any arbitrary discrimination;
7. Invalidated as unconstitutional the orders of a racially discriminatory draft board;
8. Guaranteed the right of prison inmates to receive and read literature and publish their manuscripts.

Halvonik is married, has two children, and resides in Berkeley, California.

(The following is excerpted from a memo which Paul Halvonik wrote to the Board of Directors of the American Civil Liberties Union about the Franklin case before the ACLU decided to accept the case.)

Jay Miller has asked me to prepare a memorandum on the distinction between advocacy and incitement. Since we have already been served an excellent debate on the topic by Professors [Alan] Dershowitz and [Gerald] Gunther, it may be a bit presumptuous of me to add another course. And yet it may be helpful for someone to join the discourse who is not a partisan. I designate myself non-partisan because I have not yet made a decision on the wisdom of becoming directly involved in the Franklin matter. There are a number of considerations aside from the free speech issue that must be taken into account and it is those issues which leave me in a quandary. On the free speech issue, however, I find myself squarely aligned with Alan Dershowitz and it will be the purpose of this memorandum to explain why.

At the outset we can, I think, be grateful that Dershowitz and Gunther have scotched the notion that the question presented by the Franklin case is whether ACLU will support incitement to violence. That is an artificial question; both our distinguished academicians define the issue thusly: did Franklin merely advocate or did he incite? If the latter, Franklin's words were not constitutionally protected.

Gunther seems further implicitly to concede that if Dershowitz's definition of incitement is adopted, Franklin's words were protected by the First Amendment. I agree.

The starting point, then, must be the Dershowitz formulation. As I perceive that formulation it can be summarized as follows:

Reflective Consideration

Words uttered are advocacy not incitement, as long as they communicate ideas for reflective consideration. That is to say, ideas are advocacy when offered under circumstances which give the audience an opportunity to consider their merit, assess competing thoughts, and then accept or reject the idea as a basis for action. When that opportunity for reflection is present and the lawful act nevertheless occurs the state's remedy is to punish the actors, not the speaker. Justice Black made that point with his special blend of economy and elegance in *Thomas v. Collins*:

"... [T]he protection they [the framers of the Bill of Rights] sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to ... action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the

opportunity to persuade action, not merely to describe facts. ... Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given." 323 U.S. 516, 537 (1945) (Justice Black was speaking for the majority.)

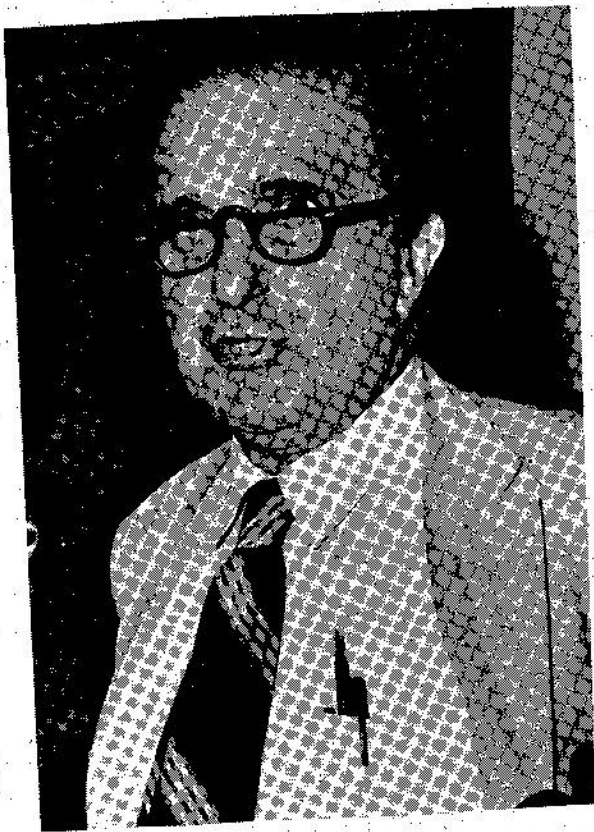
Advocacy-Incitement Distinction

The advocacy-incitement distinction advanced by Justice Brandeis is, to my mind, the most satisfying of all attempts. It is worthwhile to quote Brandeis at some length:

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

Whitney v. California, 274 U.S. 357, 377-378 (1927) (concurring opinion of Brandeis, J. joined by Holmes, J.)

But we need not go all the way with Brandeis on the facts of the Franklin case. There was, in each instance, an opportunity for considered reflection and the responsibility for the unlawful acts must, accordingly, pass from the speaker who communicated but did not act on the idea, to those who did act on the idea. To adopt the Gunther theory is to say that speech is not protected when there is any likelihood of action which is but another way of saying that only impotent speech receives the protection of the First Amendment. I do not believe that "those who won our independence by revolution" had that in mind.



Frank Donner

Frank Donner was born February 25, 1911. He received both his B.A. and his M.A. from the University of Wisconsin in 1934. He received his LL.B. from Columbia Law School in 1937. During his studies, Donner specialized in American History, American and English Legal History, Constitutional Law, and Labor.

Donner is a member of the U.S. Supreme Court Bar as well as the New York Bar and the bars of various Federal District Courts and Courts of Appeals.

After getting his law degree, Donner became a research fellow in Legal History at Columbia until 1940 when he became an attorney on the staff of the National Labor Relations Board (NLRB). From 1945 to 1946, he worked as Assistant General Counsel to the Congress of Industrial Organizations (CIO) and to the United Steelworkers of America.

Donner spent a few years in private law practice and then in 1950 he became a partner in the law firm Donner, Kinoy and Perlin, and later in the firm Donner and Piel. During most of the '60s, Donner worked as a single practitioner mainly in the areas of labor law and civil liberties, and has served as General Counsel to the United Electrical, Radio and Machine Workers of America.

Donner has published one book, *The Un-Americans* (Ballantine, 1961), and has

written another book on political surveillance which will be published by Holt, Rinehart and Winston this year. In addition, he has written numerous articles on civil liberties including many for *The Nation* magazine.

Donner has been involved in litigation dealing mainly with labor regulation and freedom of expression. He has briefed and/or argued seven cases before the U.S. Supreme Court.

At the present time, Donner is director of the American Civil Liberties Union research project on political surveillance at the Yale Law School, in addition to writing and handling cases.

(The following is excerpted from Frank Donner's article "The Theory and Practice of American Political Intelligence" which appeared in *The New York Review of Books* in 1971.)

The twentieth century has been marked by a succession of different forms of restraint of political expression: criminal anarchy statutes, sedition laws, deportations, Congressional antisubversive probes, loyalty oaths, enforced registration. These and related measures still survive. But in recent years new, more formidable ways of responding to political and social movements on the left have emerged. The most important of these is the system of political intelligence which is

rapidly coalescing into a national network.

Despite the efforts of intelligence officials to keep intelligence operations secret, reliable information about our intelligence system is steadily accumulating. We now have a clearer picture of the methods and targets of political surveillance. As a result, we can no longer seriously doubt that the main purpose of such activity is political control of dissent or that the frequently advanced justifications of law enforcement or national security are often no more than a "cover."

Black communities swarm with urban intelligence agents and informers, as do university and peace groups; invitations to young people to defect or to sell information at high prices are becoming routine. Young college graduates—black and white—are offered "career opportunities" in urban intelligence; courses in intelligence and surveillance are being taught to municipal police units and campus security police....

FBI's Central Role

The FBI plays a central role in coordinating the intelligence system; it exchanges information with other agencies, performs investigative work for intelligence groups with limited jurisdiction, and trains intelligence agents for service in other agencies. Its intelligence techniques and political standards serve as a model for local operations. It compiles albums of photographs and files of activists which are transmitted to agencies throughout the United States....

Protest activities have inevitably served to draw the police into politics and to expand their intelligence functions. Especially ominous is the widening use of photographic surveillance by intelligence units. Police in communities throughout the country systematically photograph demonstrations, parades, confrontations, vigils, rallies, activities....

Still, personal surveillance is necessary in those areas where technology cannot—at present anyway—replace human beings. Thus infiltration of dissident groups by informers remains a common procedure. Ironically, the Warren Court's limitations on wiretapping and bugging have themselves led to a heavier reliance on informers as a substitute....

The informer is not only a reporter or an observer, but also an actor or participant, and he frequently transforms what might otherwise be idle talk or prophecy into action....

Nationwide System

Experience with other official record systems suggests that it is only a matter of

time before the intelligence now being collected by thousands of federal and local agencies will be codified and made accessible on a broad scale. Indeed, we are not far away from a computerized nationwide system of transmittal and storage.

While the recent bombings and the hunt for fugitives have supplied justification for some surveillance practices, the emerging system as a whole is oriented toward the future and is justified as preventive: the security of the nation against future overthrow is said to require the present frenzy of surveillance. In cases where such an argument makes no sense, surveillance is justified on grounds that it is necessary to prevent local violence and disorder in the future.

Political intelligence indiscriminately sweeps into its net the mild dissenters along with those drawn to violence; when the national security is at stake, so the argument runs, it is folly to take risks....

While intelligence is developing new clandestine activities, it is also becoming highly visible. American political activity is plagued by an intelligence "presence" which demoralizes, intimidates, and frightens many of its targets—and is intended to do so. Intelligence not only continually expands the boundaries of subversion in its operations, but inevitably generates a stream of fear-mongering propaganda in its evaluation of intelligence data. A troubled period such as the present intensifies this process: the number of surveillance subjects increases greatly as the intelligence agencies circulate propaganda dramatizing their life-and-death struggle with subversion....

Americans will now have to answer the question whether the risks that we face—and some of them are real enough—outweigh the danger of a national secret police. One can hardly question the right of the government to inform itself of potential crimes and acts of violence. The resort to bombing as a political tactic obviously creates a justification for intelligence to forestall such practices. But the evolving intelligence system I have been describing clearly exceeds these limited ends. Before it is too late we must take a cold look at our entire political intelligence system: not to determine whether one aspect or another is repressive... but to decide whether internal political intelligence as an institution, divorced from law enforcement, is consistent with the way we have agreed to govern ourselves and to live politically.

Steve Weissman



Steve Weissman was born in Tampa, Florida on March 22, 1940. He grew up in Tampa, receiving his B.A. from the University of Tampa in 1962 and his M.A. in European History from the University of Michigan in 1964.

In September 1964, Weissman went to Berkeley to study Latin American History and became active in the Free Speech Movement (FSM) there. He was chairman of the Graduate Coordinating Committee of the FSM and a member of its Steering Committee.

He then left Berkeley to work as a campus traveler for Students for a Democratic Society (SDS), organizing opposition to the Vietnam war and to "restrictive" policies on university campuses. When he returned to Berkeley in the fall of 1965, he worked for the Vietnam Day Committee which, he claims, "started much of the early direct action against the war."

Weissman worked briefly for the Radical Education Project of SDS in Ann Arbor, Michigan, before coming to Stanford as a graduate student in Latin American Studies in 1967. He was active in the Old Union Sit-in of April 1968 after which he says the professor who was supervising his graduate work no longer wanted to work with him. He was also actively involved in the sit-in at the Applied Electronics Laboratories (AEL) and the

movement against the Stanford Research Institute (SRI).

In the summer of 1969, Weissman, along with long-time Stanford activist Lenny Siegel, helped organize the Pacific Studies Center, and still maintains a loose affiliation with it.

In mid-1969, Weissman became a consulting editor for Ramparts magazine, and served for a time as one of the editors in 1970. He is still an editor of Ramparts Press, and is currently co-authoring a book with Harry Cleaver for them entitled *The Green Revolution: Foreign Aid and the Politics of Hunger*. He researched the book during 1971 by traveling through Asia interviewing agricultural experts and people involved with AID.

Weissman also edited *The Trojan Horse: Aid and the Multinational Empire*, a collection of foreign aid articles, and wrote the foreword to *Marx and Engels on the Population Bomb*. Both books are from Ramparts Press.

Weissman is currently a free-lance journalist, and writes a weekly column called "The Emperor's Clothes" for *Alternative Features Service*, which distributes it to campus newspapers and underground publications around the country.

(The following is excerpted from Steve Weissman's "The Emperor's Clothes" column of Nov. 24, 1972.)