SEDITIOUS LIBEL: A study of its historical development and social function in Anglo-American Jurisprudence

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Submitted by: Ernest Reynolds III

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Approved:

Rudolph Gray
Graduate Dean

Joseph B. Graves Jr.

Thomas J. Cook

Jimmie H. Ramage

Carl D. Jackson

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PREFACE
(Originally Presented as "Outline of Proposed Thesis")

Chapter One: The Matrix

Beginning with the regime established by the Conqueror, Chapter One covers the development of Common Law under a centralized, national bureaucratic regime. An attempt is made to isolate the characteristic features and procedures which have remained central to Common Law, and to show the relation of law to society in Anglo-American Jurisprudence.

In order to show essential systemic continuities, the common law is traced in England until the eighteenth century. Its transmission to America and subsequent development in the United States until the twentieth century also is briefly discussed. The object of this is twofold: first, to show a continuing relationship between common law and society, and, second, to provide a background against which subsequent chapters will be more meaningful.

Chapter Two: The Evolution of Seditious Libel in England from the Tudor Era to 1843

Building upon the reader's introduction to the mechanics of common law, established in Chapter One, this chapter deals with the substance of the law of seditious libel. The Tudor

period is chosen as a starting point because it is during this period, when England was centralized into a more or less "modern" nation-state, that the law of seditious libel emerged in recognizable modern form.

The method of exposition combines discussion of customary practice binding in the courts, specific cases, and statutes. The year 1843 is chosen as the last year covered in this section because in that year legislation was passed in Parliament which allowed truth as a defense in some libel cases (Lord Campbell's Act).

Chapter Three: Seditious Libel in Early America

This chapter shows that the law of seditious libel in early America was transferred from England, intact, along with the apparatus of common law. Changes in the eighteenth century are discussed in connection with the Zenger Case (1735), the American Revolution, the First Amendment, and the Sedition Act (1798).

Chapter Four: Free Speech and Philosophy from Milton to Holmes

This chapter attempts to complement the more purely legal discussion by examining prominent free speech doctrines put forth as social philosophy. While no attempt is made to exclude legal thought from this chapter, it emphasizes the broader, or social, context of the doctrines presented. These include mention of the work of Milton, Locke, Jefferson, Mill, Holmes, and others.

Chapter Five: Seditious Libel in Twentieth Century America

The intent of this thesis is to discuss seditious libel as a law employed by and within nations (specifically, two nations: Britain and the United States). A full discussion of sedition in the various American states would be beyond the limits of this work.

The United States Supreme "Court's first major encounter with freedom of speech claims did not come until after World War I." (Gunther and Dowling, Constitutional Law, pg. 1050.) Chapter Five, continuing a case and statute approach, covers the Sedition Act (1918), the Smith Act (1940), and a number of Supreme Court cases beginning with Schenck v. United States. In discussing these cases the major doctrines of judicial decision-making in the "free speech" area, including "Clear and Present Danger" and "Bad Tendency", are discussed.

Chapter Six: Freedom of Expression and Social Control (Review and Conclusions)

This concluding chapter attempts to re-cap briefly the material covered in this thesis. The last part of the discussion relates the control of speech and press to that central and perennial issue in social-political theory, the balance of liberty and authority.

CHAPTER I

THE MATRIX

Introductory Remarks

This thesis traces the development and social significance of seditious libel, a criminal offense. The history of all criminal law is tied closely to the development of government. In this chapter we shall examine the development of central legal systems under the auspices of central governments in Britain and America from 1066 to present. This examination centers on the development of major legal institutions and procedures in an attempt to provide the background necessary to make the later consideration of seditious libel more meaningful. Chapter One, therefore, does not concern itself with substantive law except as it may enter indirectly. Furthermore, this treatment makes no pretense of being a complete digest; rather, it attempts to provide material which, when considered in conjunction with the other chapters of the thesis,

will complete the treatment of the main topic under discussion. Readers interested in a comprehensive treatment of the material surveyed in Chapter One are advised to read the books footnoted for the chapter, especially Theodore F. T. Plucknett's book: A Concise History of the Common Law.

Law Before the Normans

The Norman Conquest (1066) is definitely not the beginning of English legal history. It does mark the beginning of central government under one ruling order and, therefore, the emergence of the common law. England had been under Roman rule from 55 A.D. to 410 A.D., but by 1066 there remained no significant heritage of Roman law. During the period after the end of Roman rule in 410 A.D. the system of Roman law was forgotten. Politically, the island was carved up into numerous petty kingdoms.

Anglo-Saxons settled England from the fifth to tenth centuries (A.D.), driving the indigenous Britons into Wales. These conquering peoples probably had the greatest influence on the formulation of the pre-Conquest system of law and government. Despite sporadic attempts by some Anglo-Saxon kings to extend their rule to the whole island, no enduring unified

nation was established prior to William I. Laws were largely local in character. Because there was little reading or writing, laws were not codified. They passed from generation to generation by custom. Local kings were the source of law, and a modern concept of legislation as deliberate law making was completely unknown.[1] Anglo-Saxon trial methods were primitive and included no laws of evidence. The system typified "the small community riddled with superstition, ruled by men of violence, and divided into two main classes of the very wealthy and the very poor."[2]

The Emergence of Common Law from the Normans to the Civil War Period

The Normans brought with them a gift for efficient administration. They introduced a hierarchical system of feudal land ownership,[3] a system of well administered royal courts,[4] established the Exchequer to deal with fiscal matters,[5] and created a national system of taxation.[6] From 1066 to Magna Carta English kings were the architects of English statecraft--of the unification under one crown of Anglo-Saxon and Norman. They laid the foundations of national culture and of the common law. Into their courts they introduced the use of writs and

juries. They established a uniform territorial organization, headed in localities by sheriffs.[7] "Nowhere was national unity so real or royal authority . . . so well established."[8] The two great rulers in this period were William I and Henry II.

As a result of the Conquest, feudalism was established in England with a peculiar suddenness and completeness.[9] Toward the end of his reign, William I directed a comprehensive survey of his kingdom known as Domesday Book. Domesday Book is a precursor of the modern census. It was a complete review of all taxable property in the realm, recording value, location, and ownership. Its purpose was to clearly settle "the rights of the Crown and the taxable resources of the country."[10] Domesday Book asserted a feudal hierarchy of ownership in which the supreme overlord of all the realm was the Crown. The insistence of the Norman kings and their successors that they held direct or indirect title to all real property in the realm is important because in later times it provided "a sure foundation" upon which to build the common law.[11] In legal disputes Domesday Book was subsequently interpreted literally and considered an unimpeachable source, the first legal document in Anglo-American law to receive such treatment.[12]

Viewed in its relation to feudalism it is plausible to maintain that the common law was created by a landed aristocracy of Norman lords and English free men (upper class) under royal guidance and auspices in an attempt to preserve harmony. A fusion of Normans with Anglo-Saxons was completed in the late thirteenth century. From that time the already established, though still developing, common law continued as a shaping influence in English history.[13] Land law was the dominant branch of substantive law for quite some time. Magna Carta (1215), the Constitutional disputes of seventeenth century England,[14] the later disputes over the English Constitution in eighteenth century America, and the U.S. Constitution, though in the latter royal sovereignty is supplanted by popular sovereignty, are all based upon the feudal assumption of two way obligation.

The Monarchy dominated the early common law. To a great extent this was due to the King's position as supreme feudal overlord. In addition, the Conqueror retained and extended the Anglo-Saxon idea of the King's Peace. Prior to 1066 this "Peace" had travelled with the various English kings, who acted as law-givers and supreme judicial officers. William I put the entire realm under Pax Regis, thus making any act of violence

in the realm an offense against the Crown.[15] Offenses against the King's Peace were dealt with in the Eyre courts which were instituted in the twelfth century to aid the Crown in enforcing royal justice throughout the realm.

Beginning with the Conqueror, English kings had a council of advisors known as Curia Regis and later as Coram Rege. It was composed of officers of state, barons, and judges.[16] Though all government centered in this council, it was originally only an advisory body, similar in some ways to the American President's cabinet. As the business of government became increasingly complex the council was given greater responsibility. All of the branches of government eventually emerged from this body, beginning with the incremental emergence of the judiciary.[17]

Legislation in any modern sense was quite unknown to the Normans. In the eleventh, twelfth, and thirteenth centuries the common law emerged from judicial actions, made by judges acting as delegates on behalf of the king, and from the king's will.[18] The king was the ultimate source of all law and justice. He could make law by word of mouth.[19] In legal and governmental matters, which originally were undifferentiated,

royal will was the supreme fount.

It was the Conqueror who laid the foundations of modern England. He introduced feudalism, established national unity, nationalized the King's Peace, and introduced the Curia Regis, which proved the germ of English courts and other governmental institutions. William I ruled brutally, in the manner of a feudal warlord. He founded a dynasty which, while not always as capable as its progenitor, was able to preserve and advance his work.[20] William apparently did not consider himself an invader. Rather, he claimed simply to have re-captured a realm already his. At any rate, he wisely pursued a policy which allowed his subjects, both Anglo-Saxon and Norman, to retain their customary legal practices. Initially this policy resulted in a dual system of courts and of law, but ultimately both were successfully unified under the national order.[21] This was the work of later kings, most notably Henry II. English society became homogenous and stable under the rule of the central government and the tension between Saxon and Norman concepts of law and society disappeared during the thirteenth and fourteenth centuries. (The tension reappeared during the controversial periods of the English civil war and the American

Revolution. In each instance the revolutionaries showed sympathy for the Saxon theory of law and society as it was understood in the seventeenth and eighteenth centuries.)

Prior to the invasion William had promised to establish a system of ecclesiastical courts in England in return for a Papal blessing of his venture;[22] he kept this promise (ca. 1070). Before the conquest no system of English church courts had existed.[23] All disputes had been settled by secular means, although priests did take some part in the judicial process by administering ordeals.

Under Henry II the first real development of common law occurred.[24] Henry, who followed the reign of Stephen (1135-1154), a reign so disorderly that it is frequently called "The Anarchy",[25] was himself a strong ruler, critical of his predecessor. He set about to re-unify the nation and centralize its governmental-legal system. During his reign "royal power in England was at the highest level it was to reach before the Tudor period."[26]

England had been rich since Anglo-Saxon times, and Henry II may have been the richest European ruler in his day.[27] With the help of able subordinates he accomplished important administrative reforms in the Exchequer,[28] which was the first

body to emerge from Curia Regis and gain quasi-independent status. His financial administration was the most efficient in Europe.[29] Reforms in Exchequer are important in this study because they contributed to the rise of the Court of Exchequer, and, more significantly, because they indicate the kind of national stability achieved under Henry II. It was this stability that made possible administrative and procedural innovations which are an important part of the historical foundation of the common law, including the Eyre system, and the expanded use of writs and juries.

Henry II opened his reign (1154) with a reconfirmation of Henry I's Charter promising good government to all the realm. He then proceeded to confront and subdue the growing legal power of English ecclesiastical courts.[30] Since their inception these courts had grown to a point at which they rivalled the courts of the Crown. Henry II determined it necessary to rectify this situation and re-establish secular primacy in legal matters, a determination which led him into the famous conflict with his former friend, Becket. The immediate cause of the issue was the claim of the ecclesiastical courts to a wide jurisdiction including many criminal

and felony cases. This was a part of the broader investiture controversy in which Church and State were grappling for supremacy in the realm of temporal affairs.

In 1164 a council of magnates of Henry's kingdom "'recognised' . . . a list of customs which they declared were the practice of the reign of Henry I. This statement, called the Constitutions of Clarendon, Henry II proposed as the basis of a compromise."[31] Despite give and take on both sides, the substantial effect was to reduce and limit the jurisdiction of the church courts.

The king claimed, among other things, the right of the royal courts to try clerics. It was this issue that led to the death of Becket, following which the crown had to yield this one point. Benefit of clergy came for some time to operate as a protection for first offenders. The net result of the controversy was to assure the primacy of the secular courts, which were never thereafter seriously challenged. This primacy was reinforced by other developments during the reign of Henry II, which included sending royal justices on frequent Eyres, the growth of the writ system, and expanding the use of the jury.

The system of Eyres was essentially a system whereby royal justices "rode circuit". This arrangement had been first introduced by Henry I, but it rose to prominence and effectiveness under Henry II;[32] he also extended to all his subjects the privilege of trial by jury.[33] This extension was accomplished by the Assize of Clarendon (1166), which established "a definite system of inquisitions as part of the machinery of criminal justice which have come down to our own day as 'grand juries'."[34] These early jurors judged cases based upon their personal knowledge. They were in fact the peers of the accused, and their role in the trial was to insure that the judge did not treat the defendant unfairly.

This period also saw the early growth of the writ system, and the enactment of the petty assizes which brought all cases dealing with land to the royal courts. The petty assizes worked in conjunction with the writ system to monopolize for the Crown, as against ecclesiastical or local courts, all cases dealing with freehold tenure.[35] Also of interest at this time is the appearance of the first systematic treatise on the common law, authored by Ranulf de Glanvill, Justiciar to Henry II. The work is primarily a catalogue of writs. It is of interest

today because it gives us some insight into the structure of the common law in the twelfth century. Early writings in the common law were primarily pedantic, in contrast to the Roman law in which legal writings were tightly structured logical treatises which actually developed the legal system of which they were a part.

> About 1200 A.D. the main features of the common law and the central courts were fixed for many centuries. England would have one national law . . . one corps of royal justices . . . to administer and develop it; and not Roman or Canon but feudal law as its core . . . Procedure would be by writ.[36]

To a large degree this is the result of the reforms made under Henry II.

Courts, Writs, and Juries

The rise of the Central Courts was not due to conspiracy or to forced imposition. In part it was due to the popularity of two procedural devices employed in the royal courts which shall be separately discussed below, the writ system and the jury; in part it was due to royal attempts to oversee the entire realm, and to increasing amounts of judicial business which led to administrative division and specialization.

> The nation was offered royal justice in place of the Anglo-Saxon local courts of the county and hundred and of the domestic Court Baron which had come in with the feudal system, and the king's justices appeared as jus-

> tices in eyre. The other courts were not abolished. So long as litigants would continue to go to them they continued to function, but by the reign of Henry III (1216-1272) the king's courts, which then consisted of Exchequer, Common Pleas, and King's Bench, had practically supplanted the local courts.[37]

The eyre system gave an early impetus to this growth. Henry I sent occasional eyres from the curia regis. These groups of itinerant royal justices were acting as the king's delegates. Their jurisdiction was broad and they generally visited several counties, holding judicial hearings in each. The early use of this system was intermittent until the reign of Henry II. He revived the eyres and under him they grew in importance after the 1160's. By 1177 the eyres were a regular feature of the administration of the common law, "although their composition still varied from eyre to eyre."[38] The royal monopoly on cases dealing with freehold after 1164 must have tremendously increased the amount of royal judicial business to be heard before eyre courts. The Assize of Clarendon (1166) compelled local residents to aid the judicial process by serving as jurors. The first major eyres under Henry II occurred during the period 1166-1168.

During the twelfth and thirteenth centuries, as the press of business became greater, several courts emerged from the

curia regis. The first of these was the Court of Exchequer which dealt with matters of finance and royal revenue collection.[39] Its expedious procedure made it attractive to prospective plaintiffs, and brought to it cases that might otherwise have gone to other courts.[40] Later its jurisdiction expanded and it heard some common law and equity cases. In the thirteenth century it began keeping its own records.[41]

The next to emerge, late in the twelfth century, was the Court of Common Pleas. Originally it probably followed the curia regis which travelled with the king, but Article 17 of Magna Carta stipulated "Common Pleas shall not follow our court but shall be held at some definite place." The place chosen was Westminster.[42] Common pleas had jurisdiction in all civil cases between subjects,[43] and in cases arising in connection with freehold and writ of trespass. "Its jurisdiction in trespass, although primarily based on disputes between subjects, alleged a breach of the king's peace, and was therefore shared with the Court of King's Bench."[44] The judges in this court were called justices. Because of its cumbersome procedure and the monopoly of practice before it granted to one class of practitioners (serjeants-at-law) it

was the least popular royal court.[45]

The last major court to emerge was the Court of King's Bench which evolved out of what remained of the jurisdiction of curia regis following the separation of the other courts. Essentially this was all criminal and appeals jurisdiction.[46] Formal separation from curia regis occurred probably in the fourteenth century. The:

> prime concern (of King's Bench) was in matters directly affecting the King. Pleas of the Crown, whether civil or criminal, were the basis of its jurisdiction. By virtue of its criminal jurisdiction it could bring cases into King's Bench from inferior courts, such as the sheriff's, by means of the writ of certiorari. It could also issue the prerogative writs of mandamus, prohibition, and habeas corpus. It had a wide appellate jurisdiction, and by means of a writ of error could hear appeals, even from the Court of Common Pleas.[47]

King's Bench was the highest court, the heir of curia regis, and a procedural precursor in some ways of the United States Supreme Court. The King was theoretically a member of the court, though after early times, the only king actually to sit as a judge was James I.[48]

In addition to these courts various minor courts with specialized jurisdictions were occasionally established. Ecclesiastical, local, and baronial courts slowly atrophied after the reign of Henry II. In the nineteenth century the English (national) court system was drastically revised as

part of a broad legal reform movement.

Before moving to a consideration of the writ system one exceptional and now infamous court merits mention. The Court of Star Chamber, established to check corruption among royal officials and because of the difficulty of controlling powerful magnates. Created in 1488 by Parliament, it "had authority to call before it and to examine all those charged with any misbehavior and to punish them on conviction." It began as a sort of "court for the poor against the rich," but its cruel misuse as a tool of political oppression under the Stuarts led to its abolition in 1641.[49]

The writ system was at the heart of medieval common law and contributed to the predictability which aided its rise to predominance. A "writ is a brief official document . . . ordering, forbidding, or modifying something."[50] The writ process evolved historically. Anglo-Saxon kings had used writs as early as 1000 A.D. They were retained and modified by the Normans.[51]

Originally Norman kings apparently used writs to issue orders and thereby avoid the courts. Because the king was the final source of law and/or justice, the possibility of obtaining writ relief induced many subjects freely to approach the

central government. Royal writs were not overlooked with impunity.[52]

The writ process gradually became judicialized and was made uniform under Henry II. Henceforth writs initiated all legal actions.[53] Writs were delivered by the sheriff and were returnable; that is, they summoned their recipients to appear in royal courts at specified times and places. Each writ had a specific purpose and form and was designed to remedy a special problem. Every writ also had its own unique wording and the smallest deviation therefrom generally invalidated it. In time individuals gained the right to obtain writs to grant them redress in civil actions.

The Chancery was the writ issuing bureau. Its head, the Chancellor, was originally the king's priest, and later became his chief legal advisor. Through time the responsibility for reviewing petitions for royal writs passed from the king to the Chancellor, who issued them in the name of the Crown. By 1474, the Chancellor, with his own court and a budding jurisdiction, was transacting business in his own name.[54]

In the years following Henry II the number of writs, and therefore the number of available legal remedies, proliferated rapidly. In Glanvil's day (ca. 1189) there were thirty-

nine writs. By the reign of Edward I (1272-1307) there were over four hundred.[55] Chancery seems to have issued new writs freely, as need became known in actual cases. Clerical innovation ("legislation") appears doubtful since judges controlled Chancery to a great extent through their ability to refuse cases if they deemed writs to be improper for any reason.[56]

The "writ system hardened and set in the fourteenth century."[57] The impossibility of obtaining new writs would have severely limited any possibility for growth in the common law except for three factors: the Writ of Trespass, the growth of Equity law as a correction for the rigidities of the common law, and the rise of Parliament as a legislative body rather than a group called by the Crown to grant taxes. Through elaborations of the Writ of Trespass, an action dating from 1252, the foundation of Tort law was established.[58] A trespass was an unlawful entry by one man upon the property of another and constituted a violation of the King's Peace.

Following the establishment of the various courts outlined above, the king and his curia regis retained final appellate jurisdiction. Appellants were required to use writs of error, and they came to address them to the Chancellor

rather than to the king. The Court of Chancery (Equity) began to assume modern form around the time of Henry VII (1485-1529) and was completed in the reign of James I (1603-1625).[59] The Chancellor was the keeper of the King's conscience and it was his court, Chancery Court, that developed the law of Equity. The Chancery was also the early compiler and keeper of a system of relatively complete, though brief, records on royal judicial proceedings. These records were for royal use only.[60]

Considerable dispute exists over the origin of the jury, but its origins in criminal actions seem relatively clear. It was introduced by the Normans as a sort of all-purpose administrative inquest and thus first appears at points of contact between royal and local authority.[61] From this evolved the Grand Jury, which probably originated under Henry II with the Assize of Clarendon. The use of juries by central courts was popular and enhanced their prestige. Taken in conjunction with the growing professionalism of royal judges and the final authority of the central courts, this contributed to the greatest legal predictability available in the realm. Litigants flocked to the royal courts.

The jury offered a new and humane mode of proof. Older methods customary among Anglo-Saxons and Normans were allowed to continue. These methods included ordeals, compurgation, and combat. Compurgation, which was most often used, consisted of the "documentation" of one's case by enlisting the aid of acquaintances to be "oath helpers" and was the most humane of these methods, but often not too predictable. In 1215 a declaration of the fourth Lateran Council categorically forbade judicial ordeals.[62] Since these ordeals were appeals to God and were administered by priests, this declaration marked their death knell.

The original jury could only offer presentments. The "petit" or trial jury evolved a bit later:

> By the time of Bracton (ca. 1250) when a man put himself upon the country . . . (after presentment) . . . he was tried by a jury of twelve . . . which determined his guilt or innocence of their own knowledge and not on evidence adduced before them. This was the origin of the petit jury. . . . (It) was not until long afterwards that the petit jurors lost their character as witnesses and became judges on the evidence given in open court.[63]

Not until the sixteenth century did juries become disinterested judges of fact. It was then that the use of witnesses in a modern way began and the early formulation of rules of evidence took place.[64] Jurors were held accountable by threat

of punishment for improper activities. Starting around 1600 the jury began to use its power of veto to protect political offenders who had gained popular support.[65]

In 1670 (Bushel's Case) Chief Justice Vaughan defined a jury's duties and position in such a way as to give the jury a large share of independence.[66] Prior to this case trial juries were subject to review by attaint juries when they rendered verdicts of not guilty. If the attaint jury decided that the trial jurors had lied, the trial jurors were punished by forfeiture of property. By the seventeenth century attaint juries were very reluctant to pass a judgement of guilty on petit jurors accused of lying. Bushel's Case established the precedent that petit jurors were free to render any verdict they desired.

Sources of the Common Law

The English common law is . . . "the oldest body of (European) law that was common to a whole kingdom and administered by a central court with nation-wide competence."[67] (The French Civil Code, for example, dates from 1804). The early date of the establishment of common law resulted in its unique development. On the Continent systems of Roman and

Canon law matured after the establishment of English common law.[68] Consequently, they never greatly influenced the development of English law.

The common law had its basis in feudalism. It was the creation of the king and the upper (landed) classes. Basically it was a law governing ownership of land and ordering human conduct in accordance with property rights. After the feudal system was largely gone from the land, following the War of the Roses, this feudal legal system remained.[69] Lord Coke's comments on Littleton's Treatise on Tenures helped to keep the common law primarily feudal system.

Originally all law and justice flowed from the Crown. Domesday Book had established the king as the supreme feudal lord of the realm. Though the king's theoretical supremacy in legal matters went without serious challenge until the seventeenth century, from the twelfth century the king gradually delegated more legal authority to judges, sitting in court, and later to parliament.

The foremost creators of medieval common law were the judges of the major royal courts. "English law of the twelfth and thirteenth centuries was judge made law to a degree unknown

in later periods."[70] Medieval common law was based largely on custom and precedent. Much of the early development was the definition of established custom and its recognition as part of the body of common law.[71] The courts were active in this process. Through the centuries legislation became a prominent source of law and the role of the judge became less prominent, but judges have retained a central and somewhat creative position in Anglo-American law.

The common law was not a written code. Early in the development of common law judges adopted the practice of regularly giving a statement of the reasons for their judicial decisions. This statement of fact and reasoning is known today as the ratio decidendi.[72]

In medieval law precedents set by judicial decisions were examples which helped to achieve judicial uniformity, but they weren't legally binding. Precedents were referred to in the same semi-formal way as customs.[73] In the thirteenth century, and long afterward, modern stare decisis, the common law practice of standing on precedent, was unknown because uniform case reports were not available to judges. Reliable and comprehensive law reports did not begin to be available until the seventeenth century. Modern law reporting emerged in the

eighteenth century.[74] Only then did modern stare decisis become fully possible. The United States Supreme Court is fortunate to have had an adequate system of reporting from its inception.

As important as the judges, who generally were drawn from their ranks after about 1300, were the lawyers. A class of professional lawyers emerged very early in the development of common law, and they were, and have continued to be, influential in shaping it. Originally they were mostly ecclesiastics. Under Edward I (1272-1307) professional temporal lawyers emerged.[75] English legal training, once done by the church, moved to the secular Inns of Court and became similar to guild training. Practically oriented, it trained technicians rather than abstract scholars. Students learned by contact with practitioners.[76]

Around 1300 laymen, rather than clerics, came to dominate the legal profession. At first, as was later the case in the American colonies, they were apparently trained while on the job, probably beginning as apprentices in the service of lawyers and judges. There was a need for a more formal method of training, but the Universities of the day could not provide it

since they were controlled by the Church, and therefore, while suitable for providing training in Roman or Canon law, not prepared to train laymen for the practice of the common law. The institutions that emerged to educate lawyers came to be known as the Inns of Court. Originally law students continued to be trained solely by contact with practioners, but they gathered into groups and rented inns in which to live. This was then a common practice among students, and is still practiced by some fraternities and sororities in present day America. From this practice of obtaining lodging came the term Inns of Court. The major inns were in London where they probably began to appear in the thirteenth century. In the early years they moved about as leases expired, but by the late fifteenth century they had acquired title to their sites and erected buildings which they owned. Also by this time they had developed a varied and technically complex legal curriculum and they enjoyed a monopoly in the field of legal training. During these times the men trained in law came from prosperous backgrounds, a circumstance necessitated by the expense of obtaining an education in law.

The men trained in this way were the judges and lawyers

of the fourteenth, fifteenth, and sixteenth centuries. In contrast to the earlier formative era, this was a dull period, but not unimportant, for during this time the common law gained a firm foundation. The lawyers of the period were "dry logicians. . . . The common law was made tough by these common lawyers, but perhaps it was this toughness which saved it from the Tudors and the Stuarts."[77]

The lawyers, beginning with Glanvil, molded common law in another way. They wrote the reports and law books which became the reference works of future generations. This is especially notable because of the importance of precedent in common law. The first lawbook was done by Ranulf Glanvil, Justiciar to Henry II. His Laws and Customs of England (ca. 1189) is primarily a catalogue of the writs of his day.[78] A second and greater work appeared in the mid-thirteenth century. Its author, Bracton, was an ecclesiastic. Bracton's book has been held the best treatment of English law until Blackstone's Commentaries,[79] though Thomas Littleton's Treatise on Tenures, published in the fifteenth century, was itself of major importance as was the great commentary on it by Justice Coke, always referred to as Coke on Littleton and,

as noted earlier, influential in prolonging the life of feudal law after the death of feudalism.

Edward Coke (1551-1633) was himself the author of Four Institutes on law which were tremendously influential, especially in America. Through his interpretation of Magna Carta he asserted judicial independence from the crown, a doctrine not accepted in England in his day, but fully implemented later, both there and in America, largely as a result of Coke. Coke's defense of this position incurred the wrath of James I, who relieved him of his judicial duties.[80]

Another author, very conservative, deserves mention. William Blackstone,[81] the author of the Commentaries (1765) was especially influential in America. There were few law books and his work was often the principal text for American lawyers in the early years of the republic. In England, Blackstone's work led Jeremy Bentham to dissent from the established views. While Blackstone was a major force for American legal interpretation in the nineteenth century, Bentham was a major progenitor of legal reform in nineteenth century England.[82] America, however, did not need many of England's reforms, in part owing to Thomas Jefferson's resistance to primogeniture.

Another great source of law in England was the Parliament. It emerged slowly. Legislation in any modern sense was completely alien to the twelfth and thirteenth centuries.[83] The early precursors of statutes bear a marked resemblance to treaties. Sometimes a king was forced to make concessions to the magnates of the realm; at other times early kings apparently felt it prudent to consult their subjects before issuing Assizes.

During the period between Henry II and Henry VII, the first Tudor, the Baronage was quite powerful, and the crown often found it impossible to control. In 1215 King John (1199-1216), a devious ruler with a record of repeated abuses of royal prerogative, was forced to grant, by the charter we call Magna Carta, a series of concessions to unhappy barons. Magna Carta limited the King, but left him power to govern.[84] This was not the last time the Baronage became discontent. Magna Carta was re-confirmed repeatedly by succeeding kings, sometimes more than once in a reign, in an attempt to please these powerful subjects. It became revered as a fundamental and basic guarantee of rights of Englishmen, especially after the seventeenth century, which creatively reinterpreted the original document. Associated with it was the idea of a

government of laws, and not of men, to which even a king was answerable for criminal conduct.

Edward I (1272-1307) in addition to reaffirming Magna Carta, called the first Parliament.[85] The early Parliament allowed the king to act with "the common counsel of the realm," and saved royal prerogative. Its concept of a "government of laws" has its basis in feudal contractual relations.[86] Chapter twelve of Magna Carta contained a precursor of the doctrine "no taxation without representation."[87] This made it popular with merchants and clerics, as well as gentry. It also made a Parliament a necessity when the Crown wished to levy taxes.

Parliament first legislated under Henry VI (1461), but control of the common law remained with the courts. Henry VIII (1529-1547) saved a Parliament that by his day was very weak and used it for his own purposes. In the process Parliament began to pass important legislation, and the judges stopped disregarding statutes. Legislation, like other law at this time, was the sovereign's command.[88] The seventeenth century saw Parliament rise to dominance, a process largely completed by the early eighteenth century. Parliamentary dominance made legislation, rather than judicial decisions or royal fiat, the

ordinary source of new law.[89] By the second half of the eighteenth century Parliament was legislating in a modern sense.[90]

The Civil War to the American Revolution: The Colonial Heritage

The fifteenth century saw the Wars of the Roses, a period of great disorder during which a large portion of the English nobility were killed off. It also saw the coronation of the first Tudor, Henry VII (1485-1529). The Tudors (1485-1603 collectively) restored order, strengthened the Parliament (Henry VIII), and are especially noted for putting the crown in the strongest position it had enjoyed since the reign of Henry II. They were followed by the Stuarts, who, beginning with James I (1603-1625) found themselves in conflict with the Parliament.

The Stuarts tried to rule in the high-handed Continental fashion of the day, attempting to control the courts and the Parliament. When the Parliament could not be controlled Charles I (1625-1649) moved to terminate the existing Parliament.

As the Royalists and Roundheads (Parliamentary faction) squared off during the century each attempted to justify its position philosophically. The Stuarts claimed to rule by

Divine Right, the doctrine that the King's temporal powers were given to him by a direct grant of authority made by God.

In formulating opposition strategy and philosophy many lawyers and judges, though not all of them, were in the front ranks. Most notable during the reign of James I was Edward Coke.[91] The arguments of the Parliamentary party were based on an interpretation of English political-legal history stressing the rights of Englishmen as based on several alleged precedents dating to at least Magna Carta. The position of the crown was further undermined when William I was portrayed as a usurper by some major leaders of radical movements at the time of the civil war.

As the Parliament successfully stood its ground and ultimately won the day these arguments hardened into Whig philosophy. That philosophy, most ably stated in 1690 by John Locke, stressed popular sovereignty, a government of laws and not of men based on contract and majority consent, separation of powers, and legislative primacy. The idea of a government of laws, and not of men, had originated not with Locke but with James Harrington, who proclaimed it in his book Oceana (1656). The stress on contract is a direct carryover from feudalism.[92]

The triumph of Parliament did not mean the immediate end of government arbitrariness. The Stuarts had initiated the use of Bills of Attainder as political weapons and the triumphant Parliament, jealous of its powers, was not above using the device. Furthermore, neither were the thirteen mini-Parliaments growing in the American colonies. Since the 1620's American institutions had been growing on the English pattern, and we will see examples in Chapter III of colonial legislatures summarily punishing persons charged with seditious libel.

The Development of American Common Law

America is a common law country, and the American legal system is an adaptation of British practices modified to suit the American experience.[93] The American colonies carried with them British practices, and even American innovations at the time of the revolution and the subsequent launching of the Republic generally have precedent somewhere in the British experience. During the eighteenth century American discontent with British administration gave rise to a philosophic controversy in which the dissident colonies fell back upon arguments similar to and largely based upon the philosophy of the late

seventeenth century Whigs.[94]

Important legacies from the medieval common law include the doctrine of a rule of law and not of men arising out of the concept of higher law as limiting all authority,[95] faith in written charters as fundamental legal contracts for a society, the dynamic role of the judges and courts,[96] adherence to a doctrine of judicial precedent, use of juries,[97] and, growing from the writ system, the definition of numerous distinct and separate causes of action. The influence of Whig thought, and especially of John Locke, on America is evidenced in the doctrine of popular sovereignty, separation of powers, legislative primacy and the American faith in bills of rights, an extension of the idea of constitutionalism designed to safeguard basic rights, including, in the United States Constitution, free speech and freedom of press.[98] These ideals, beliefs, and practices germinated and developed over the course of several centuries.

The independence initially enjoyed by the original states resulted in a Federal rather than Unitary national state. This has come to mean the existence of fifty state governments very similar to the federal government, and, except for Louisiana,

sharing the common law heritage. Some of the cases considered in subsequent chapters, though finally decided in Federal courts, were initially heard in state courts.

The American Constitution and Bill of Rights (Amendments one through ten), while grounded in the common law heritage, accomplished some significant innovations. The United States Constitution, unlike the British, cannot be changed by ordinary legislation. The American President never enjoyed the prerogatives so painfully wrested from the British king, though in this century the power of the Presidency has grown tremendously. The American Congress was expressly forbidden to engage in certain once common practices, including the passage of bills of attainder. Save for impeachment, the legislature has no judicial function. It is charged with the making of statutory law. The entire system of separation of powers is more sharply and thoroughly delineated in the Constitution of 1787 than ever before in a common law system of national government.

The most radical structural innovation is the position of the judicial branch. From the beginning (1789) it has been a distinct and separate branch of government. Unlike the British courts, American federal courts have established a power of judicial review over the Constitutional legality of acts of the

other branches of the Federal government. This is exercised by the Supreme Court. It may also review the decisions of state courts in some cases, and may hear and determine cases arising out of state actions on Constitutional grounds,[99] as may the lower federal courts.[100]

The American Federal judiciary, in addition to administering criminal laws and resolving civil conflicts, has a policy making function. "In the realm of the administration of the criminal law . . . (such as a law of sedition, it can make policy) . . . for example, when one of the provisions of the Bill of Rights is called into question."[101]

The United States Supreme Court is the paramount judicial policy maker because it is the highest court and because, in addition to its clearly delegated jurisdiction, it has a power of judicial review. Judicial review is:

> the power of the Supreme Court to pass on the validity of legislation in cases and controversies actually before it. (Federal courts may never render advisory opinions.) The standard is the Constitution, thought of as higher law and deemed to be binding on government at all levels.[102]

This power was first clearly established in the precedent making case of Marbury v. Madison (1803), but is not without substantial prior historical foundation.[103]

The Supreme Court is part of the system of separation of powers set up for our national government by the Constitution. It is the only Court specifically mentioned there (Article III)[104] and is granted a specific and limited original jurisdiction. Its much more important appellate jurisdiction is subject to legislative control, but has not been limited by the Congress. Congress also creates inferior federal courts (Art. I, Sec. 8, para. 9, and Art. III, Sec. I).[105]

The Court has complete authority to accept or reject cases on appeal. By controlling its own docket it may select only those issues it wishes to confront.[106] It procedes largely on the basis of judicial precedent and in so doing is aided by the complete case reports available in this country. A body of federal case law stands beside a body of federally legislated statute law.

Generally the Court follows precedent, but it can and does break precedent from time to time in Constitutional cases. While it stands, a precedent serves as law and as a judicial statement of policy. The Court has been more active in making policy during some periods, than during others.[107] It was reluctant to make policy during the period of Analytical Jurisprudence from roughly 1895-1930. Since then, especially

from 1937 to the resignation of Chief Justice Warren in 1969, it has tended to be an activist Court. Though even during this period many people have been reluctant to admit that the Court has any policy role, evidence seems to over-rule this view.

As early as 1920 (Gilbert v. Minnesota 254 U.S. 325) the Court was beginning to bring under its jurisdiction cases involving First Amendment freedoms, specifically speech. This was also about the time when the Court heard cases arising out of criminal syndicalism acts for the first time. It was in one of these that the Court completed its jurisdiction in cases involving the First Amendment freedoms of speech and press in 1925 (Gitlow v. New York).[108]

Conclusion

The substantive law of England and America developed within the institutional matrix here briefly summarized. Just as the institutions evolved slowly through the years, so the various areas of substantive law grew in the attempt to solve successive social problems in the context of their times.

Likewise the American colonists brought with them as part of their English heritage common law institutions which they later developed. The particular area of substantive law, seditious libel, with which this work deals evolved within that

larger institutional matrix having likewise itself been brought here by English colonists. It too changes over time as social and political issues of freedom of expression emerge on both sides of the Atlantic. As the respective needs and desires of the two societies changed so did the solutions preferred and embedded in the laws of each country.

Chapter I Footnotes

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[3]Jenks, p. 16.

[4]Ibid., p. 15.

[5]Rudd, p. 12.

[6]R. C. van Caenegem, The Birth of the English Common Law (New York: Cambridge University Press, 1973), p. 9.

[7]Ibid., pp. 9-10.

[8]Ibid., p. 10.

[9]Jenks, p. 17; see also: Hugh Evander Willis, Introduction To Anglo-American Law (Bloomington, Indiana: Indiana University Press, 1931), p. 83.

[10]Theodore F. T. Plucknett, A Concise History of the Common Law, 5th ed. (Boston: Little, Brown, and Co., 1956), p. 12.

[11]Ibid., p. 13.

[12]Ibid., p. 12.

[13]van Caenegem, p. 97.

[14]Ibid., pp. 97 and 109.

[15]Willis, p. 87.

[16]Ibid., p. 90.

[17]Rudd, p. 11.

[18]Arthur R. Hogue, Origins of the Common Law (Bloomington, Indiana: Indiana University Press, 1966), p. 6.

[19]van Caenegem, p. 27.

[20]Ibid., p. 9.

[21]Ibid., p. 11.

[22]Rudd, p. 11; see also: Jenks, p. 19.

[23]van Caenegem, p. 13.

[24]Rudd, p. 17.

[25]Plucknett, p. 16.

[26]van Caenegem, p. 100 (Quoting from: Painter, English Feudal Barony, p. 193).

[27]Ibid., p. 102.

[28]Plucknett, p. 18.

[29]van Caenegem, p. 102.

[30]Plucknett, p. 17.

[31]Ibid.; Also: Willis, p. 82.

[32]Jenks, p. 15.

[33]Willis, p. 96.

[34]Plucknett, p. 112.

[35]Hogue, pp. 81 and 153; Also: van Caenegem, p. 42; Also: Plucknett, p. 19.

[36]van Caenegem, p. 29.

[37]Ibid., p. 82.

[38]Ibid., p. 21.

[39]Willis, p. 90.

[40]Rudd, p. 12.

[41]Hogue, pp. 143-144.

[42]Ibid.

[43]Willis, p. 90.

[44]Rudd, p. 12.

[45]Ibid.

[46]Willis, p. 91.

[47]Rudd, p. 13.

[48]Willis, p. 91.

[49]Ibid., p. 114.

[50]van Caenegem, p. 30.

[51]Ibid.

[52]Ibid., p. 35.

[53]Ibid., p. 40.

[54]Rudd, p. 26.

[55]Hogue, p. 12.

[56]Ibid., p. 22.

[57]Ibid., p. 14.

[58]Ibid., p. 16.

[59]Willis, p. 101.

[60]Hogue, p. 170.

[61]Plucknett, p. 136.

[62]van Caenegem, pp. 68-69.

[63]Willis, p. 95.

[64]Willis, p. 115.

[65]Plucknett, p. 134.

[66]Ibid.

[67]van Caenegem, p. 88.

[68]Ibid., p. 108.

[69]Ibid., pp. 87 and 97; Also: Jenks, pp. 17-18.

[70]Hogue, p. 191.

[71]Ibid., p. 76.

[72]Rudd, p. 23.

[73]Hogue, p. 187.

[74]Rudd, p. 24.

[75]Willis, pp. 97 and 99.

[76]van Caenegem, pp. 88-89.

[77]Willis, p. 100.

[78]Ibid., p. 150.

[79]Ibid., p. 152.

[80]Ibid., pp. 158-159.

[81]Ibid., pp. 167-168.

[82]Ibid., p. 169.

[83]Hogue, p. 6.

[84]Ibid., pp. 42-52.

[85]Willis, p. 99.

[86]Hogue, p. 108.

[87]Ibid., p. 50.

[88]Willis, p. 99.

[89]Ibid., p. 117.

[90]Hogue, p. 180.

[91]Carl J. Friedrich, The Philosophy of Law in Historical Perspective, 2nd ed. (Chicago: The University of Chicago Press, 1963), Chap. X.

[92]van Caenegem, p. 109.

[93]Roscoe Pound, The Formative Era of American Law (Boston: Little, Brown, and Co., 1938), Chap. 3; see also: Joseph C. Hutcheson, Jr., "The Common Law of the Constitution," Texas Law Review 15 (1937): 317.

[94]Thornton Anderson, Jacobson's Development of American Political Thought (New York: Appleton-Century-Crofts, 1961), chaps. 6 and 7.

[95]Hogue, p. 237.

[96]Hutcheson, see generally, especially p. 320.

[97]Hogue, p. 238.

[98]John Ferguson and Dean McHenry, The American System of Government, 12th ed. (San Francisco: McGraw-Hill Book Co., 1973), chaps. 1 and 6. (This provides a brief but helpful introduction to the subject matter compacted into a few phrases in this thesis.)

[99]Alpheus T. Mason and William M. Beaney, American Constitutional Law, 5th ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1972), p. 3.

[100]Harold J. Spaeth, An Introduction To Supreme Court Decision Making (San Francisco: Chandler Publishing Co., 1972), chap. 4; Also: Mason and Beaney, chap 1, especially pp. 1-9.

[101]Spaeth, p. 2.

[102]Mason and Beaney, p. 16.

[103]Roscoe Pound, The Development of Constitutional Guarantees of Liberty, 5th printing (New Haven: Yale University Press, 1967), pp. 78-81 and 110-111; also: Mason and Beaney, pp. 13-26.

[104]U.S. Const. art. III.

[105]U.S. Const. art. I, sec. 8, para. 9; Also: art III, sec. I.

[106]Spaeth, p. 17.

[107]Mason and Beaney, pp. 25-26.

[108]Ibid., pp. 528-529.

CHAPTER II

THE EVOLUTION OF SEDITIOUS LIBEL IN ENGLAND FROM THE TUDOR ERA TO 1843

A seditious libel is a publication which the government finds repugnant, usually on the grounds that the libel defames the government and thereby threatens its efficacy or survival. From the days of the Tudors, when the law of seditious libel was already firmly established, to the middle of the nineteenth century there occurred major changes in the substantive law of seditious libel, in trial procedures, and in the scope of liability. The strength of the governing order varied, as did its relation to its people and the interrelations of its branches. Still, a seditious libel remained at base a publication which the government felt to be repugnant as dangerous to its operation or security.

Truth was no defense against a charge of seditious libel. This doctrine began at least as early as the time of the House

of Tudor, and may have been in force even earlier. Upon inspection the cruel logic of this position becomes obvious. The law was designed to control communications in an attempt to prevent opposition to the government or its policies. It was felt that criticisms might lead to opposition or even insurrection. If this is allowed, then obviously a true criticism is more dangerous to domestic peace than a false one, for the former is more apt to stir people to action.

During medieval times English kings were usually embroiled in a struggle for power with the Baronage. At the end of the War of the Roses the Tudors centralized the nation under their rule, but this did not bring domestic tranquility immediately. Furthermore, they soon found themselves embroiled in religious conflicts, first with Rome, and later with Puritan reformers. Under such conditions criticism of the government by anyone tended to weaken it and encourage its rivals. In consequence the government was very intolerant of such criticism and usually dealt with it as sedition.[1]

Acts attempting to prevent seditious behavior had been enacted as early as 1275. In that year an act outlawed "any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great

men of the realm."[2] It was re-enacted in 1379 to prevent "subversion and destruction of the said realm"[3] through speech judged by relevant authorities to involve false statements or accusations. These early laws do not refer clearly to what we call seditious libel, though they do try to prevent similar behavior, and apparently could in fact be used to prosecute a seditious libeller. These acts are more directly concerned with slander, that is, verbal defamation, than with libel, which is written. In the middle ages slander and libel were first differentiated because of the political importance of the latter type of defamation. Originally, prior to the advent of printing, this, rather than the question of the written or oral character of the defamation, appears to have separated the civil offense, slander, from the criminal offense, libel.[4]

As growths from this beginning, four major classes of libel eventually can be identified. They are: 1)obscene or immoral libel; 2)private libel, a crime of printing or writing defamation against an individual; 3)blasphemous libel, an offense against the church; and 4)seditious libel. Each offense came to have its own substantive law. Seditious libel and blasphemous libel are in many ways similar: both are defamations of an institution which controls human conduct.

Though today the influence of the church has waned greatly when compared with its position in the fifteenth and sixteenth centuries, we should note that one reason for the early common law of seditious libel was to aid the secular government in its frustration of church political aspirations. In fact, secular rulers often copied techniques of social control used by the church. Seditious libel and the control of presses through licesing are cases in which this appears to have happened. As a result of the Reformation the English King became also the head of the nation's church. "Nonconformity and heresy became virtually indistinguishable from sedition and treason."[5] This parallelism gradually disappeared, though not without a struggle, in the eighteenth and early nineteenth centuries.

We should note that seditious libel is in a way an odd offense, a mixture of a civil and a criminal offense. Some categories of libel are not criminal offenses. Personal libel, for example, can be tried as a civil offense. Sedition is a criminal offense against the governing order. As with libels, we find several classes of sedition; seditious words, seditious libels, and seditious conspiracies. All of these involve expression of dissatisfaction with the conduct or norms of the

ruling order and/or its personnel.[6]

Seditious libel is, then, one of several types of seditions and libels. It is a criminal offense which was originally a felony. The Tudors dealt with offenders in Star Chamber, the court instituted by them in which even the most powerful subjects of the realm could be called to account for criminal conduct. Sedition and treason being offenses against the monarch and his realm, no privilege was allowable to men of high rank to violate laws against these crimes or to escape punishment for violation, or to enjoy lesser punishment for violation. On the contrary, where these offenses were invloved, the greater the rank of the offender the greater the offense and the more sure and awful the retribution.

During the period from the end of feudalism until the burgeoning of industrialism there was more case law than legislation. Still, acts dealing with sedition, libel, and printing can be found. There were at least three during the reign of Elizabeth, two of which dealt specifically with press censorship.[7] According to an act of 1581 which was designed to prevent sedition

> if any person . . . shall advisedly and with a malicious intent . . . devise and write, print or set forth any manner of book . . . or writing containing

> . . . seditious . . . matter to the defamation of the Queen's Majesty . . . or . . . encouraging . . . any insurrection . . . within this realm . . . and the said offense not being punishable . . . (as) . . . treason . . . then every such offense shall be deemed felony.[8]

Punishment upon conviction was death and forfeiture of all real property to the ownership of the Crown. In short, sedition was considered virtually as dangerous as overt treason.

An Elizabethan Statute of 1586[9] was probably the first fairly comprehensive ordinance dealing with the control of printers and printing. It was clearly political, motivated "by reason . . . (of) . . . sundry intolerable offenses, troubles and disturbances . . . as well in the church as in the civil government of the state" which its framers attributed to an unlicensed and licenscious press. Provisions of this act established registration of presses and a system of prior censorship under the supervision of the Archbishop of Canterbury, the Bishop of London, and the Company of Stationers. Even the number of apprentices which a printer could have at one time was limited. This ordinance extended to all persons engaged in "the trade or mystery of printing, bookselling or bookbinding."

Under this ordinance failure to register a press resulted in its destruction and its owner's imprisonment for one year

without bail. One of the act's express purposes was to limit the number of presses in operation and thus rid the realm of an "excessive multitude of printers." Section four of the ordinance made it illegal to "imprint any book against the form or meaning of any restraint or ordinance contained in any statute or laws of . . . (the) . . . realm." This statute was re-enacted by James I in 1623.[10]

During the Tudor and Stuart era the object of the law of seditious libel was to prevent criticism of the government, especially if that criticism might lead to violent actions. The medieval English mind never seems to have considered the possibility of allowing free political discussion. Even Lord Coke, who, though in many ways a truly conservative jurist is generally thought of today as a liberal because of his struggle against the Crown for judicial independence and his role in securing the adoption of the Petition of Right in 1628, fails to mention such freedoms.[11] He states that seditious libel is a grave offense, more serious than a private libel, because the former may not only lead to a breach of the peace (something which private libel may also cause), but also to a scandal of government.[12] Medieval England, just emerging

from Feudalism, was too busy worrying about the security of the nation-state to indulge in much discussion of civil rights such as freedom of speech and press. The substance of Coke's definition of seditious libel, which is found in his Reports under the heading "De Libellis Famosis", is "written censure upon public men for their conduct as such, or upon the laws, or upon the institutions of the country."[13]

A person could commit the crime of seditious libel by criticizing the nobility, including, of course, the monarch, or the Parliament, or any agency of government. To illustrate we will jump forward in time. In 1777, for example, one Horne Tooke was prosecuted. His specific crime was printing criticism of the role played by British troops in the American Revolution.[14] The case of Rex v. Owen (1752) was a prosecution based on an alleged libel of the House of Commons. In the publication for which he was prosecuted Owen had accused the House of Commons of unjustly and oppressively imprisoning one Alexander Macdonald on account of his behavior during an election.[15] The case of Rex v. Woodfall (1770)[16] was one of three cases resulting from the publication of the so-called "Junius" letters critical of the King. "Junius", whose true

identity is unknown, secretly wrote these letters, and they were clandestinely delivered to Woodfall who published them in his Public Examiner from 1769 until 1772. The letters were critical of the men forming the king's government during these years. It was for the publication of letter number XXXV[17] on December 19, 1769 which criticised King George III that Woodfall was indicted. His trial resulted in acquittal.

Members of virtually every social stratum were vulnerable. William Prynne, a Puritan, was a barrister of Lincoln's Inn. This indicates that he was a man of some substance at the time of his prosecution for the publication of a seditious libel in 1637[18] since the expense of legal training barred all but the wealthy from pursuing that profession. One result of his conviction in this case was disbarment. Another man of high rank punished for seditious libel was Algernon Sidney, a member of the nobility. In Sidney's case there were other charges also; the actual prosecution was for treason. He had for all of his active life been associated with the movement which opposed the King and desired popular sovereignty and parliamentary government. He was implicated in the Rye House plot, a scheme to sieze the royal person and force from him

concessions. Sidney was arrested and his papers, including an unpublished political treatise, were seized. During his trial portions of this treatise were taken from context by the prosecution to establish guilt.[19] Because the charge was treason the prosecution was required to produce two witnesses in court to verify the charge. When only one could be produced, Judge Jeffreys ruled that the portions taken from Sidney's treatise could substitute as the second witness. Algernon Sidney was convicted and put to death, but he continued to be influential as a Whig martyr to the cause of resisting tyranny, a cause of which one component was the opposition to the law of seditious libel.

The Stuarts made much more frequent use of the law of seditious libel than had their precursors, the House of Tudor.[20] This is true both before the Protectorate and after the Restoration. Seditious libel proceedings in the Star Chamber, prior to its abolition in 1641, were stern matters in which judges heard cases without juries. Punishments were cruel and often horrible. William Prynne, as a penalty in the case mentioned above, had his ears shorn. John Lilburne, aged twenty-one, was brought before the Court of Star Chamber shortly after Prynne.[21] Lilburne's crime was his involvement in the publication of some pamphlets deemed seditious. He was convicted,

pillored, "whipped at cart-tail through the streets of London," then jailed. (Punishments similar to this, however, were not uncommon or reserved only for sedition.)

A case that occurred during the reign of Charles II was more grim.

> In 1663 . . . William Twyn, for printing a book that endorsed the right of revolution, was held to have compassed the king's death; Twyn was sentenced to be hanged, cut down while still alive, and then emasculated, disemboweled, quartered and beheaded--the standard punishment for treason.[22]

Twyn had been convicted of a "Constructive treason" as a result of his publication. This was not an uncommon practice under the Tudors and Stuarts. The practice of convicting seditious libellers of constructive treason died out after Rex v. Mathews[23] in 1720.

Any piece of written or printed material could contain a seditious libel. In addition to books, pamphlets, and newspapers, even personal letters could provide grounds for a prosecution of seditious libel. To modern students this may be unexpected, and certainly seems unfair. In the age when printing was in its infancy and completely controlled by the government, however, it is not too surprising. The masses could not read or write during the Tudor and Stuart periods. The class which was literate was the same relatively small class at the

top of the social hierarchy which was the class of political influentials. Because of the difficulty of getting works printed when there were few presses and typesetting was done manually, it was common practice for these literate and influential aristocrats to write tracts and circulate them in manuscript among friends. This was a traditional method of communication pre-dating printing which had proved to be an effective mode of communication for all forms of literature from poetry to political discourses. As to the question of fairness, it was virtually unconsidered by the rulers, especially the Stuarts, whose desire to muzzle critical political discussion of all forms was well served by a strict law. The leading case of prosecution for personal writings is the case of Algernon Sidney.[24] Sidney's offense was not, however, the writing of a letter. He had written a treatise critical of the government. The unpublished manuscript was discovered in his study. Based in part upon this he was convicted of treason and punished accordingly.

Not only were the authors of seditious materials liable to punishment; any publisher, seller, or distributor was also liable. Publishers could also be punished for acts of their

servants about which they had no knowledge. "In the case, for instance, of R. v. Cuthill, evidence was given to show that the pamphlet in question was by a classical bookseller (Cuthill), who had never read it, and who published it under the impression that it was not a political work at all . . ."[25] . . . . because the author of the pamphlet in question did not generally write about politics. The actual work involved in the printing had been done by persons working for Cuthill. Cuthill's attorney maintained that although the book had in fact been printed by Cuthill's shop the bookseller deserved acquittal if it could be proven that the publication had been issued through negligence and without intent. The judge took scant notice of this point and Cuthill was convicted. Following this case other convictions were secured under similar circumstances with no question as to their legality until 1843 when the Campbell Act accepted and made lawful as a defense in such cases the position put forward by Cuthill's attorney.

The control of the press through licensing acts has been previously adverted to, along with specific mention of press control acts from the reigns of Elizabeth and James I. The licensing acts, which were administered through the Royal Stationers and acts of Star Chamber,[26] were apparently never

challenged by Westminster Hall or the Parliament prior to the Puritan Revolution. These acts and controls helped the government to prevent what it deemed sedition through an open system of prior censorship administered by the state. Any person who published without a license was subject to a libel prosecution.[27] When William Caxton introduced the first press into England in 1476 he did so under special encouragement from Edward IV. The king granted Caxton a charter allowing him to operate his press. Thus, from its inception, printing was carried on in England under firm control of the crown.[28]

Printing did not begin to be widespread in England until the middle of the sixteenth century. It posed a problem of control which the crown met by continuing to control the presses. This control extended to their locations and numbers as well as to what could be printed.[29] Formal controls were first imposed by Henry VIII.[30] They were elaborated under both Elizabeth and James I. "Until the year 1640 the Crown . . . . exercised this restrictive jurisdiction without limit, enforcing by the summary powers of search, confiscation, and imprisonment, its decrees."[31] In 1640 the system was abolished by the new government.

In 1641, following the abolition of Star Chamber, the common law courts assumed jurisdiction over cases of seditious libel. All such cases now would be tried to a jury, and the crime of seditious libel became a misdemeanor rather than a felony. Another result, not directly important in the development of seditious libel, was that the modern civil law distinction between libel and slander emerged at this time, libel being "thenceforth reserved as the term for the more obviously deliberate and malicious written defamation."[32]

The period without controls on publication was short. Despite an eloquent plea against it (Areopagitica (1644)) by no less a figure than John Milton the Parliament retained the controls that it had re-instituted on publications in 1643.[33] Similar acts were passed after the restoration in 1662, 1685, and once after the Glorious Revolution, in 1692.[34]

The Commonwealth also had its own laws of seditious libel. Joseph R. Tanner tells us:

> The attacks of the Royalists on the one side and of the Levellers on the other constituted a real danger for the newly founded Commonwealth . . . . it was obligated to adopt measures which savoured a good deal more of an ancient despotism than a new republic . . . . On July 17, 1649, an Act 'declaring what offenses shall be adjudged treason' made a wide departure from the older conception of treason as mainly consisting of an overt act proving the

> traitorous imagination of compassing the King's death or levying war against the King, and recast the law to meet the new circumstances of the case. It was now declared to be treason 'if any person shall maliciously or advisedly publish, by writing, printing, or openly declaring,' that the Government of the Commonwealth is 'tyrannical, usurped, or unlawful; or that the Commons in Parliament assembled are not the supreme authority of this nation; or shall plot, contrive, or endeavor to stir up or raise force against the present Government or for the subversion or alteration of the same,'. . . In September, 1649, an Act was passed forbidding the publication of any 'book or pamphlet, treatise, sheet or sheets of news' without a license, and imposing a penalty for spreading abroad scandalous or libellous books--not only for the author, printer, and seller, but also on the purchaser if he did not inform within twenty-four hours.[35] (Tanner does not tell us the nature of the penalty, nor does he give the number of prosecutions under these acts.)

Although they could no longer employ the Star Chamber, the Restoration Stuarts continued to try to prevent or punish seditious publications. Such cases were now misdemeanors rather than felonies and therefore punishments were much less harsh.[36] The Crown would resort to the device of an ex officio information obtained through the attorney general.[37] This procedure bypassed the grand jury in securing an indictment, but the actual case was heard and decided by a jury.

In 1694 Parliament finally abolished the licensing acts. One impact of this was that henceforth politically dangerous libels had to be dealt with as seditious libels rather than as unauthorized publications.[38] The presses were free of prior restraint, but not free from all restraint since writers,

printers, and publishers were still liable to be prosecuted for what they printed. Seditious libel became the chief government tool to control the press. According to Chief Justice Holt in Tuchin's Case (1704) the concept behind seditious libel was then understood to be that

> 'a reflection on the government' must be punished because, 'If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.'[39]

On this basis there were hundreds of convictions in the seventeenth and eighteenth centuries.[40]

During the turmoil of the seventeenth century the Parliament gained the privilege of unfettered speech. This did not mean that it became a champion for a democratic sharing of this privilege: quite the contrary. Parliament was apt to become enraged by what seemed to it seditious libel, especially if the libel was aimed at Parliament. "Between the Restoration (1660) and the Revolution there were no less than forty-two cases of imprisonment by order of the House of Commons for criticising Parliament or some member of Parliament."[41] This practice continued after 1689. Defendants were tried in summary fashion. Their works were burned. They were fined, humiliated, and sometimes imprisoned.[42]

The zealousness of the Parliament is illustrated by the case of Rex v. Woodfall (1770). Woodfall was prosecuted for seditious libel on an information for publication of the Junius letters but was not convicted. In 1774 the Commons prosecuted him for the very "same offense, imprisoned him and extracted costs of seventy-two pounds."[43] In the eighteenth century the Parliament apparently exerted as much if not more pressure against free publication than did the common law courts.[44] Fortunately for the defendants the crime was no longer a felony; as a misdemeanor it carried a milder sanction.

Intent, which has not yet been mentioned, is an important component of the crime of seditious libel. The statute of 1581 quoted earlier said in part ". . . if any person . . . shall advisedly and with a malicious intent . . . devise and write, print or set forth any manner of . . . seditious matter. . ."[45] that person would be guilty of a felony. The reference to malicious intent is important. "To be a crime, the publication of a libel must always have been intentional. Moreover, the meaning of the whole of the words published taken together must always have been intentional."[46] In fact, however, the law did not always operate this way. The case of Algernon Sidney,[47]

in which he was condemned based in part on passages taken from the context of a manuscript never made public by its author is probably the leading example. Sidney was a victim of the excesses of the Restoration Stuarts. This provides an illustration of the illegal use of law by the "legitimate" authorities. Such "use", or rather misuse, is apt to be especially bad when it leads to the amplification in scope of an already repressive measure.

Intent to defame is closely bound to the issue of truth. So long as truth was no defense the prosecution had merely to prove that the accused libeller had intentionally written, printed, or distributed the material in question. This was the basis for a legitimate, lawful conviction, though we would not accept it as valid today.

In 1769 Sir William Blackstone published volume four of his Commentaries, the volume which dealt with public wrongs. Blackstone's work was not a compendium of statutes, but rather an organized scholarly essay. It enjoyed deep esteem among the legal profession, and because it is considered an authoritative work on the law of its day, we will look at length at Blackstone's remarks concerning seditious libels:

> . . . libelli famosi (Defamatory Writings), . . . taken in their largest and most extensive sense, signify any

> writings, pictures or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public either by printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to public hatred, contempt and ridicule. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed.
>
> The communication of a libel to any one person is a publication in the eye of the law; and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate its guilt and enhance its punishment.
>
> . . . . But in a criminal prosecution, the tendency which all libels have to create animosities and to disturb the public peace is the sole consideration of the law. Therefore, in such prosecutions, the only points to be considered are, first, the making or publishing of the book or writing, and, secondly, whether the matter be criminal: and, if both these points are against the defendant, the offense against the public is complete.[48]

The sanctions include fines and other (corporal) punishments.

In the closely related section on "Liberty of The Press", Blackstone contends that this is an essential liberty which "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." It is the right of every free man to publish what he pleases; "he must take the consequence of his own temerity." To

> punish any dangerous or offensive writings which, when published, shall on a fair and impartial trial be

> adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion--the only solid foundations of civil liberty.[49]

Blackstone was a conservative jurist. His treatment of these topics in 1769 does not differ significantly from Coke's position a century and a half earlier. Even at the time Blackstone wrote, however, his position was in fact seriously undermined. Changes in the relationship of the government to the people and in the role of juries in trials dealing with seditious libel had been evolving toward the point at which, in 1769, the substantive law of seditious libel was approaching change. The change would be formalized in two increments, one in 1792 (Fox's Libel Act) would re-define the role of the jury; the second, in 1843 (Lord Campbell's Act), would allow truth as a defense in some cases. As these changes occurred the relationship of intent to the crime would change beyond Blackstone's recognition.

In the eighteenth century the Court, in determining law in cases of seditious libel, left only one fact for the jury to determine: the fact of publication. In 1731 a criticism of the government's foreign policy regarding relations with European allies appeared in the Craftsman. This periodical was under the control of the Tory party and was used primarily by that party, which was then out of power, to criticise the actions of the Whigs who were in control of the government. The objectionable article was written by Lord Bolingbroke, the leader of the Tories, who also had helped found the Craftsman, but the periodical's

publisher, one Franklin, was prosecuted for seditious libel. During the course of this trial the judge definitely ruled on the jury's role.[50] He stated

> . . . 'whether these defamatory expressions amount to a libel . . . does not belong to the office of the jury (to determine), but to the office of the court.' He also said that if the innuendoes were proven, 'I must say that they are very scandalous and reflecting expressions . . . . So, gentlemen, if you are . . . convinced that the defendant published that Craftsman . . . and that the defamatory expressions . . . refer to the ministers of Great Britain, you ought to find the defendant guilty.'[51]

Franklin was convicted. This is not too surprising since the judge had more or less directed a verdict. The position of the court and the directions of the judge in this case exemplify the norm for such cases from the time of the Stuarts[52] until the end of the eighteenth century. Juries were not always so easily controlled, though it is true that through the first half of the eighteenth century they rarely gave any resistance to the Court.

An early example of jury independence in cases of seditious libel is the Seven Bishops' case (1688). The bishops had expressly criticized King James II in a petition privately delivered to the king, for issuing a religious Declaration of Indulgence. The bishops maintained that the king had overstepped his power by making this law and that the Declaration was therefore illegal. In court the prosecution contended the petition was libellous because it attempted to restrict the power of the Crown, and at one point prosecution went so far as to deny the right to petition the Crown. The defense pled innocence based on the contention that the petition was entirely true and the

fact that it was delivered privately to the king. The jury found the bishops innocent.[53]

This case, however, was in all respects too unusual to stand as legal precedent. The bishops, because of the position of the Episcopal church, were certainly not ordinary defendants. This circumstance must have affected the jury's behavior. Even the judges were divided, two for conviction and two for acquittal. The proceedings were of an irregular nature. The bishops pled in defense that their remarks were true, and though this was not a lawful defense, it was allowed. Further, the jury was allowed extraordinary latitude in reaching its verdict; it appears really to have decided questions both of fact and of law. The latter were, of course, beyond its lawful competence. The judges allowed this because of the delicate question involving the king's "dispensing" or lawmaking power in an apparent attempt to duck personal responsibility. When the bishops' contentions were adjudged true, the Crown's power was limited and the alleged libel involved no falsehood. Had the bishops' contentions been deemed false, through intent or mistake, there would have been no possible way to avoid a conviction for seditious libel.

With the exception of this case, Rex v. Owen (1752) is the first case in which a jury returned a general verdict of not guilty in a case of seditious libel. While the return of a verdict of innocent is of course always within a jury's legal competence, up to this time concern for law and order and the security of the ruler had worked against a finding of innocence. In this case the jury, in exercising its proper legal prerogative,[54] was essentially taking the view that public safety and the ruler's position were not threatened.

In 1770 three men, Almon, Miller, and Woodfall, were tried separately for their involvement in the publication of the "Junius" letter which criticised the king. Almon was convicted. Miller was clearly acquitted by the jury. The jury found Woodfall "guilty by publishing only."[55] Lord Mansfield, presiding over these cases, gave the customary instruction to the jurors concerning their role and its limitations, instructions similar to those given by Lord Holt in Tuchin's Case. The cases were not appealed, but based on Mansfield's instructions certain members of the House of Lords became aroused. They were critical of Mansfield and of the whole doctrine of limiting the role of the jury to determining only the fact of

publication. They addressed several questions to Mansfield concerning the intent of his opinion: did it mean that the jury could not examine the documents in question in order to establish whether or not they were criminal? (in fact the jury could not do this); could the questions of fact and of law really be neatly separated in seditious libel cases?; if a jury found a defendant had printed the document in question but said that it was not of a criminal character, did the court necessarily have to find the defendant guilty? (Rex v. Woodfall must have posed this question.)[56] Mansfield refused to answer these questions; but the time was not too far off when they would appear again, and be answered by legislation (Fox Act).

Thomas Erskine, the most notable advocate of the right of free political expression, raised the same question a few years later. During his career he served as a member of both Houses of Parliament, and in the posts of Attorney General and Chancellor, but his enduring fame was achieved as an attorney defending political offenders in cases of treason and libel. Of the libel cases Erskine argued, the most significant was the Dean of St. Asaph's Case (Rex v. Shipley-1783).[57]

The case arose after the publication of a pamphlet entitled A Dialogue between a Gentleman and a Farmer published by the Dean of St. Asaph's (Shipley) but written by the Dean's brother-in-law. During this period there was a general agitation in England for recasting the system of representation, an agitation due to the reverse of the American War. The pamphlet in question was occasioned by this controversy. It was a work devoted to the principles of government and the objection to it was that "towards the end of the pamphlet the right of subjects to bear arms was noticed in a manner capable of being represent- by a hasty reader as advice to them to rebel."[58] The prosecution resulted from an indictment initiated by a private individual after the crown had declined to prosecute.

In this case the jury rendered a verdict of "guilty of publishing" without ruling on whether the publisher had criminal intent. There was confusion as to what the actual verdict should be. What was in effect a debate between the Court and Counsel for defense ensued during which Erskine argued that the jury's verdict should be recorded as "guilty of publishing only." The judge pointed out that the jury could not judge the criminality of the printed matter for this was a question of

law, and that the inclusion of the word "only" would therefore render the verdict meaningless. The jury agreed that the verdict should therefore not include the word "only".[59] The case was retried during the Court's next term. Erskine maintained at this trial that the questions of criminal[60] or seditious[61] intention were questions of fact which should be for the jury, not questions of law. The general thrust of his argument was for the jury to give general verdicts of guilty or not guilty in cases of seditious libel.[62] This case raised the issue of the jury's role in cases of seditious libel to prominence and is generally credited as having influenced the framers and supporters of Fox's Libel Act (1792).

In Woodfall's case (1770), Lord Mansfield had admitted that under some circumstances publication of a libel might be justifiable.[63] In two other cases, Horne Tooke's case (1777) and Rex v. Stockdale,[64] which was tried sometime during the period between 1783 and 1792, it was established that the author's intent in publishing, an important question, may differ from the intent of the words. Horne Tooke called the troops employed against the American colonies murdurers. In defense he offered a witness who had served as an English

military officer at Lexington in an attempt to prove that the charge was true. Of course truth was no defense, but in Tooke's case the issue of truth led to a question of intent. If Tooke had referred to "the employment of the troops under proper authority," said Lord Mansfield, the judge in this case, then truth was no issue and he was clearly guilty. But if the charge of murder had referred to men involved in "a lawless fray," the point which Tooke's counsel apparently tried to prove by introducing Mr. Gould who had served at Lexington, then no criminal libel was involved, because such a criticism, aimed at lawless individuals, would not have been made with intent to defame the government.[65]

In Stockdale a similar question of intent was raised. Stockdale's crime was the publication of a pamphlet, which he had not written, which defended Warren Hastings and denounced his detractors. The charge was a libel on the House of Commons but counsel for defense, Thomas Erskine, set out to show that the criticism was aimed "not to the House of Commons as a whole, nor to their public conduct but to the proceedings of some particular persons." Stockdale was acquitted, apparently because the prosecution failed to show that he had intended to

criticise the whole House. The issue of intent here was fundamentally the same as the issue in Horne Tooke's case: a criticism aimed at individuals would not have been made with intent to defame the government. Up to 1792, the conclusions to which these admissions might lead in the law of seditious libel remained far from certain. That same year Fox's Libel Act (32 Geo. III, c. 60) was passed. This act effectively granted the jury the right to return general verdicts of "Guilty" or "Not Guilty" in seditious libel cases.[66] The eventual result was that juries allowed reasonable political dissent by denying its criminality in cases brought to their consideration. This result, however, was not immediate. During the years of English-French conflict, which continued from the last decade of the eighteenth century through most of the first two decades of the nineteenth, juries tended more often to side with the government than with its critics.[67]

The Libel Act enlarged the older definition of seditious libel which has been summarized as ". . . written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever . . ."[68] to include reference to the libeller's specific intent and purpose thus turning into solid statute law changes adumbrated in the cases of Woodfall,

Tooke, and Stockdale. The working definition of a seditious libel after passage of the Libel Act became "(in general terms) . . . blame of public men, laws, or institutions, published with an illegal intention on the part of the publisher."[69] That is, publication is no longer sufficient proof; deliberate intention also has to be demonstrated as fact to the jury's satisfaction.

This doctrine opened the possibility of criticizing the government without acting unlawfully. The case of the proprietors of the Morning Chronicle (1810), Lambert and Perry, provides an illustration. They criticized the king's policy, were tried on a charge of seditious libel, and were acquitted. This case is cited as the earliest one "in which a judge of . . . high authority . . . distinctly said that it was no libel to say that a king was mistaken in the whole course of his policy."[70]

Following the passage of the Reform Act of 1832 prosecutions for seditious libel virtually ceased.[71] With the passage of the Campbell Act (6 & 7 Vic. c. 96) in 1843 truth became a defense in cases of seditious libels[72] subject to the qualification that "it was for the public benefit that the said matters charged should be published."

Chapter II Footnotes

[1]Roscoe Pound, The Development of Constitutional Guarantees of Liberty, 5th printing (New Haven: Yale University Press, 1967), pp. 66-67.

[2]Leonard W. Levy, Legacy of Suppression, 2nd printing (Cambridge, Mass.: Belknap Press, 1964), p. 7.

[3]Ibid., p. 8; Also: Alan Harding, A Social History of English Law (Baltimore, Maryland: Penguin Books, 1966), p. 80.

[4]Harding, p. 80.

[5]Levy, p. 7.

[6]James Fitzjames Stephen, A History Of The Criminal Law Of England, vol. II (New York: Burt Franklin, (Original published in London; 1883), n.d.), p. 298.

[7]Harding, p. 80; Also: George W. Prothero, Statutes and Constitutional Documents 1558-1625, 4th ed. (Oxford: Clarendon Press, 1913; reprinted in Britain, 1965), pp. 78 and 168-172; Also: Joseph R. Tanner, Constitutional Documents Of The Reign Of James I, 4th reprint (Cambridge: University Press, 1930), p. 143.

[8]Prothero, p. 78.

[9]Ibid., pp. 169-172.

[10]Tanner, pp. 143-145.

[11]Pound, Development of Constitutional Guarantees, p. 66.

[12]Levy, p. 9.

[13]Stephen, vol. II, p. 348.

[14]Ibid., pp. 326-328.

[15]Ibid., p. 323.

[16]Ibid., pp. 324-326.

[17]Junius, Stat Nominus umbra, vol. I (London: T. Bensley, 1805), pp. 205-225.

[18]John Drinkwater, Oliver Cromwell (New York: George H. Doran Co., 1927), pp. 91-92.

[19]Caroline Robbins, The Eighteenth Century Commonwealthman (Cambridge, Mass.: Harvard University Press, 1961), pp. 41-43.

[20]Stephen, vol. II, p. 310; Also: Hugh E. Willis, Introduction To Anglo-American Law (Bloomington, Indiana: Indiana University Press, 1931), p. 119.

[21]Drinkwater, p. 92.

[22]Levy, pp. 10-11; Also: Harding, p. 80.

[23]Levy, p. 11.

[24]Ibid.; Also: Thomas I. Cook, History of Political Philosophy (New York: Prentice-Hall, Inc., 1936), p. 473; Also: Stephen, vol. I, pp. 409-410 and 410-412.

[25]Stephen, vol. II, p. 361.

[26]Ibid., p. 310.

[27]Levy, p. 9.

[28]C. A. Peairs, "Freedom Of The Press," Kentucky Law Journal 28 (1939-1940): 369.

[29]Stephen, vol. II, p. 309.

[30]Levy, p. 8.

[31]Stephen, vol. II, p. 29.

[32]Harding, p. 294.

[33]John Milton, Areopagitica and Of Education, ed. George Sabine (New York: Appleton-Century-Crofts, 1951), pp. viii-ix.

[34]Stephen, vol. II, p. 309.

[35]Joseph R. Tanner, English Constitutional Conflicts of the Seventeenth Century 1603-1689 (Cambridge: The University Press, 1962), pp. 161-162.

[36]Levy, p. 11.

[37]Pound, Development of Constitutional Guarantees, p. 67.

[38]Harding, p. 272.

[39]Levy, p. 10.

[40]Ibid., p. 11.

[41]Pound, Development . . ., p. 67.

[42]Levy, p. 15.

[43]Ibid.

[44]Ibid., p. 16.

[45]Prothero, p. 78.

[46]Stephen, vol. II, p. 352.

[47]Cook, p. 473; Also: Stephen, vol. I, pp. 409-410 and 412.

[48]J. W. Ehrlich, Ehrlich's Blackstone, vol. II (New York: Capricorn Books, 1959), p. 366.

[49]Ibid., p. 367.

[50]Arthur Hassall, Life Of Viscount Bolingbroke (Oxford: B. H. Blackwell, MCMXV), p. 135.

[51]Stephen, vol. II, pp. 321-322; Also: Levy, p. 13.

[52]Pound, Development . . ., p. 68.

[53]Stephen, vol. II, pp. 315-316; Also: Joseph R. Tanner, English Constitutional Conflicts of the Seventeenth Century (Cambridge: The University Press, 1962), pp. 359 and 292-294.

[54]Ibid., p. 323.

[55]Ibid., p. 324.

[56]Ibid., p. 325.

[57]Theodore F. T. Plucknett, A Concise History of the Common Law, 5th ed. (Boston: Little, Brown, and Co., 1956), p. 500.

[58]Stephen, vol. II, p. 330.

[59]Ibid.

[60]Ibid., p. 337.

[61]Ibid., p. 339.

[62]Thomas Erskine, The Speeches of The Honorable Thomas Erskine, When at Bar, On Subjects Connected with The Liberty of the Press, and Against Constructive Treasons, ed. James Ridgeway, vol. I (London: Printed for Ridgeway, No. 170, Opposite Old Bond Street, Piccadilly, 1810), pp. 264-364, especially 267 and 269.

[63]Stephen, vol. II, p. 355.

[64]Ibid., pp. 328-329.

[65]Ibid., pp. 326-327.

[66]Edward Jenks, The Book of English Law, 6th revised ed. (Athens, Ohio: The Ohio University Press, 1967), p. 188.

[67]Plucknett, p. 501.

[68]Stephen, vol. II, p. 350.

[69]Ibid., p. 359.

[70]Ibid., p. 368.

[71]Ibid., p. 373; Also: Plucknett, p. 501.

[72]Stephen, vol. II, pp. 383-384. (Explanation of and comments on Campbell Act of 1843).

CHAPTER III

SEDITIOUS LIBEL IN EARLY AMERICA

Early Colonial Background

The presses in England's American colonies were kept under the same types of controls as presses in the mother country. As presses were introduced in the Seventeenth century they were followed by the licensing systems which continued to restrict American printers for a generation after their repudiation by England in 1694. Free political criticism was neither desired nor tolerated by colonial governors and assemblies. The colonies were ruled under English common law, and Blackstonian doctrines of seditious libel were enforced against government critics. It is noteworthy that the colonial assemblies, now generally pictured as relentless defenders of liberty for all men, were probably the primary enforcers of the law of seditious libel in early America. "The law of seditious libel, particularly in the eighteenth century, was enforced in

America chiefly by the provincial legislatures exercising their power of punishing alleged breaches of parliamentary privilege, secondly, by the executive officers in concert with the upper houses, and lastly, . . . by the common law courts."[1]

For two decades prior to the Revolution enforcement became a problem for crown officials because sympathetic juries were inclined to find for the defendant in cases of seditious libel. During this period there was a clamor for freedom of the press which was ultimately answered by the First Amendment to the United States Constitution. However, the American press was not completely free from 1776 to 1791, or even after 1791. A major effort to limit freedom of political criticism was launched by the Federalists in the fifth Congress. The death of the Sedition Act (July 14, 1798--March 1, 1801) insured relatively great freedom of the press, at least during peacetime, to future generations of Americans, but during the present century, covered in Chapter V of this work, the federal government has enacted laws to restrict printed political criticism twice and these statutes have caused some restrictions to be imposed in times of peace.

The Colonial Press

The first two colonial presses were set up in 1639 and 1656 in Massachusetts. In 1662 the colony enacted a licensing system, but repealed it the following year. In 1664, however, a licensing system modelled on English practices was enacted. It stipulated that no press could be set up outside of Cambridge and that nothing could be printed without prior approval. "Violations were punished by forfeiture of equipment and the right to engage in the occupation."[2]

In Pennsylvania, where William Bradford by invitation established a press in 1682, a licensing system was put into effect as soon as he began to print.[3] New York had a system of prior censorship.[4] The licensing system in Virginia, which had no press as late as 1671, was so strict that printer John Bucknew was arrested for printing the laws of the colony without a permit. Following that incident, from 1683 to 1729, Virginia allowed no printing. From 1729 until 1765 only one press was allowed to exist. This press was virtually controlled by the governor of Virginia.[5] Prior censorship through licensing had ended in England in 1694. It continued in New York until 1719[6] and in Massachusetts until 1721. The Massachusetts

General Court appears to have rejected the licensing law in 1721 for fear that the Governor would use the law against its members.[7]

Colonial assemblies, like the English Parliament, jealously guarded their right to speak freely, but were intolerant of anything they deemed seditious. They sat as courts rendering summary judgements and meting out punishment to offenders on many occasions. In Pennsylvania, for example, William Bradford, who was one of a group of dissident Quakers, was convicted by a group of magistrates sitting as a court in 1690 without a trial for printing a tract critical of the colony's government.[8] Earlier, in 1635, the Massachusetts Assembly had set as a court to punish Roger Williams. For the crime of spreading "newe and dangerous opinions, against the aucthoritie (sic) of magistrates" Williams was banished.[9] In 1695 the Massachusetts Assembly punished Thomas Maule, a man who had licensed and printed in New York a book which critized the magistrates in Massachusetts. Maule was arrested and his books were burned by order of the council.[10]

Actual court trials in cases of seditious libel were rare, and are therefore well remembered. Most notable before the Revolution was the Zenger case (1735), but there were at

least two prior to it; both Bradford and Maule, facing retribution at the hands of angry legislatures, demanded trial by jury under the provisions of Magna Carta. Maule was tried in 1696 and the jury acquitted him.

> Though this was the first criminal trial in Massachusetts for a printed libel and had been hailed as a precursor of the Zenger case, the participants regarded the cause as a matter of conscience rather than that of a free press.[11]

One must realize, however, that conscience and free press may be two sides of the same coin, and that in the Massachusetts theocracy it was only natural to stress conscience and ignore the press issue.

The case of Bradford (1691) is America's first criminal trial for seditious libel. Bradford did not raise the issue of freedom of the press, but, significantly, he did contend that the jury was to decide not only the fact of publication, but whether or not the material in question was libellous. Bradford was the "earliest advocate of the jury's power to decide the law in libel cases."[12] The court rejected this argument[13] which was re-introduced by Erskine almost a century later and accepted by Parliament in the Fox Act of 1792.

The most celebrated case of seditious libel during the colonial period was the trial of John Peter Zenger in the colony

of New York. It took place in 1735 and has been the subject of much comment and legend. Zenger was an immigrant, a circumstance not uncommon in New York at this time. Contrary to legend he was not poor. "He was remarkably well supported in his printing business by the most powerful group of public men who had ever established a newspaper in an American colony."[14] These men, headed by James Alexander, were the bitter political enemies of their colonial governor Cosby. Zenger's New York Weekly Journal was their forum for political criticism.[15]

The Weekly Journal was subjected to the scrutiny of a grand jury after only ten issues had appeared, but no indictment was returned. Zenger's political criticisms, often written for his editions by others, became increasingly bold both in the Journal and in occasional pamphlets. Eventually his conduct was repaid by an administration unsympathetic to criticism with an indictment for seditious libel. It was based on remarks in two issues of the Weekly Journal, neither of which expressly mentioned Governor Cosby.[16] When Zenger's attorneys, James Alexander and William Smith, requested that Justices De Lancey and Philips disqualify themselves from the case De Lancey, C.J., replied by disbarring them.[17] The unfor-

tunate advocates then obtained the services of Andrew Hamilton, a leading Philadelphia lawyer and political figure, for their client. Though Hamilton is generally pictured as the leader of the colonial bar, he was in 1735 virtually unheard of in the colonies outside of Pennsylvania.[18] He proved, however, to be extremely competent, and due to his efforts the jury rendered a verdict of not guilty despite a charge to the jury by De Lancey almost identical to Justice Holt's in Rex v. Tuchin (1704).[19]

Early in the proceeding Hamilton conceded the fact of publication. When the prosecution called for the jury to convict based on this admission its move was legally correct. Hamilton, however, made an unprecedentedly bold argument for free expression, and the unfettered right of political criticism. Responding to the prosecutor he argued truth as a defense, to which Justice De Lancey replied "You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence. A libel is not to be justified, for it is nevertheless a libel that it is true."[20] This was, in fact, the common law till 1843. Hamilton then urged that the jury should be allowed to decide the question of criminality. "No, Mr. Hamilton," replied De Lancey; "the jury may find that Mr. Zenger printed and published these papers, and

leave it to the court to judge whether they are libellous."[21] This doctrine stood in English common law till 1792.

Though Hamilton's argument was based on bad law, it convinced the jury. The case did not establish new law or precedent[22] in America, but in the popular mind of a later time it bolstered the argument for freedom of political expression and the right of juries to render general verdicts in cases of seditious libel.

Prosecutions for seditious libel and control of the press continued to be common in the English colonies long after 1735. Twenty-two years after the Zenger case a printer was prosecuted and convicted of seditious libel for printing the New York Assembly's public proceedings.[23] After the Zenger trial, however, New York's courts were only a formal threat; the legislature held the real threat of suppression during the decades prior to the revolution. "In practice, all political comment was tolerated so long as criticism did not touch the people's representatives in any way."[24]

The Pennsylvania legislature was also wont to punish those whose writings offended it. In the Smith-Moore trials of 1757 the Pennsylvania legislature punished a judge (Moore) and his future son-in-law (Smith) for seditious libel. The real

"crime" of the two appears to have been that they were influential Anglicans and occasional critics of policy in the colony. In 1757 Judge Moore, who from time to time disagreed with the Quakers who dominated the colony, was charged by the Assembly with conducting his judicial duties unjustly, and an investigation of his conduct was begun by that body despite his protest that the House could not try a judge. While the investigation was underway an attack on Judge Moore demanding his removal from office for corruption was published in the Pennsylvania Gazette. Judge Moore prepared a defense which was published in the Gazette and the Pennsylvania Journal. At Moore's request Reverend William Smith arranged for the defense to be published in a German-language newspaper.

In 1758 Smith and Moore were imprisoned by the Assembly and tried for printing libels against the preceding Assembly. When Moore appeared in the House for a hearing he admitted to authoring the controversial newspaper defense, but denied the right of the Assembly to try him. Despite this he was tried and convicted of judicial misconduct and also of seditious libel. Further, the Assembly commanded the sheriff to deny Moore habeas corpus.

Shortly afterward Smith was tried as an accomplice to the libel. The Assembly actually decided his guilt by a vote taken before the trial commenced. This action, taken by an American legislature, is even more arbitrary than the procedure followed in Star Chamber under the Stuarts. There, at least, guilt or innocence was not determined until the case had been heard. The Smith trial made a mockery of procedure. Smith, according to some accounts, raised the issue of freedom of the press. If this is true, he was the first to employ that defense.[25]

When Smith and Moore were released they went into hiding and attempted to appeal their cases to the Privy-Council. Meanwhile another Assembly was elected in Pennsylvania and it proceeded to re-indict the two men because Moore, while hiding, had published another piece it considered libellous. The Privy-Council ruled that the publication was indeed libellous but that only the Assembly directly libelled could prosecute. Thus Smith and Moore were to go free and a measure of satisfaction was given to both sides in the case for, concurrently, the decision did not weaken the Government's ability to prosecute seditious libel in any way.[26]

Legislative prosecutions in all colonies tended to follow

a pattern. Having been accused of a crime against legislative privilege, a man would be arrested by legislative decree. Before the assembly the victim would be forced to admit error and express sorrow and respect. He would then be generally allowed to pay costs and go free, though in some cases a public humiliation was part of the package.

In the decade just prior to the Revolution authorities in New England generally avoided court prosecutions because of public sentiment. Juries would not convict. Such was the case in Massachusetts. In 1768 Dr. Joseph Warren criticized the colony's governor in an article in the Boston Gazette. The irate governor demanded that Warren be punished for libel; but, the House, controlled by radicals, would take no action. When the case was put before a grand jury, the jurors refused to return a true bill.[27] Warren remained unpunished.

Colonies in the South, including Virginia and the Carolinas, actively prosecuted cases of seditious libel in the decade prior to the revolt.[28]

> It is probable that no one thing contributed more to inflame the public mind against the common law than did the insistence of the American courts on enforcing the harsh doctrines of the English law of criminal libel--that truth was no defense and that the jury could pass only on the fact of publication and the application of the innuendo.[29]

Political criticism was an important component of the Revolutionary movement in the colonies, and royal judges naturally resisted it. Freedom to publish political criticism was not a condition of life in colonial America. Juries did often

exonerate accused libellers, but there was no broad libertarian heritage in the American experience prior to the federal Bill of Rights.[30]

The first Continental Congress (1774) extolled the virtues of a free press "whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs,"[31] but during the years of revolution free speech and press were allowed to only one side. Patriot committees closely supervised all editors.[32] In 1776, Congress advised the states to pass laws to insure that citizens were not "deceived and drawn into erroneous opinion."[33] By 1778, all the states had done so.[34]

As originally presented for ratification, the U. S. Constitution itself contained no guarantee of free expression. During the debates over ratification which followed the Constitutional Convention, an Anti-Federalist faction actively opposed the Constitution on the ground that it proposed to introduce a powerful central government which would be capable of subjecting the states and the citizens to tyranny as oppressive as that suffered under the English Crown. At the end of the Philadelphia Convention, it is true, George Mason and Elbridge Gerry unsuccessfully attempted to add a bill of rights to the proposed constitution,[35] but despite their argument that without a federal bill of rights the new national government could supersede the various state bills of rights, the delegates failed to adopt the proposals of the two Virginians.

Bills of rights were a feature of most of the state constitutions which were adopted after the outbreak of hostilities in 1776. Their purpose was to limit the power of government by protecting the citizens in the enjoyment of enumerated rights. Freedom of the press was frequently one of these rights. Section twelve of the Bill of Rights of the Constitution of Virginia (June 12, 1776) stated: "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."[36] The Declaration of Rights of the Massachusetts Constitution (June 15, 1780) provided that: "The liberty of the press is essential to the security of freedom in a state(;) it ought not, therefore, to be restricted in this commonwealth."[37]

The Federal Bill of Rights was a compromise measure, promised reluctantly during the debate over ratification to the Anti-Federalists by the proponents of the Constitution to assuage fears of a "new oligarchic centralization"[38] in which the central government would dictate to the state in the same arbitrary fashion that England dictated to them when they were her colonies. The small states were fearful that the national government would be dominated by the big states, especially New York and Virginia. The southern states feared that a domination by northern states might cause government economic policies to discriminate against agricultural interests and in favor of trading interests. Individuals in many parts of the country were also fearful of the establishment of a strong and unlimited government which might treat citizens arbitrarily. Many of these

concerned citizens were knowledgeable about English history and knew that the English bill of rights had been adopted in 1688 to prevent the government from mistreating citizens because of the excesses of the House of Stuart. Based on this precedent of 1688 several of the American states adopted bills of rights during the Revolution. The federal bill of rights was not without precedent in the American experience, and following the pattern set by some bills of rights, it guaranteed to the people of the United States freedom of the press from interference by the federal government. (Not until much later would these amendments be construed as guarantees against state action.) The guarantee of free expression was a part of the First Amendment to the U. S. Constitution. (The Federal Bill of Rights consists of Amendments one through ten to the Constitution.)

The First Amendment, freedom of press, may be variously construed. At the extremes it may be seen as an absolute guarantee to print anything whatsoever without fear of legal retribution, or, conservatively, as a mere restatement of the Blackstonian absence of prior restraint. The latter approach was taken by the Federalists and has gained wide judicial acceptance through American legal history.[39] The intent of the framers of the First Amendment, which falls between these two extremes, appears to have been

> . . . to repudiate the law of the colonial courts and to create a new and expanded, though not an absolute, freedom of the press . . . . Restrictions on speech (or publication) can be imposed . . . . but the freedom of political criticism was preserved.[40]

Sedition Act of 1798

It was in such a context that the present government of the United States was established. The Federalist proponents of the new government dominated it until 1801. This was the party of Adams and Hamilton, a party of aristocratically inclined men, primarily Anglophiles, devoted to the development of a strong centralized nation under the recently established Constitution. It was not a popular party in the modern sense, nor did it seek broad general support. It sought to govern. Federalist political philosophy found democracy unacceptable because of the depravity of mankind. "To save the United States from the evils of unlimited democracy was to most Federalists one of the historic missions of their party."[41] It was their belief that the government must remain in their hands in order to insure the continued indipendence and welfare of the young nation.

Another faction in the government, headed by Thomas Jefferson and destined to become the Democratic-Republican party ("Republicans"), opposed Federalist philosophy and tactics from the beginning of the new government. Though equally dedicated to the welfare of the nation, the Jeffersonians espoused an agrarian philosophy similar in some ways to that of the Physiocrats. They championed the interests of farmers, mechanics, and petty traders, and were closer to a popularly supported party than any other major party in Anglo-American history up to that time. Their faith in mankind supported their belief in democracy. Incidentally,

these "Republicans" are the direct ancestors of the present Democratic party, a fact sometimes hidden by conservative political historians in their treatment of the "era of good feelings."

The Republicans were admirers of the ideals of the French Revolution, and their open admiration of France in the closing years of the eighteenth century earned them the suspicion of conservatives as well as the derogatory name "Jacobins." In this period France's democratic revolution of 1789 was as alarming to many Anglo-American conservatives as the Russian communist revolution has been in this century. During the Adams administration (1797-1801) England was fighting for her life with France. United States relations with France were rough, and the two nations were engaged in a "half-war" at sea. In 1798 the situation was aggravated by the so-called XYZ Affair, an attempt made by three agents of the French minister Talleyrand to extort a bribe from three American envoys whom President Adams had sent to France to negotiate an end to the hostilities at sea.

War with France appeared imminent in America as public indignation rankled over the incident. The Anglophile Federalists, more popular than ever before, determined to pass

legislation to control the conduct and immigration of aliens (who, incidentally, tended to support the Republicans) and to stiffen naturalization requirements. They also proposed to stifle political criticism by means of a sedition law. All of these things were done in the name of national security. To prepare the public for these measures the Federalist press labelled the Republican opponents as pro-French traitors, seething with sedition and ready to revolt and hand the nation over to France. This was more than political hyperbole; it was clearly untrue. Although "it is true that in denouncing the administration (Republicans) used violent language, they intended to win their victories at the polls, not on the barricades."[42]

The Sedition Act of 1798, formally entitled "An Act in addition to the act, entitled 'An act for the punishment of certain crimes against the United States'" was introduced in the Senate by its author, Senator James Lloyd of Maryland. Lloyd, a staunch Federalist and a former General, was anxious to silence Republican critics of the government. His original bill is notable because in addition to proscribing sedition this proposed bill contained the only legislative attempt in the history of the young Republic to define and punish treason.[43]

The sedition bill was inspired by similar actions resorted to by the British to curb criticism during the war with France.[44] After amendment, including removal of the section dealing with treason, the bill passed the Senate on July 4, 1798.[45] Representative John Allen spoke for the bill in the House. Allen felt that the Republican papers represented a dangerous combination which would lead to the overthrow of the government. Republicans failed in an attempt to reject the bill outright after the first reading.[46] Following minor changes the legislation went to President Adams who willingly signed it, though he had not proposed it, on July 14, 1798. Except for John Marshall[47] and possibly Alexander Hamilton every leader of the Federalist party apparently backed the Sedition Act. During this period of war fever conservative opinion was strong and widespread, and the Act seems to have been generally acceptable among the rank and file at the time of its passage.[48]

The Sedition Act had four sections. Section One provided that any persons combining or conspiring

> with intent to oppose any measure . . . of the government . . . and with such intent counselling . . . insurrections, riots, etc. (would be punished) by a fine not exceeding five thousand dollars, and by imprisonment during a term not less than six months nor exceeding five years.

Under Section Two any person writing, printing, uttering, or publishing

> any false, scandalous and malicious . . . writings against the government of the United States, or either house of the Congress . . ., or the President . . . (was to be) punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

Section Three explicitly allowed truth as a defense and granted the jury in all cases arising under the act the "right to determine the law and the fact, under the direction of the court, as in other cases." By the terms of Section Four the Act expired on March 1, 1801.[49]

A vigorous debate over the Sedition Act was carried on during its consideration and following its passage in the partisan press of the day. Most of the press was controlled by Federalists[50] who also, being in possession of the Presidency, controlled the postal service; but several leading papers and some minor ones were Republican organs.

The Federalists contended that the First Amendment incorporated the English Common Law (Blackstonian) doctrines of sedition and free press, and therefore merely forbade prior restraint. Many Federalists were convinced that the United States government possessed complete jurisdiction to enforce the English Common Law and felt that the Sedition Act merely

reaffirmed this in a particular substantive area. If this were the case, replied unhappy Republicans, the Act was redundant and unnecessary.[51]

Arguing that the Act was needed because of a dangerous international situation and treachery at home, the Federalists pointed out that their statute was more lenient than the common law. Not only did the Act grant the jury the right to determine the issue of criminality, something introduced into English sedition law only six years before, but it also allowed truth as a defense.[52] Despite sentiment from some quarters which advocated making truth a legal defense, common law did not allow truth as a defense until forty-five years after the passage of the American Sedition Act.

Federalists also pointed out that under the Sedition Act illegal intent had to be proved. Finally, the Act clearly set down punishment; at common law this was left to the Court's discretion.[53] Unfortunately for defendants, the safeguards embodied in the sections of the Act dealing with intent and truth were often obscured during the actual cases by strong prosecutors and Federalist judges.

The Republicans criticized the law as a bold attempt to silence legitimate political criticism. They held the act unconstitutional on two grounds. "Madison and Gallatin argued, first, that the First Amendment had been intended to sweep the old law of seditious libel into the rubbish heap and thereby make all federal sedition laws constitutionally impossible."[54] Second, the Republicans took a strict construction approach. No power for such a law is specifically enumerated in the Constitution; nor, they asserted, could such a power be properly inferred through the "necessary and proper" clause.[55] The proper place to punish sedition under this doctrine is in state courts, and it was in these courts that eventually some Federalists were somewhat ironically made to rue their criticisms of the no less intolerant Republicans; and, presumably, their advocacy of the Sedition Act.

Enforcement of the Sedition Act

Enforcement of the Sedition Act was vigorous, systematic, and aimed almost exclusively against Republicans. The strongest pressure to execute the law came from Federalist presses which stood to gain doubly from the eradication of business and political rivals.[56] The chief agent of enforcement was Secre-

tary of State Timothy Pickering.[57] Federal judges made a general practice of charging "grand juries with the duty of inquiring into all offenses against the Sedition"[58] Act.

Just before passage of the Act two Republican papers, Benjamin Bache's Philadelphia Aurora, and John Daly Burk's New York Time Piece, were indicted for sedition under common law.[59] Neither proceeding came to trial. Bache, the person indicted in the Aurora case, died in the epidemic of 1798 and the prosecution was therefore never brought into court. The Aurora continued under Bache's former assistant, William Duane, who later married the deceased man's widow.

At the time of his arrest (June 26, 1798) for "libelling the President and the Executive Government, in a manner tending to excite sedition and opposition to the laws, by sundry publications and re-publications,"[60] Bache felt he was in no danger. If the opinion of Justice Chase in United States v. Worrall were allowed to stand, Bache noted, his acquittal would be insured. In that case, decided in Philadelphia three months earlier, Chase had denied that the Federal courts had common law jurisdiction in criminal cases.[61]

Following Burk's indictment quarrels with his business partner, who wished to follow a more moderate editorial pol-

icy than that advocated by Burk, led to the end of the Time Piece. The government was slow to bring the case to court, either doubting its ability to win or satisfied with the fact that the objectionable paper was no longer publishing. The Time Piece was a major organ of the Republican party in New York, and Burk received support from several leading Republican politicians in the state including Aaron Burr, then the leading Republican in New York. At Burk's request Burr negotiated with the Federalist administration, obtaining a bargain whereby in return for having the charges against him dropped Burk would quietly leave the country. Burk departed from New York by ship in 1799, but he did not really leave the country, though the Federalists thought he had. Until the Republicans were safely in power Burk hid in Virginia under an alias, employed as the "Principal" of a college.[62]

There were at least seventeen indictments for sedition during the years from 1798 to 1801, fourteen of which were under the sedition act and three of which were at common law.[63] All except one of these cases involved the Republican press whereof the leading papers, the Richmond Examiner, the Baltimore American, the Boston Independent Chronicle, the New York Argus,

and the most influential Philadelphia Aurora all suffered prosecution except for the Baltimore American.

Editors of four less prominent publications were also indicted. These papers included two New York papers, the aforementioned Time Piece and the Mt. Pleasant Register, both of which ceased to exist. In New England, the New London, Connecticut, Bee suspended publication for four months in 1800 while editor Charles Holt was in prison.[64] Anthony Haswell, prosecuted for printing an advertisement for a lottery which helped pay the fine of United States Representative Lyon of Vermont,[65] was a victim of the Federalist campaign of enforcement of the Sedition Act prior to the election of 1800. Because he was imprisoned in his home town he was able, with help, to continue publishing his paper, writing communiques to his readers from his cell. Haswell became a Republican martyr and increased the unity of the Republican party in 1800.[66]

Cases aimed specifically at individuals, rather than at newspapers, struck several national figures, including one member of the House of Representatives, Matthew Lyon. Several persons of lesser stature became "victims of panicky localities." These included Luther Baldwin, a drunk who criticized

the administration by indicating that it would please him if the shot of a cannon landed in President Adams' posterior,[67] and two men who had been involved in the raising of a Maypole in Dedham, Massachusetts.[68] One of the Dedham defendants, a man of some means, received the only lenient sentence handed down in a Sedition Act prosecution after Federalist Fisher Ames spoke in his behalf. This defendant was jailed six hours, fined $5.00, and assessed $10.50 costs. Federalists, following the example of Justice Chase who tried the case, gave this as an example of the lenient operation of the law.[69]

The case of the drunken critic of the government, Luther Baldwin, was also highly publicized. Republicans referred to this case to show how truly dangerous the Sedition Act was to First Amendment freedoms,[70] for Baldwin was in fact harmless, and his imprisonment was based solely on an impotent comment. It is interesting to note by comparison that in our own enlightened age an American citizen could be imprisoned for making a similar comment about the president. From time to time men are prosecuted for threatening a president, generally with much publicity, and public opinion in such cases generally supports the government. Though these cases are not brought

under a sedition law, they have a similarity to the Baldwin case, which was connected with a sedition law. It is necessary to protect our government officials from harm, but the men enforcing laws designed to protect them from violence should be careful to examine the circumstances in which threats are made and to separate advocacy from action. If a man is punished for a threat which clearly will not lead to an illegal act, then he is being punished only on the basis of the "bad-tendency" or "remote-tendency" doctrine. That doctrine, while it has never completely died out, is rather primitive and allows for infringements on citizens' rights which are inconsistent with the needs of a democratic system.

Enforcement of the Sedition Act was strongest in Federalist strongholds. Sixteen of the indictments were returned in New England and the Middle States. Only one case was heard in a Republican state. This was the Callender case in Virginia.[71] The Callender case was one of several in 1800 prosecuted in an attempt to reduce Republican chances of winning the Presidency. Other prominent victims that year were Republican publicist Thomas Cooper[72] and William Duane, editor of the Aurora.[73]

Thomas Cooper edited the Sunbury and Northumberland Gazette. He had requested a political appointment from President Adams and during the political controversy prior to the election of 1800 Cooper published a piece intended to justify his claim to the position. In it he said that President Adams, when the request was made,

> was hardly in the infancy of a political mistake: even those who doubted his capacity thought well of his intention. Nor were we saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent . . . nor had he yet interfered, as President . . . to influence the decisions of a court of justice . . . an interference without precedent, against law and mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up, with the advice of Mr. Adams, to the mock trial of a British court-martial . . . a case too little known, but to which the people ought to be fully appraised, before the election, and they shall be.[74]

For printing this Cooper was indicted under the Sedition Act.

Cooper's case was the first Sedition Act case presided over by Justice Chase, who gave a long charge to the jury which distinctly favored the prosecution's case. "When men are rash enough 'to commit an offense such as the traverser is charged with, it becomes the duty of the government to take care that they should not pass with impunity'", stated the Federalist judge who equated the government with the ruling party. The

sentence quoted above is similar to Lord Holt's charge in the celebrated Tuchin's Case of 1704. Continuing in this same tone Chase added: "If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government." This statement, made in the context of a sedition trial in which the offensive literature was merely a criticism connected to an election campaign, sounds highly undemocratic. It is unnerving because, at the same time that we see its clear descent from the English doctrine enunciated in Tuchin, it sounds uncomfortably modern and comfortable to a contemporary law such as the Smith Act (1940). In concluding his charge to the jury Justice Chase stated "This publication is evidently intended to mislead the ignorant, and inflame their minds against the President, and to influence their votes on the next election."[75] The jury convicted and Cooper was fined and imprisoned.

The Aurora was involved in more cases than any other paper; four of them. The first of these was the aforementioned common law prosecution against Benjamin Bache. Editor Duane was the most indicted individual. He was involved in three cases as a defendant. In the first he was acquitted by a jury.

Duane and three other men were tried under the Sedition Act for circulating a petition which opposed the Alien Law which had been passed by the Federalists in conjunction with the Sedition Act. There was apparently no case against Duane, who in any event was not even the principal promoter of the petition, and the prosecution was in fact "an attempt to strike at the nation's most influential Republican editor."[76]

President Adams had the second Aurora case dropped. In this case Duane was aided by Section Three of the Sedition Act which allowed truth as a defense. The case apparently was dropped because Adams knew that Duane possessed a letter written by the President which, if produced in court, would vindicate the editor and embarrass its author. Shortly after his acquittal in the earlier case, Duane had written and published an article in which he contended that through intrigue the British had influenced the course of policy in the American government. Leading Federalists including President Adams, Secretary of State Timothy Pickering and former president Washington favored prosecuting Duane for this "libel" against the government. He was arrested on August 2, 1799, and bound over for a trial which commenced in October. During the interim Duane was free

on bail and continued to publish the Aurora and to criticize the government. All along Duane had claimed to possess an authenticated copy of a letter by President Adams which would document the alleged libel. When the trial opened a large crowd of Federalist spectators expected to see Duane brought to "justice", but early in the trial it became apparent that Duane did in fact possess the saving letter, and after the judge pondered whether such evidence could be admitted against the President and Duane's attorney argued that the evidence was clearly admissable in view of its contents and the charge against the defendant, inasmuch as Section Three of the Sedition Act made truth a defense, the trial was adjourned for an indefinite period, never to resume again.[77]

The third attempted prosecution against Duane was dropped by Jefferson in 1801. This is probably the most interesting case to which Duane was a party. It began early in 1800 when Duane printed the text of a proposed Senate bill sponsored by the Federalists. The bill was in fact an attempt to alter by legislation that part of the United States Constitution which defines the Electoral College and proscribes its duties and functions, and Duane exposed it as such. The Federalists in

the Senate, who had backed the proposed measure for fear of losing the presidency in 1800, were enraged. They determined to take action against Duane for a breach of legislative privilege, and because they commanded a Senate majority were able to do so. Duane was convicted without a hearing in an action strongly resembling the passage of a bill of attainder, though such bills are strictly prohibited in the Constitution, the Senators in the majority agreeing that he had published a seditious libel on the upper house.

Having pre-judged his guilt, the Senate ordered Duane to appear before it in March, 1800. Duane appeared and requested the right to be represented by counsel, but the Senate, though it granted the request, placed so many procedural restrictions upon any attorney that might represent Duane that he could not find anyone willing to represent him, and he therefore refused to return to the Senate, which issued an order for his arrest on charges of contempt on March 25, 1800. This order was signed by Thomas Jefferson, who, though he opposed it, was obligated to issue it because as Vice President he was the presiding officer of the Senate. Duane managed to remain at large and the bill he had denounced was rejected by the House.

Following this a group of Philadelphians presented the Senate with a petition requesting that body to drop its charges against Duane, but the Senate refused. As its session came to an end it requested President Adams to have proceedings against Duane initiated under the Sedition Act, and Adams complied, instructing his attorney-general to do so on May 16, 1800. The trial began October 17, 1800, but was postponed because a number of material witnesses for the defense were not available. These were Senators, and with the Senate out of session they had left Philadelphia, then the capitol, and also the site of the alleged offense and the trial, to visit their home districts. The court met once again but granted a second postponement for the same reason. This was to be the last postponement, but Thomas Jefferson had now become President, and at Duane's request he discontinued the proceeding.[78]

The Callender case[79] stands out because it was the only Sedition Act prosecution in a southern state (Virginia), and because of the obvious bias against the defendant by Justice Chase. Chase provided the prosecution with a copy of the printed matter in question in which he had marked the offensive passages prior to the trial, and is reported to have said

"that before he left Richmond, he would teach the people to distinguish between the liberty and the licentiousness of the press."[80] The defense was based on the alleged unconstitutionality of the Sedition Act. Defense wanted this question to be decided by the jury, but Chase denied that request. Following a one day trial Callender was sentenced to serve nine months in jail and pay a two hundred dollar fine.[81]

The first victim of the Act was Matthew Lyon, an Irish immigrant, who was a Republican member of the United States House of Representatives for Vermont at the time of his trial. Lyon had published an article critical of the administration in the Vermont Journal. President Adams approved of the prosecution[82] which was held in Rutland, Vermont, "a strongly Federalist community," in an obvious attempt by prosecution to obtain a jury sympathetic to its views. Lyon's defense asserted the unconstitutionality of the Sedition Act. Though he had originally felt certain of acquittal he was convicted, sentenced to four months in prison, and fined the then staggering sum of one thousand dollars. With no time allowed to arrange his affairs Lyon was immediately taken to Vergennes, a town some miles distant from his home, where he was placed in a

stinking cell generally used to house horse-thieves, common felons, and the dregs of humanity.[83] Lyon became a Republican martyr. While in prison he was overwhelmingly re-elected to Congress. By holding a raffle in Vermont and collecting donations in Virginia, Republicans raised more than enough money to pay his fine.

In striking contrast to the highly publicized tribulations of Lyon, the case in which the harshest punishment was meted out went virtually unnoticed. David Brown was the second defendant in the maypole sedition cases at Dedham. His offense was the relatively minor one of having had a seditious placard printed and displaying it at the maypole rally. "The leniency to the wealthy hometown culprit contrasted strikingly with the punishment meted out to the vagabond Brown."[84] Despite a guilty plea and evidence of real contrition, Justice Chase sentenced him to spend eighteen months in jail and fined him four hundred fifty dollars.[85]

Brown suffered much more than Lyon. Unable to post a surety bond when he had completed his sentence, he remained incarcerated. Because of this he ultimately served two years.[86] Two appeals to President Adams for parole went unheeded.[87] It

was Adams' general policy to ignore such appeals from Republicans convicted of sedition.

The only person convicted under the Sedition Act to be pardoned by President Adams was William Durrell. Significantly, Durrell was a Federalist. A reprint in his New Windsor Gazette, a minor upstate paper in New York, was critical of the President, but not of the administration or any other part of the government. Durrell was punished in a common law prosecution which was not heard until 1800. In the interim he had fully and publicly repented and ceased publication. Following his conviction he was with some reluctance granted a pardon.[88]

When the Republicans came to power all those convicted under the Sedition Act were pardoned and pending prosecutions were dropped. The Act expired under its own terms on March 1, 1801. Some Federalists in Congress had tried unsuccessfully to extend it. Throughout its existence it had faced opposition. As it became evident that America would not go to war with France, popular support for the measure waned. In 1799 and again in 1800, attempts to repeal the act nearly succeeded.[89]

It is easy to paint the Federalists as forces of evil and the Republicans as the personification of good in this con-

troversy. It is true that the Republicans opposed the Sedition Act, but to a large extent this was a controversy between the "ins" and the "outs" for control of government. Republicans were not above prosecuting Federalists for libel, but they did so under common law in state courts. Two such cases were tried in Pennsylvania and resulted in convictions and stiff penalties.[90]

"In December, 1800, John Ward Fenno was fined two thousand, five hundred dollars in a Pennsylvania court for libelling a Republican."[91] "What a difference there is between the chance of a Federalist among Jacobins, and of a Jacobin among Federalists" said an article in Fenno's Gazette of the United States, Pennsylvania's leading Federalist paper, on December 15, 1800. Federalists quickly forgot, if indeed their self-righteous political creed had ever allowed them to realize it, that Federalists such as Justice Chase had dealt harshly and summarily with Republicans accused of seditious libel. In reference to the staggering fine the article continued: "The boasted friends of liberty of the press inflict a tenfold more severe punishment, when their characters are canvassed.[92]

At about the same time William Cobbett, an Englishman living in Pennsylvania, was sued by Republican Benjamin Rush for libel. Though this was a civil case, it had political overtones and was integrally tied to the controversy raging over the Sedition Act. Cobbett published Porcupine's Gazette which, like Fenno's paper, was a prominent Federalist political organ. Though represented by one of the most able Federalist attorneys, Cobbett lost in the suit and was obliged to pay five thousand dollars damages. As a result he sold his press and returned to England. Federalists were disheartened, Republicans were jubilant, and Porcupine's Gazette was no more.[93]

Jefferson, now President, condoned such proceedings. The Federalists, now out of power, espoused a free speech doctrine because they had supplanted the Republicans as the opposition party. In 1803 a man named Croswell, editor of the Wasp, a New York Federalist paper, was tried in a New York state court. Croswell was charged with printing "a scandalous, malicious and seditious libel upon Thomas Jefferson, the President of the United States; the libel charged was a statement that Jefferson paid one Callender to print libellous denunciations of John Adams and George Washington."[94] The judge,

proceeding under common law doctrines, refused to accept truth as a defense. The defendant was convicted but obtained a new trial. This proceeding, in 1804, saw Federalist attorney Alexander Hamilton defending the right of free expression, but the conviction stood. Hamilton argued that freedom of the press "consists in the right to publish, with impunity, truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals,"[95] a remarkably modern doctrine which is in substantial agreement with the United States Supreme Court's 1964 decision in New York Times v. Sullivan. As a result of this case the New York legislature passed in 1805 a libel law making truth a defense in that state if the allegedly libellous material was published "with good motives and for justifiable ends." Under this law Croswell, who had not yet been imprisoned, was granted a new trial by the New York Supreme Court. The 1805 statute also empowered the jury to see the allegedly libellous matter and to judge its criminality. The material provisions of this statute pertaining to truth and the jury's role became part of the New York state constitution when that document was revised in 1821.[96]

Though the Republicans repeatedly condemned the Sedition Act as unconstitutional, it was never tested before the Supreme Court. The Justices at that time were Federalists and at least five of them,[97] a majority, are known to have favored the act. The Republicans refrained from appealing cases to the Court to avoid a legal precedent that they considered inevitable and undesirable.

Republicans denied a common law jurisdiction to the national government. In 1812, eleven years after the Act expired and at the nadir of Anglo-American relations since independence, the Court denied common law jurisdiction to the federal government in United States v. Hudson.[98]

As a result of all this the United States would have no common law of seditious libel, and relatively great freedom would be allowed for political debate and criticism. Not until the twentieth century would America have national sedition laws, and even then the term seditious libel would be studiously avoided.[99]

The Sedition Act of 1798 would be considered unconstitutional today because it is too broad. Congress may, through the "necessary and proper" clause, punish offenses connected

with enumerated powers.[100] In this century sedition is one such offense, but modern sedition laws have treated the separation of speech from action more carefully than the Act of 1798.[101]

Chapter III Footnotes

[1]Leonard W. Levy, Legacy of Suppression, 2nd printing (Cambridge, Mass.: Belknap Press, 1964), p. 20.

[2]Edward G. Hudon, Freedom of Speech and Press in America (Washington, D.C.: Public Affairs Press, 1963), pp. 16-17.

[3]Ibid., p. 17.

[4]Levy, p. 24.

[5]Hudon, p. 18.

[6]Levy, p. 24.

[7]Ibid., p. 36.

[8]Ibid., pp. 25-26.

[9]Ibid., p. 30.

[10]Ibid., p. 32.

[11]Ibid., p. 34.

[12]Ibid., p. 29.

[13]Hudon, p. 18.

[14]John H. Powell, General Washington and the Jack Ass and other American Characters, in Portrait (New York: Thomas Yoseloff, 1969), p. 16.

[15]Ibid., see chap. I generally.

[16]Ibid., p. 55.

[17]Arthur E. Sutherland, Constitutionalism in America (New York: Blaisdell Publishing Co., 1965), p. 121.

[18]Powell, p. 17.

[19]Sutherland, p. 123.

[20]Hudon, p. 19.

[21]Ibid.

[22]Powell, p. 16.

[23]Ibid., p. 17.

[24]Levy, p. 48.

[25]Ibid., pp. 53-59.

[26]Ibid., pp. 60-61.

[27]Ibid., pp. 66-69.

[28]Ibid., p. 74.

[29]John Kelly, "Criminal Libel and Free Speech", Kansas Law Review 6(1958): 306. (Quoting: Warren, History Of The American Bar, 1st ed. (1913), p. 236).

[30]Levy, p. vii.

[31]Ibid., p. 307.

[32]Levy, pp. 177-178.

[33]Ibid., p. 181. (From: Journals of Continental Congress, 4:18, Jan. 2, 1776).

[34]Ibid., p. 181.

[35]Thornton Anderson, Jacobson's Development of American Political Thought, 2nd ed. (New York: Appleton-Century-Crofts, 1961), p. 234.

[36]Ibid., p. 161.

[37]Ibid., pp. 163-166, especially 165.

[38]Ibid., p. 226.

[39]Kelly, pp. 308-310.

[40]Ibid., p. 310.

[41]John C. Miller, Crisis in Freedom: The Alien and Sedition Acts (Boston: Little, Brown, and Co., 1951), p. 15.

[42]Ibid., p. 24.

[43]James Morton Smith, Freedom's Fetters (Ithaca, New York: Cornell University Press, 1956), p. 107.

[44]Miller, p. 68.

[45]Smith, p. 111.

[46]Ibid., p. 116.

[47]Ibid., pp. 109 and 151.

[48]Miller, pp. 21-22.

[49]An Act in addition to the act, entitled "An act for the punishment of certain crimes against the United States", I Stat. 596-597.

[50]Miller, p. 31.

[51]Smith, p. 139.

[52]Alfred H. Kelly and Winfred A. Harbison, The American Constitution, 4th ed. (New York: Norton and Co., 1970), p. 197.

[53]Miller, p. 82.

[54]Kelly and Harbison, p. 198.

[55]Ibid.

[56]Smith, pp. 177-181.

[57]Ibid., p. 181.

[58]Ibid., p. 182.

[59]Miller, pp. 65-66; Also: Smith, chap. X generally.

[60]Ibid., p. 200.

[61]Ibid., p. 201.

[62]Smith, pp. 216-218.

[63]Ibid., p. 184.

[64]Ibid., pp. 186-187.

[65]Hudon, p. 49.

[66]Smith, pp. 265-271.

[67]Ibid.

[68]Ibid., pp. 257-270.

[69]Ibid., pp. 265-266.

[70]Ibid., p. 270.

[71]Ibid., p. 187.

[72]Hudon, p. 50.

[73]Miller, p. 194; Also: Smith, p. 307.

[74]Hudon, p. 50 (quoting Wharton).

[75]Ibid., pp. 50-51 (quoting Wharton).

[76]Smith, p. 281 and 278-282.

[77]Ibid., pp. 282-288.

[78]Ibid., pp. 288-305.

[79]Ibid., chap. 15.

[80]Hudon, p. 51.

[81]Miller, pp. 216-219.

[82]Smith, pp. 240-241.

[83]Miller, pp. 106-111.

[84]Smith, p. 266.

[85]Miller, pp. 114-120.

[86]Smith, p. 269.

[87]Ibid., p. 268.

[88]Ibid., pp. 385-389.

[89]Miller, p. 180.

[90]Ibid., p. 229.

[91]Ibid.

[92]Ibid. (Quoting Gazette of the United States).

[93]Ibid.

[94]Sutherland, p. 258.

[95]Levy, p. 298 (Quoting Hamilton).

[96]Sutherland, pp. 258-259.

[97]Hudon, p. 52.

[98]Ibid., p. 48.

[99]Kelly, p. 316.

[100]Kelly and Harbison, p. 199.

[101]Kelly, p. 316.

CHAPTER IV

FREE SPEECH AND PHILOSOPHY FROM MILTON TO HOLMES

The Growth of Liberal Doctrines

The liberal positions considered first in this chapter had to struggle for recognition against established doctrines which were far more conservative and repressive. The older doctrines were historically well entrenched among the governing class in England and America, though to an extent more limited in America because of the different social setting. Against stubborn resistance the liberal doctrine evolved incrementally.

John Milton authored the first great prose defense of freedom of publication. In Areopagitica (1644) he argued for a press free from licensing or any other form of prior censorship. Milton believed that a free atmosphere is necessary for intellectual growth and that in free dialogue truth will defeat

falsehood.[1] The open publishing of ideas readily puts their truth to the test.[2] Censorship he called "the greatest discouragement and affront that can be offered to learning and learned men."[3] Censorship will fail when imposed for three reasons: first, virtue can only exist in the face of possible evil (this is one type of argument of responsibility)[4]; second, libel can be spread by word of mouth; third, the judges of libel must themselves be perfect, an unlikely event, if censorship is to work.

At a time when censorship and libel were closely tied this was a bold argument for intellectual liberty. It was, however, far from the defense of an absolute freedom. Milton disliked Kings and Parliaments, but he was instinctively an aristocrat nonetheless. He couldn't really trust average men with a voice in government or its affairs.[5] Nor would he tolerate Roman Catholics. Like John Locke, he considered them unable to give allegiance to any ruler except the Pope.[6]

These were common prejudices among Protestant Englishmen of Milton's time. They do not rob Areopagitica of its liberalism, but they are noteworthy, and they show that Milton had made only a beginning. Milton probably "never intended that anything but serious works of intellectuals, chiefly scholars

and Protestant divines, should be really free."[7] His proposals stressed individual responsibility as a corollary of the ability of truth to win out. Unlicensed printing was still to be conditional upon registration of all printers, and, if possible, authors. Further, he never proposed to abolish the law of libel. This, he stated would provide, along with the executioner, "the most effectual remedy" against "mischievious" writers and printers.[8] With the end of licensing in 1694, the English system had effected even more reform than Milton called for. This action stands roughly between Milton and Blackstone.

In 1769 Blackstone, a backward looking legal scholar, defined libel and free press in terms generally compatible with the aspirations of Milton and the achievement of 1694. Free press consisted of the right to publish without prior censorship. Any writer or printer was held to be responsible for anything printed. The law of libel would assess punishment, though Blackstone recognized libel as a misdemeanor whereas Milton had explicitly mentioned the executioner.[9] Blackstone did not recognize truth as a legal defense. Milton himself, though he held that in a rational argument truth would prevail over falsehood, had not stated that truth should be a legal

defense in libel cases. The United States would not recognize this defense until approximately 1800, and it would not be recognized at common law until 1843.

After Blackstone, eighteenth century liberals began to press for an expanded role for juries and for the recognition of truth as a competent defense in libel cases. At the time Blackstone wrote on libel (1769) the jury in these cases was legally competent to determine only the fact of publication. The court determined whether the material in question was criminal.

An American printer, William Bradford, first challenged this position in 1691. He claimed the jury should be judge of criminality in his seditious libel case. The request was denied. The right of juries to render general verdicts based on considerations both of fact and criminality was again asserted in America in 1735. In the Zenger trial Andrew Hamilton raised the issue and again the court denied that jurors could determine criminality. In this case, which made neither law nor precedent, the court was legally correct. But the jury, swayed by Hamilton, acquitted Zenger. For the popular imagination of later generations the case served to establish the

need for an expanded jury role in seditious libel cases.[10] Though juries were not legally competent to decide anything except the fact of publication for some time after the Zenger trial, it appears that juries in New York made a regular practice of returning acquittals in seditious libel proceedings after the Zenger case. Thus it may be that many people felt erroneously that a legal and binding precedent had been set in the Zenger case.

Thomas Erskine argued the same point in England. In the Dean of St. Asaph's case (1783) he asserted

> . . . our ancestors, for many centuries, must have conceived the right of an English Jury to decide upon every question which the forms of the law submitted to their final decision; since, though they have immemorially exercised that supreme jurisdiction, we find no trace in any of the ancient books of its ever being brought into question.[11]

How, asked Erskine, could the state legitimately constrict the role of the jury in cases of seditious libel. His arguments influenced the framers of the Fox Act (1792).

Juries had the power to render a verdict of not guilty, despite the fact that they could not judge the issue of criminality. This was first established as a binding precedent in England in 1752 (Rex v. Owen), seventeen years after a jury had acquitted Zenger. In the years prior to the American

Revolution, as colonists came increasingly to see the government as an oppressor, juries in cases of seditious libel were increasingly inclined to acquit, especially if the defendant appeared to them to be a victim of hostile government. The generally conservative authors of the American Sedition Act (1798) contended that their statute was in fact liberal because it allowed juries to determine the issue of criminality.

Another way in which liberals sought to mitigate the scope and severity of the law of seditious libel was by claiming truth as a defense. The law, as Blackstone recognized, had proceeded on the assumption "The greater the truth, the greater the libel."

Two Englishmen, John Trenchard and Thomas Gordon, first presented and popularized the liberal contention that truth should be a legal defense in a series of social criticisms which appeared as articles in a newspaper, The London Journal, from late 1720 to September, 1722.[12] These articles were penned under the mane of "Cato", and made their first American appearance in Boston's New England Courant in 1722. Benjamin Franklin, who was then editing the Courant, continued to quote

"Cato" from then until the American Revolution,[13] and as the years passed from 1722 to 1776 other American editors of liberal persuasion quoted "Cato" with increasing frequency.[14] John Peter Zenger was among them.[15]

The authors of "Cato" were liberal Whigs of Lockian persuasion. John Trenchard (1662-1723) was educated at Trinity College, Dublin, and subsequently called to bar. Later a fortuitous marriage and an inheritance made him a man of ease, and he devoted most of his time after 1697 to politics and political writing. Trenchard, though a liberal Whig, was not a Republican.[16] In 1719 he began his literary connection with Thomas Gordon. Gordon, who was probably educated in law and called to bar in Scotland, was the subordinate partner in these joint endeavors.[17] "Cato" was an advocate of freedom of speech and political criticism, and in three articles he discussed the law of seditious libel, a law which he disapproved of. He felt it inimical to the public good. The law of libel in the England of his day "Cato" likened to a tool used by the party in power against its opponents.[18] Freedom to criticize the government, said "Cato", is a safeguard for the governed.[19] Since "Every Crime against the Public is a great Crime"[20] it

is every man's duty to expose "publick Wickedness."[21] Libels, contended "Cato", seldom hurt an innocent man,[22] and given this and their role in safeguarding the public, it follows that they should be prosecuted only as a last resort.[23] In an argument somewhat reminiscent of Milton and Locke, "Cato" maintained that the suppression of libels, far from aiding society, only succeeds in suppressing truth and encouraging the anomic publication of untrue innuendo.[24] This whole argument is a justification of "Cato's" belief that truth should be a defense in cases of seditious libel.

"Cato" did not argue for completely unfettered free expression; "Decency, good Manners, and the Peace of Society forbid it;[25] but "Cato" did call for defendants in seditious libel cases to be treated fairly by courts and juries. The broad discretion delegated to the court in these cases, he stated, had done injury to free expression.[26] In free states, "Cato" asserted, defendants should only be adjudged guilty if guilt is established beyond doubt.[27] A logical conclusion from these arguments is that truth should be a defense in seditious libel cases.

The attempt to separate speech and action in cases of seditious libel is a third way in which liberals have tried to protect free expression. The original theory of the law was based on the "bad tendency" of the libel, the possibility, however remote, that the libel might cause action to be taken which would disrupt community peace or threaten the government. As early as the Seventeenth century this was challenged in England and America. The Levellers argued for free press in some of their tracts (ca. 1620-1630). At one point William Walwyn rejected the bad-tendency doctrine and suggested that only criminal deeds should be punished. Walwyn's plea for free expression drew the line on expressions actually injurious or "dangerous" to government. These were to be punished.[28]

It is interesting that the Levellers condemned criticisms aimed at them in speech and press by Royalists.[29] It was often the case in early free expression controversies that the real issue was between "ins" and "outs", that is, between those in control of government and an oppressed group whose cries, though cloaked in expressions of pure liberty, were largely motivated by group self interest. To a certain extent this was the condition of the Levellers, yet not all were narrow

group partisans. The Levellers were a varied group generally united by opposition to Charles I and to monarchy. Some were in fact narrow partisans, but many were interested in the establishment of religious and civil toleration under a Republican government. Among the latter group there were some progressive thinkers who coupled to Republicanism the concepts of democracy and popular sovereignty.[30]

Thomas Erskine took a position on the separation of speech from action which was similar to Walwyn's when he defended Thomas Paine. Paine was tried for publishing The Rights of Man. The portions offensive to the British state were those in which he criticized the Glorious Revolution of 1688 (it is interesting to note that Paine also spoke out against the British for refusing to recognize truth as a defense in libel cases in the same book).[31] In defending Paine Erskine maintained "that opinion is free, and that conduct alone is amenable to law,"[32] but he added that in contending for free expression he was "not contending for uncontrolled conduct."[33]

John Stuart Mill also repudiated bad-tendency in favor of free expression.[34] The most important and influential American argument for free expression and a deliberate analytical separation of speech and action was influenced by Mill's work.

This, of course, is Justice Holmes' "Clear and Present Danger Test" which appeared early in this century. It is significant that all of these liberal doctrines reserve to the state, for various reasons, a right to punish seditions deemed truly dangerous to the well-being of society.

Defense of freedom of expression is today a plea for civil toleration, but historically the issue of toleration was first raised in Europe and, somewhat later, in England on purely religious grounds. Before the seventeenth century church and state were in England effectively allied and exercised considerable and not infrequently repressive control over ideas and activities in the realm. The English Reformation which began in the sixteenth and continued into the seventeenth century was a rebellion of sorts against the authority of the established church. The reformers, many of whom borrowed their ideas from continental divines (most notably from Calvin), called in varying degrees for religious toleration. While some would have been content merely with toleration for the beliefs and practices of their own sects, others called for complete toleration of all religious belief and practice. Such demands became increasingly common in the third decade of the seventeenth century and remained prominent after that time. These

demands were based on a conviction that religion is a matter of conscience and that therefore each individual must make his own private accomodation with God.

One immediate effect of demands for religious toleration was to challenge the Church of England and, thereby, to also weaken by indirection the monarchy which controlled the church and used it to keep the subjects of the realm properly submissive. The Stuarts depended especially on the Church because they justified their rule on the basis of "divine right", the doctrine that kings were chosen and ordained by God to rule their realms as His vice-regents. It was in part because of Charles I's early refusal to abandon the Church of England in favor of a policy of toleration, and also in part because of his willingness later to recognize on purely political grounds the exclusive claims of Presbyterians, that the British monarch met his ultimate fate.[35]

Originally the reformers asked for toleration only in religious, as opposed to civil affairs, but as G. P. Gooch has so clearly shown, the religious claim of freedom of conscience led to a plea for toleration in political matters.[36] A complete discussion of this development would be beyond the scope

of this thesis. The author feels, however, that the thesis would be incomplete if it failed to point up the relation between religious and civil toleration. The next few paragraphs attempt to illustrate this relationship with the examples of Roger Williams, John Locke, and Thomas Jefferson. Williams, of course, was the only one of these men who was a theologian.

The first American liberal of major importance argued primarily for religious toleration. Roger Williams was persecuted, not by the English government, but by the Calvinist theocracy in Massachusetts. Having been influenced by Luther's emphasis on "inner religious experience" and man's direct relation to God,[37] Williams was unable to accept orthodox Calvinism or to refrain from criticizing it.

Williams left the Massachusetts Bay Colony in 1635 and went to Rhode Island, but his debate with Puritan leaders continued. In 1644 he published a tract that stands as one of the leading defenses of religious freedom, The Bloudy Tenent of Persecution, for cause of Conscience. This argument for free expression advocated complete separation of Church and State. The state, said Williams, serves citizens by maintain-

ing peace. Neither civil nor religious peace requires uniformity: "God requireth not an uniformity of Religion to be inacted and inforced in any civill state"; furthermore, "persecution for cause of conscience is most evidently and lamentably contrary to the doctrine of Jesus Christ."[38] Under Williams' guidance Rhode Island extended toleration to persons of all religions, and allowed them to openly discuss and practice their beliefs and even to proselytize. Jews, who were persecuted throughout the Christian world, were made welcome, and the first Jewish refugees from intolerance arrived in Rhode Island in 1558.[39] Quakers, though persecuted and banned in the other English colonies, came to Newport where they were welcomed and eventually made many converts.[40] Even the Indians, regarded by New England Puritans, who tried to convert them to Calvinism, as heathens, were treated with respect and allowed to practice their religion without hindrance.

Williams' argument for free expression was absolute in religious matters, but not in civil affairs. There he argued for free expression, but noted that the magistrate "ought" to punish . . . "scandal against the civil state."[41] By this he meant that criticisms leading to civil violence should be punished, not that all criticisms should be punished. The

purpose of the civil authority was to maintain a tranquil order in which all might thrive; if it failed this, it failed to justify its existence. To secure tranquility Williams was willing to consider all freedom of expression as a social, and therefore limited right, rather than as an absolute. Thus, though he advocated complete separation of church and state, Williams realized that in some instances it might be necessary for the civil power to punish religious utterances to preserve civil peace.

John Locke, who is most generally remembered for his Treatises on Government, also authored four Letters on Toleration. Like Williams, Locke clearly separated Church and State[42] and contended that toleration was a characteristic of true religion.[43] Locke's argument for toleration, which is "agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind,"[44] obviously rests upon the foundation of Christian Natural Law doctrine.

Locke's Letters deal primarily with religion, but the first letter, which examines the relationship of civil and religious authority, deals with the civil magistrate's duty of toleration in more detail than does Williams. In the state, which is purely secular and social, "The public good is the

rule and the measure of all law making."[45] That is, the purpose of the State is to establish and maintain domestic peace.

Locke states that one man cannot force another to believe anything; "faith is not faith without believing."[46] But like Milton, he is not tolerant of Catholics. Neither does he like Jews or Atheists. Williams, a religious eclectic, would have disagreed here. Yet, notably, Locke's position is not one of absolute intolerance. In what amounts to an overt-acts test, he maintains that the magistrate must allow Catholics and Jews, and even the practices of idolatry, covetousness, and heathens, so long as the public peace is not disturbed.[47] Only then is persecution legitimate, because disturbing the peace cannot be tolerated by a government which is instituted precisely for the purpose of preserving domestic peace. Men are not to be punished for their private beliefs and convictions, or even for overt non-conformity, so long as their idiosyncracies do not cause any breach of the peace.

On a practical level "persecution is never expedient, while conversely, toleration is always useful."[48] There are two main dangers associated with persecution. First, there is the economic danger that socially useful citizens will leave, a problem currently faced by the U.S.S.R. The most prominent

example of such a forced migration, and the one which Locke's generation saw and learned from, was the migration of Protestants from France to Holland following the revocation of the Edict of Nantes in 1685.[49] The second danger threatens political stability. In an echo of Milton, Locke points out that an intolerant policy does not end dissent; it merely drives it underground and invites conspiracy. Toleration, by contrast, allows a government to know what is being thought, said, and written.[50]

Though the Letters on Toleration were primarily concerned with religious toleration, their plea for freedom of expression extended into civil matters as well. In neither sphere was freedom of expression held to be absolute. Under the test "Whatsoever is lawful in the commonwealth, cannot be prohibited by the magistrate in the church,"[51] civil law was proclaimed to be both supreme and uniform in its application. Thus, while laws should not be passed for the purpose of controlling religion or punishing dissenters, things not lawful in society at large were not to be allowed within the church. The final test was one of social well-being. Crimes against the state, including "sedition", were to be "punished and suppressed"; "But

those whose doctrine is peaceable, and whose manners are pure and blameless, ought to be upon equal terms with their fellow subjects."[52] (This is essentially a restatement of the doctrines of "King's Peace"[53] and "fighting words." Under the doctrine of King's Peace it was the office of the King to keep peace in the realm. In so doing he was justified in punishing offenders against the civil order. The fighting words doctrine, which operated in conjunction with the notion of King's Peace, justified punishment of any person whose utterances caused a fight, that is, a breach of community peace.)

In a time when Church and State were generally closely interrelated, and heresy was akin to libel, Locke's letters represented a liberal Whig position on a matter which was, in fact, one of considerable political significance. Locke's work influenced the work of Trenchard and Gordon, the authors of the "Cato" letters.

Thomas Jefferson, who, like Locke, is primarily remembered as a secular thinker, wrote a distinguished defense of religious toleration, the Bill for Establishing Religious Freedom. Like Locke and Williams, Jefferson completely separated church and state. This, of course, was also a characteristic of all

of his political thought.

Though some scholars have subsequently interpreted the Bill for Establishing Religious Freedom as a plea for both religious and secular freedom of expression, it was not. Its exclusive concern was the establishment of religious liberty, and this fact is essential to properly understand it. The Bill numbers among Jefferson's most liberal works, ranking with the Declaration of Independence. It embodied an overt-acts test.[54] Part of the justification for free expression in the Bill was based on the argument that "truth is great and will prevail if left to herself,"[55] an argument that we shall encounter again in J. S. Mill and Holmes.

In secular affairs Jefferson was a democrat, but not a radical libertarian. From the Revolution to the end of his Presidency he believed that states were fully competent to punish seditious libel under the English common law. He did not support absolute freedom of the press as an end in itself; he felt it important, but important as a means to another end: educating the citizens.[56]

Jefferson preferred a policy of tolerance for expression in civil matters, but his interpretation of the law of libel appears to have been close to Blackstone: no prior restraint,

but full responsibility; and in civil affairs he advocated no overt-acts test.[57] Jefferson's primary Constitutional objection to the Sedition Act (1798) was not that it violated natural rights, but rather that it violated the principles of federalism and state's rights as he understood them. It was on this ground that he based the Kentucky Resolution, an argument against the Sedition Act which contended that seditious libel should be punished by the states. This knowledge tempers the impression of liberalism that a letter such as President Jefferson's to his Attorney General, in which he wished "much to see the experiment tried of getting along without public (federal) prosecutions for libel," would otherwise impart.[58]

If properly understood Jefferson's much quoted statement "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter,"[59] must be seen as a political hyperbole. It is true that the Republicans and their leader were much more liberal than the Federalists, but Jefferson's actions in office show his toleration was not unlimited. He condoned the prosecutions of several Federalists on charges of seditious libel in the state courts, and he gave tacit approval to a Federal prosecution in Connecticut in 1807

when, despite prior knowledge of it, he failed to halt it. This case involved the Connecticut Courant, a newspaper which had on May 7, 1806, accused the President and the Congress of secretly giving two million dollars to France. The dispute ultimately rose to the United States Supreme Court. It was there heard, decided, and recorded as United States v. Hudson and Goodwin. This case is briefly discussed at the beginning of chapter five.[60] A confidential letter written by Jefferson to Governor McKean of Pennsylvania, a state where some Federalists were prosecuted, is revealing. In it he maintained:

> The Federalists having failed in destroying the freedom of the press by their gag-law, seem to have attacked it in an opposite form, . . . by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit.
> (Therefore) a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like a persecution; but a selected one.[61]

In justifying arguments for religious toleration it is perhaps possible to say simply that free expression is an inviolable right. Because religion appeals at once to the highest authority and goodness, this argument can stand with little or no practical argument or justification of the secular merits of free expression. Given human nature, such propositions are bound to be received in some quarters with

scepticism, especially when they are aimed at securing secular rather than religious freedom. In the area of freedom of expression, as in other areas of human conduct, secular rulers are unlikely to make any policy changes unless, in addition to an argument of abstract rights, they hear a convincing argument showing compelling practical reasons to effect change.

At the practical level there have been two major arguments. One is Locke's argument, the center of which is the contention that men are powerless to constrain the minds of their fellows through force. Locke also argues on the grounds that suppression is apt to cause economic and political instability, but these are secondary matters, effects of the above mentioned cause.

The second major argument is J. S. Mill's marketplace of ideas,[62] in which truth, being of higher quality than falsehood, always prevails over its competition. This was near the center of Justice Holmes' argument. The Mill-Holmes line presupposes a world of rational men acting rationally and is closely related to the ideas of both Adam Smith and the Benthamites. Though the argument that truth will prevail is generally attributed to Mill, Milton had made an analogous argument, all differences in time allowed for, in 1644.

Like the Utilitarians John Stuart Mill believed that freedom of expression should be justified because it would bring about the greatest possible good for society. The "only unfailing and permanent source of improvement is liberty, since there are as many possible independent centers of improvement as there are individuals."[63]

The core argument of On Liberty, however, is not Utilitarian. Rather, it is a defense of the right of the personality to develop freely to its full potential. This defense, which shows Aristotelian influence, is not based on natural law doctrine.[64] Mill places the personality in a social context, thereby making necessarily for some limitations upon its autonomy and raising the issue of moral responsibility.

Repudiating the bad-tendency approach,[65] Mill calls for complete liberty of thought, taste, and expression in society. Without these no society is free. In society each individual is sovereign over his own body and intellect. Like Milton and Locke, Mill maintains that "the sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number, is self-protection."[66]

It is in Chapter II of the Essay On Liberty that Mill argues that truth will prevail in the marketplace of ideas. Modern readers must note that Mill's argument is one of aristocratic rationalism, for he tacitly supposes that, despite the irrationality of the masses, the marketplace of ideas will be populated by men of education and ability who think and act rationally and are amenable to persuasion. Mill's "marketplace" is a nineteenth century descendant of the Greek polis of Socrates and Plato. Today what prevails in the marketplace of ideas may be irrational and conducive to majority tyranny. Mill early realized and feared this possibility, and sought to prevent it. In Chapter III he insists on "the importance of genius," the need for individual intellectual freedom, and the social benefits to be derived therefrom.

Mill's argument is liberal, but properly to understand it, and his insistence on the role of genius in society, we must understand that he feared oppression not undertaken by government on its own iniative, but imposed by government under popular pressure from the masses, who might make the government an oppressive "organ of the general intolerance of the public."[67] Because of the ignorance and intolerance of the masses, Mill feared the danger of mob rule which would cause a

general leavening downward of society to the lowest common denominator. Here we can see the influence of the Benthamite Utilitarians, including James Mill. Though they called for reforms in government and gave impetus to the changes of the 1830's, they were not democrats. Their motivation was the mechanical expectation of increased efficiency.

In discussing the individual's obligation or responsibility in society, Mill draws a distinction between actions that are purely self-effecting and actions which effect others. The latter area demands individual responsibility and respect for the rights of others. As professor Sabine has pointed out, the discussion of the relationship of freedom and responsibility is not completely clear.[68] It is probably impossible to completely resolve this problem, even with a social "hedonistic calculus". Essentially, in something approaching a wage-fund theory, Mill seems to be saying that in any society each member is fully entitled to a given share of rights and freedoms, and just as fully prohibited from taking more than his share, for this, given total limitations, would necessarily result in depriving another of some or all of his just portion.

Having repudiated the bad-tendency doctrine, Mill states:

> it must by no means be supposed, because damage, or probability of damage, to the interests of others, can . . . justify the interference of society, that therefore it always does justify such interference. In many cases, an individual, in pursuing a legitimate object, necessarily and legitimately causes pain or loss to others.[69]

This appears not only to justify at its outset an overt acts test, but to indicate that some acts connected with advocacy of ideas may be justified even if they cause harm to others. Mill is not advocating a right to be wantonly destructive, but he is realistically, if perhaps vaguely, stating that social change often does harm the interests of some parts of society. The key to understanding Mill on this point appears to be to view the phrase "pursuing a legitimate object" through the lens of the hedonistic calculus. In attempting to do only that which maximizes pleasure and minimizes pain for society as a whole we are compelled to seek progress toward a social order of increased pleasure and decreased pain. Such progress is, along with its attendant social change, legitimate and desirable. But even legitimate social change will involve, as society restructures, some "pain or loss" for some members of society. This pain or loss, though itself inherently undesirable, is in Mill's view acceptable so long as the process

which causes it, in this case unfettered social criticism, results over all in an improvement of society.

In 1919 Justice Holmes wrote two opinions which form the basis of the Clear and Present Danger doctrine. In Schenck v. United States, where the right to publish was in question, Holmes wrote a majority opinion in which he announced the clear and present danger doctrine. Clearly placing the right of advocacy in a social context, he noted that it is not absolute: "The character of every act depends upon the (social) circumstances in which it is done."[70] Even "stringent protection" of the right of free speech would not allow a man to "falsely shout fire in a theatre" for this would cause a panic. This leads to the issue of the proximity of advocacy to action.

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[71]

Questions of "proximity and degree", which differ in times of war and peace, as well as questions of the intent behind each act of speaking or writing in question, must always be carefully considered.[72]

In Abrams v. United States Holmes wrote a dissenting opinion in which he more completely defined the Clear and

Present Danger doctrine. Here the influence of Mill, which permeates both opinions, is more readily apparent. Society may limit freedom of expression, but only when this is absolutely and immediately necessary to insure social preservation. In a passage which echoes Mill closely he asserted "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[73]

Holmes clearly repudiated any contention "that the First Amendment left the common law as to seditious libel in force."[74] His danger test separated advocacy from action in a formula which differed according to circumstances and intent, and always reserved to the state the right to punish expression perceived to be immediately dangerous to its continued survival. He is generally considered to be a liberal, but some doubt exists on this point. It has been contended that Holmes was a Conservative who was too proud to be afraid. In Patterson v. Colorado he wrote an opinion, which he took care not to repudiate in Schenck, that was much more restrictive of speech and press.[75] The Patterson case involved the appeal of Thomas M. Patterson to the United States Supreme Court to reverse a decision of the Colorado Supreme Court. Patterson, the owner of a Denver newspaper, published charges that two members of

the Colorado Supreme Court had obtained office in an unethical partisan scheme, and he was ultimately convicted of contempt by publication and fined one thousand dollars. The appeal in this case raised the question of whether the Fourteenth Amendment, which guarantees certain privileges and immunities to citizens against arbitrary state action, guaranteed the First Amendment freedom of press. Holmes, writing for the majority, upheld the conviction and cited with apparent approval the Blackstonian libel doctrine that a free press meant simply freedom from prior restraint.[76] (Holmes declined to decide the question relating to the Fourteenth Amendment; the question here posed received an affirmative answer in Gitlow v. New York--1925.)

The Conservative Position

The bad tendency doctrine, which was the original theory of seditious libel, seeks to prevent any printed communication which might possibly cause, no matter how indirectly, any action which would lead to a breach of the peace. Bad tendency was tied to the doctrine of the King's Peace under which the King had an obligation to his subjects to maintain domestic tranquility. Bad tendency postulated that criticism of the government, its personnel, or its policies might result in

public dissatisfaction that would lead to disorderly, violent, and anarchic actions. Therefore, given the government's obligation to prevent such activity, the government had not only the right, but also the duty to prevent criticism. To this end sedition laws were promulgated making criticism of government acts, institutions, and personnel criminal and subject to punishment (see Chapters II and III). Bad tendency was a broad and vague doctrine which, in practice, was expanded and contracted by the English government virtually at will during the Tudor and Stuart periods.

Under the Tudors and Stuarts seditious libels were prosecuted for their bad tendency. Such prosecutions were easily justifiable in terms of a political theory which maintained that the sovereign king actually owned the real property of the realm and was by virtue of this entitled to make laws and rule his people as subjects. Another reinforcing component of the prevalent theory maintained that the king was obligated as ruler to keep the peace of his subjects. Preventing sedition was generally construed as necessary to the maintenance of order. Stuart thought included, in addition to these elements, a divine right argument which made the king God's vice-regent

on earth. Upon penalty of displeasing God the king was obligated to rule his people in a way that would secure their peace and well-being. They, in turn, were under divine obligation to serve their king loyally and uncritically.

Out of this context grew the doctrine "The greater the truth, the greater the libel." Based on these political theories the English rulers naturally felt they had a right to license and control printing. These twin practices, and the doctrines behind them, are the background against which to assess Blackstone.

Blackstone certainly feels that the established government has the right to rule. It governs through laws and their attendant sanctions, and is fully justified in punishing seditious libels on the basis of bad tendency, regardless of their truth, in the interest of law and order. Blackstone believes that Englishmen have rights, but that these must be used responsibly. And responsibility means for him accountability under the law for offenses against it.

The Federalist position was not dissimilar. The American Federalists were not democrats. They believed that by reason of being in control of the government they were entitled

to stifle and punish political criticism, and were quite willing to use the common law and Blackstonian doctrines to secure their position. Holding these beliefs, they asserted that the Sedition Act was merely a reinactment of a power the federal government already possessed by common law and was thus fully legitimate. They interpreted the First Amendment as a statement of the Blackstonian prohibition of prior restraint and nothing more. Federalists contended on these grounds that the Sedition Act was in fact liberal because it explicitly allowed truth as a defense and gave juries legal competence to determine the fact of criminality, made intent an element of the crime, and clearly defined punishment.

The American Liberal Response to Federalist Doctrine

The bad-tendency position of the Federalists was attacked by the emergence of an American libertarian theory.[77] A group including Madison, Jefferson, and Gallatin maintained that the First Amendment was an absolute protection of free expression which completely superseded the common law, that the federal government had no common law jurisdiction, that only the states could punish seditious libel, and that therefore the Sedition Act was unconstitutional.[78] The right of government to punish

dangerous sedition was never totally repudiated.

An American professor of law, St. George Tucker, published in 1803 a revision of Blackstone which was widely used as a legal text. In it he contended for absolute freedom to write, speak and publish, though maintaining that "a press stained with falsehood" was not beyond punishment.[79] Tucker felt the Sedition Act unconstitutional because in the American system, founded on popular sovereignty, the government is limited, not absolute.[80] "Where absolute freedom of discussion is prohibited, or restrained", he stated, "responsibility vanishes."[81]

Tucker (1752-1827), a graduate of William and Mary, was trained in law, later fought in the Revolution on the American side with distinction, and still later (1786) was a commissioner at the Annapolis Conference. Most of his time after 1786 was spent in public service. In 1800 he became a law teacher at William and Mary. In 1803 he was elected to the Virginia general court, on which he served until 1811. Also in 1803 he published his edition of Blackstone. It contained an appendix in which Tucker explained and discussed the principles of government in America under the federal constitution.

The tone of Tucker's Blackstone, as evidenced by its position on the law of libel, modified the original Commentaries to make them congruent with the American doctrines of popular sovereignty and constitutionalism. Tucker later served as a federal district court judge in Virginia for fifteen years. President Madison appointed him in 1813.[82]

One other liberal response was Tunis Wortman's A Treatise Concerning Political Enquiry (1800). According to Wortman, free enquiry is necessary for the moral and intellectual happiness of humanity and to protect civil liberty.[83] Freedom of investigation is an absolute natural right.[84] "Political institution", wrote Wortman echoing Tucker, Jefferson, and Locke, "is but the instrument of society."[85] Because governments, like men, are fallible, the unfettered right of free expression is absolutely essential to human happiness and progress.[86] Willful and untrue defamation is, of course criminal,[87] but censorship or prior restraint is not to be allowed because it allows the already fallible populace to be more readily deluded. Wortman also argues, in essence, that truth will prevail when confronted with falsehood, and cautions that freedom of investigation is the best preventive for revolution.[88]

The emergence of libertarian theory in America did not eradicate bad-tendency, nor did the new theory achieve lasting dominance. In the next chapter we will see the re-emergence of bad-tendency in a seditious libel case heard in America in this century (Gitlow v. New York--1925).

Chapter IV Footnotes

[1]George Sabine, A History of Political Theory, revised ed. (New York: Henry Holt and Co., 1937), p. 508.

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[3]Ibid., p. 28.

[4]Ibid., p. 25.

[5]Sabine, p. 512.

[6]Ibid., p. 509.

[7]Leonard W. Levy, Legacy of Suppression, 2nd printing (Cambridge, Mass.: Belknap Press, 1964), p. 97.

[8]Milton, p. 55.

[9]Ibid.

[10]John H. Powell, General Washington and the Jack Ass and other American Characters, in Portrait (New York: Thomas Yoseloff, 1969), pp. 16 and 54-58.

[11]Thomas Erskine, The Speeches of the Honorable Thomas Erskine, ed. James Ridgeway, vol. II (London: printed for J. Ridgeway, no. 170, Opposite Old Bond Street, Piccadilly, 1810), p. 269.

[12]John Trenchard and Thomas Gordon, The English Libertarian Heritage, ed. David L. Jacobson (Kansas City: Bobbs-Merrill Co., Inc., 1965), pp. xxv-xxvii.

[13]Ibid., p. 1.

[14]Ibid., p. xvii.

[15]Ibid., li.

[16]Sir Leslie Stephen and Sir Sidney Lee, eds., The Dictionary of National Biography, vol. XIX (London: Oxford University Press, 1917), pp. 1125-1126.

[17]Ibid., vol. VIII, p. 230.

[18]Trenchard and Gordon, p. 232.

[19]Ibid., p. 231.

[20]Ibid., p. 73.

[21]Ibid., p. 74.

[22]Ibid., p. 234.

[23]Ibid., p. 79.

[24]Ibid., p. 141.

[25]Ibid., p. 236.

[26]Ibid., p. 237.

[27]Ibid., p. 239.

[28]Levy, Suppression, pp. 91-93.

[29]Ibid.

[30]G. P. Gooch, English Democratic Ideas in the Seventeenth Century, 2nd. ed. (Cambridge: University Press, 1954), pp. 118-134. This provides an introductory account of the Levellers.

[31]Edmund Burke and Thomas Paine, Reflections On The Revolution In France and The Rights Of Man (Garden City, New York: Dolphin Books, 1961), p. 273.

[32]Erskine, vol. II, p. 104.

[33]Ibid., p. 159.

[34]John Stuart Mill, The Six Great Humanistic Essays of John Stuart Mill, introduction by A. W. Levi, 2nd printing (New York: Washington Square Press, 1969), pp. 218-219.

[35]On this see generally: Joseph R. Tanner, English Constitutional Conflicts of the Seventeenth Century 1603-1689 (Cambridge: The University Press, 1962) Chapters I-X.

[36]G. P. Gooch, English Democratic Ideas In The Seventeenth Century, 2nd ed. (Cambridge: The University Press, 1954), see generally; esp. pp. 8, 16, 25, 116-117.

[37]Thornton Anderson, Jacobson's Development of American Political Thought, 2nd ed. (New York: Appleton-Century-Crofts, 1961), p. 45.

[38]Ibid., p. 47.

[39]Samuel H. Brockunier, The Irrepressible Democrat Roger Williams (New York: The Ronald Press, 1940), p. 242.

[40]Ibid., p. 245.

[41]Levy, Suppression, p. 94.

[42]John Locke, The Works of John Locke, vol. III (London: printed for Thomas Tegg, et. al., 1823 (reprint by Scientia Verlag Aalen, Germany, 1963), p. 9.

[43]Ibid., p. 5.

[44]Ibid., p. 9.

[45]Ibid., p. 30.

[46]Ibid., pp. 10-11.

[47]Ibid., pp. 36-40.

[48]Thomas I. Cook, History of Political Philosophy (New York: Prentice-Hall, Inc., 1936), p. 540.

[49]Victor Duruy, A History of France, 4th ed. (New York: Cromwell, 1929), pp. 442-444.

[50]Thomas I. Cook, pp. 540-542; Also: Locke, vol. 6, p. 50.

[51]Locke, vol. 6, p. 34.

[52]Ibid., p. 52.

[53]Frederick W. Maitland, The Constitutional History of England, 16th printing (Cambridge: The University Press, 1965), pp. 108-110.

[54]Leonard Levy, Freedom of the Press from Zenger to Jefferson (Kansas City: Bobbs-Merrill Co., Inc., 1966), p. 328.

[55]Ibid., p. 330.

[56]Ibid., p. 332.

[57]Ibid., p. 336; Of course Jefferson is not alone even among liberals in not defending freedom of expression as an absolute. Few people do; one who does is T. V. Smith--see, for example: T. V. Smith, Discipline for Democracy (Chapel Hill: The University of North Carolina Press, 1942), esp. pp. 34-48. Smith argues for toleration in this work on the practical ground that an intolerant society degenerates into an authoritarian monism and in so doing fossilizes, thus insuring an incapability to provide for its people a "good" life. In other places Smith argued that complete freedom of expression was a good social outlet to prevent frustrations and dissatisfactions which, if allowed to grow under a policy of intolerance, could result in intrigue, insurrection, and political instability. In our modern post-Freudian world of irrational beings we must seriously question the validity of Smith's absolutism before accepting (or rejecting) it. Smith's argument, like those of Mill and Milton before him, may be better tailored to an aristocratic democracy in which political actors are educated, rational beings, than to a mass democracy characterized by irrationality, manipulation through symbolic politics, etc.

[58]Ibid., p. 360 (Letters to Levi Lincoln).

[59]Ibid., p. 333.

[60]United States v. Hudson and Goodwin, 3 Lawyers' Ed. 259.

[61]Levy, . . . Zenger to Jefferson . . ., p. 364 (Letter to McKean).

[62]Cook, p. 539.

[63]M. H. Abrams, et. al., The Norton Anthology of English Literature, vol. II, revised ed. (New York: W. W. Norton and Co., 1968), p. 1272.

[64]Mill, p. 136.

[65]Ibid., pp. 218-219.

[66]Ibid., p. 135.

[67]Ibid., p. 142.

[68]Sabine, p. 712.

[69]Mill, pp. 218-219.

[70]Robert E. Cushman and Robert F. Cushman, Cases in Constitutional Law, 3rd ed. (New York: Appleton-Century-Crofts, 1968), p. 815.

[71]Ibid.

[72]Ibid.

[73]Gerald Gunther and Noel T. Dowling, Constitutional Law, 8th ed. (Mineola, New York: The Foundation Press, Inc., 1970), p. 1066.

[74]Ibid., p. 1067.

[75]Edward G. Hudon, Freedom of Speech and Press in America (Washington, D. C.: Public Affairs Press, 1963), p. 69.

[76]Alfred Lief, The Dissenting Opinions of Mr. Justice Holmes, 3rd printing (New York: The Vanguard Press, 1929), pp. 251-253.

[77]Levy, Suppression, chap. 6.

[78]Alfred H. Kelly and Winfred A. Harbison, The American Constitution, 4th ed. (New York: Norton and Co., 1970), pp. 198-199.

[79]Levy, . . . Zenger to Jefferson . . ., p. 326.

[80]Ibid., p. 318.

[81]Ibid., pp. 319-320.

[82]Dumas Malone, ed., Dictionary of American Biography, vol. XIX (New York: Scribners, 1936), pp. 38-39.

[83]Levy, . . . Zenger to Jefferson . . ., p. 230.

[84]Ibid., p. 232.

[85]Ibid.

[86]Ibid., pp. 232-233.

[87]Ibid., p. 244.

[88]Ibid., p. 260.

CHAPTER V

SEDITIOUS LIBEL IN TWENTIETH CENTURY AMERICA

1801-1909: A Brief Survey

During the nineteenth century the United States had no federal statutory law of sedition after 1801. In United States v. Hudson and Goodwin (1812) the Supreme Court overturned a federal libel conviction secured in Connecticut. The defendant had been prosecuted at common law "for a libel on the President and Congress of the United States, contained in the Connecticut Currant, of the 7th of May, 1806."[1] (For more detail on this case see Chapter IV at p. 146 and Chapter III at p. 118.) In a short opinion Justice Johnson, speaking for the court, dealt with a question that had been closely connected with every American discussion of seditious libel since 1798: "whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases."[2] The answer was a decisive no. As a result there would be no common law of seditious

libel in America, and no federal law of seditious libel was to be enacted until 1917. In the interim the presses were free from federal regulation, but two attempts at restraint, one during the civil war and another during the administration of the first Roosevelt, merit brief examination.

During the American Civil War President Lincoln refrained from suppressing printed criticism even though he and his administration were repeatedly attacked in the "Copperhead" press. When General Burnside ordered on June 1, 1863, the suppression of the Chicago Times on the basis of its "tendency . . . to cast reproach upon the Government . . . by creating distrust in its war policy,"[3] President Lincoln told his Secretary of War to have the order revoked as soon as news of it reached the President's ears.[4] While all this transpired the paper was out of circulation for three days. In a letter written in 1864 the President's references to this situation indicate that he balanced the interests of the military and of freedom of press and concluded that the latter were more important.[5] If this is vague, shedding no light on the rationale behind the decision, Secretary Stanton's dispatch ordering General Burnside to revoke the order may shed some light on our

problem. According to Stanton, it was the President's opinion that the "irritation produced by such acts is . . . likely to do more harm than the publication would do."[6]

Theodore Roosevelt became so enraged in 1908 over charges of corruption in the construction of the Panama Canal that he denounced them as a "string of infamous libels." At his instigation prosecutions were initiated against the Indianapolis News and the New York World. Though the actual charges were "criminal libel", there is no question that these cases constitute examples of seditious libel proceedings. Two federal prosecutions were attempted and both failed. The first, which attempted to bring the publishers of both papers to Washington, D. C., failed in the court of District Judge A. B. Anderson. At this point the initial charges were dropped, but a second proceeding, based on the fact that copies of the World had been distributed at West Point, was then initiated. In this case a motion to kill the indictment was granted on the ground that the government lacked jurisdiction in the case.[7] In the earlier case Judge Anderson had found for the defendants on the basis of the Sixth Amendment which grants accused persons a right to trial in the state where an alleged offense is committed. He held specifically that the offense of the Indian-

apolis News could have been committed in Indianapolis, the site of publication, but not in Washington, D. C. where the newspaper had no agent and merely distributed a small fraction of its papers via the United States mails. "If the history of liberty means anything, if constitutional guarantees are worth anything," said Judge Anderson in the conclusion of his oral opinion, "this proceeding must fail."[8]

W. W. I: The Espionage and Sedition Acts

Early in World War I (1917) President Wilson denounced a Senate Bill which would have made the entire United States a part of the war zone and thus allowed wholesale infringements of civil liberties.[9] That such action was patently unconstitutional had been established by the Court in 1866 (Ex Parte Milligan[10] held that even during wartime citizens were guaranteed all Constitutional civil liberties so long as the civil courts remained open, i.e., so long as the country was not invaded.) Impetus for this type of legislative action grew from America's involvement in her first major foreign conflict. American public opinion during the war period was in no mood to tolerate any actions, or even expressions of opinion, which were not in complete conformity with accepted "patriotic" po-

sitions.[11] The government and the military were concerned over national security. Though existing conspiracy legislation was probably adequate, administration legal advisors pushed for tougher laws.[12] Under existing laws, which dated back as far as the Civil War, the government

> could and did . . . punish conspiracies . . . aiming to resist recruiting and conscription by riots and other forcible means, or seeking by speeches and publications to induce men to evade the draft. In some respects, however, these statutes were felt by the Department of Justice to be incomplete. (1) It was not a crime to persuade a man not to enlist voluntarily. (2) Inasmuch as one man cannot make a conspiracy all by himself, a deliberate attempt by an isolated individual to obstruct the draft, if unsuccessful, was beyond the reach of the law except when his conduct was sufficiently serious to amount to treason.[13]

The result was two pieces of legislation, the Espionage Act of 1917 and the Sedition Act of 1918, designed to close any possible loopholes in the law.

The Espionage Act of 1917[14] was "designed and intended to further the nation's successful prosecution of the war."[15] It was a broad act, only applicable in times of war, which included provision for military and postal censorship. It specifically prohibited making false statements for the purpose of interfering with the war effort, inciting disloyalty, and obstructing enlistment. Violators could be fined up to $10,000 and/or imprisoned for up to twenty years. A conspiracy clause

extended liability to all persons involved in any way in a group effort which violated this law.[16] The prohibition on expression critical of the war effort applied to newspapers[17] and other writings.

Eleven months after its passage, the Espionage Act was amended to include the piece of legislation often referred to as the Sedition Act of 1918.[18] In addition to the activities earlier proscribed, this act provided the already established penalty of fine and imprisonment for anyone who "shall willfully utter, print, write, or publish any disloyal . . . language about the form of government . . . or the Constitution of the United States"[19] or the armed services, or their uniform, or the flag. Here the reference to printed sedition was very plain and there appears to be no way to escape the conclusion that this is in fact a seditious libel law.

There were nearly two thousand federal prosecutions under these Acts of 1917 and 1918. Cases were heard in all parts of the country, and they resulted in approximately nine hundred convictions.[20] Though not all of these cases dealt with sedition, many of them did, and of those several were specifically concerned with seditious libel. This chapter shall examine in detail only the cases dealing with printed

sedition which reached the United States Supreme Court.

The Sedition Amendment, by far the harshest part of the Acts, came so late that there were few cases tried under it. The only leading case it produced was Abrams v. United States[21] (1918). The Sedition Amendment of 1918 was formally repealed in 1921, but the basic statute, the Espionage Act (1917), after some further amendment, remained on the books for possible use in future wars.[22] It was not used in World War II, probably because of new legislation designed to punish sedition which was enacted prior to America's entry into that war. (Smith Act; 1940).

State Laws: Criminal Anarchy; Sedition; Criminal Syndicalism

Even before World War I some states had adopted Criminal Anarchy statutes, apparently as a reaction to President McKinley's assassination. These statutes were intended to prevent and punish individuals or groups engaging in violent revolutionary or anarchic behavior. It was possible to use these laws to punish seditious libel, as New York did in the Gitlow case[23] which is discussed later in this chapter.

During the war years many states followed the example of the federal government by enacting state sedition laws and

laws against Criminal Syndicalism,[24] "the doctrine which advocates crime, sabotage, violence, and other unlawful means for the purpose of accomplishing changes in . . . political control."[25] Criminal Syndicalism statutes generally punished seditious libel by providing, in part, that persons involved in the writing, publishing, printing, or distribution of literature advocating the proscribed doctrine could be punished. Though knowledge of unlawful doctrines contained in any such literature was a necessary element to secure conviction, intent was not an element of the offense.[26]

In all, thirty-seven states eventually enacted one or more of these three kinds of statutes[27] (Criminal Anarchy, Sedition, and Criminal Syndicalism). Most of these statutes could be stretched for use against sedition or seditious libel. By 1935 there had been few such cases arising under state laws.[28] This is interesting because the climate of opinion,[29] especially from World War I through the decade of the twenties, was generally intolerant of "radical" ideas, but perhaps the reason that there were so few state prosecutions in this area is because there were numerous federal cases under the Espionage Act.

During the war anybody who failed to give unqualified support to the war effort was suspect, especially if he was an immigrant, and in the years after the war the nation went through a "red scare" as a result of the successful communist revolution in Russia and the avowed and highly publicized international designs of the Communists. The state legislation mentioned above and other state laws, including one type forbidding the display of red flags, were used against proven or suspected communists and against labor organizations suspected of communist sympathies including, in the West, the I. W. W. First Amendment liberties suffered a general constriction during this period as public intolerance demanded enactment and enforcement of restrictive legislation. Indicative of public pressure is the fact that the Department of Justice had to make a concerted effort beginning in 1918 to limit the number of prosecutions under federal law to cases of actual offenses. The Attorney General

> issued a circular directing district attorneys to send no more cases to grand juries under the Espionage Act of 1918 (Sedition Amendment) without first submitting a statement of facts to the Attorney General and receiving by wire his opinion as to whether or not the facts constituted an offense under the Act.[30]

This action was needed because under an earlier directive

prosecutors had been too zealous in enforcing the law and also because grand juries were far too eager to return true bills, regardless of the merits of a case.[31] Public opinion became more tolerant of dissent and political nonconformity in the thirties.

The Supreme Court began to hear cases arising out of all of this federal and state legislation in 1919 (Schenck v. United States).[32] The Court had never previously heard any such cases, and it faced the momentous task of formulating judicial interpretations for future use in cases involving freedom of expression. An attempt to do this had been made by District Judge Learned Hand in 1917,[33] but his work failed to provide a usable precedent for the Court.

Throughout the twenties the Court upheld the Constitutionality of Federal and State statutes dealing with Espionage, Sedition, Criminal Anarchy, and Criminal Syndicalism, and generally upheld convictions for their violation. The judicial doctrines formulated in these and later cases, such as the Clear and Present Danger test, discussed later in this chapter, came to have wide application to the whole field of First Amendment freedoms. Since this paper is concerned with the area of seditious libel only, the present chapter shall at-

tempt mainly to deal with cases falling into that area of law.

Because of the unpopular connotations attached to "seditious libel", that term has been rarely used in this century. Activities formerly punishable as seditious libel have been punished in this century under the legislation described above, and under some later federal and state statute law to be discussed below, most notably the Smith Act of 1940. The principal cases of seditious libel, prior to 1940, all of which are discussed below, were the Schenck,[34] Frohwerk,[35] Abrams,[36] Schaefer,[37] Gitlow,[38] and Herndon[39] cases. The Grosjean[40] and Near[41] cases provide examples of state laws used to punish the same kind of activity formerly denounced and punished as seditious libel.

In March, 1919, the United States Supreme Court handed down its decision in Schenck v. United States,[42] the first case prosecuted under the Espionage Act (1917) to reach it. The defendant was charged with causing insubordination in the armed services, obstructing the enlistment process by willfully having "conspired to have printed and circulated to men who had been called and accepted for military service . . . a document

. . . calculated to cause . . . insubordination and obstruction" by criticizing the draft as an unconstitutional infringement of citizen rights, and with using the mails in violation of Title XII of the Espionage Act.[43]

Mr. Justice Holmes, writing for the majority, upheld Schenck's lower court conviction and formulated the Court's first standard for judging the constitutionality of laws alleged to infringe upon freedom of speech or press, the "Clear and Present Danger Test". The danger test is a rule rule of evidence based upon the common law of incitement,[44] the doctrine which made it a crime to incite others to perform criminal acts. The danger test made it clear that the Court would not treat freedom of speech as an absolute. The normal remedy for harmful talk is rational debate in the marketplace of ideas even where there is some danger, but where the danger is clear and present Justice Holmes ruled that a nation at war might be justifiably compelled to limit some forms of expression:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that

> they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[45]

The week after the Schenck decision the Court handed down a decision in Frohwerk v. United States[46] upholding a conviction for the publication of articles questioning the constitutionality of the war and the draft in a German language newspaper, the Missouri Staats Zeitung.[47] Justice Holmes wrote the majority opinion and made no mention of the danger doctrine. The defense had challenged the constitutionality of the Espionage Act on First Amendment grounds, but the court denied this defense citing the precedent set in Schenck. Frohwerk was charged with involvement in a conspiracy to obstruct the draft. Despite the protections of the First Amendment, said Justice Holmes, "a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion."[48]

In several subsequent cases upholding convictions for seditious writings, the Schenck decision, which had itself upheld a lower court conviction, was cited by the majority as the controlling precedent with no mention of the danger test.[49] Through the twenties the danger test continued to appear, but always in dissenting opinions. It was kept alive by Justice Holmes and Justice Brandeis.[50] The first such

case, and also the first case under the Sedition Act of 1918 to reach the Court, was Abrams v. United States (1919).[51] In this case a majority upheld the conviction of a man who had printed and distributed leaflets denouncing President Wilson for sending American troops to Russia. The case was prosecuted under the Sedition Act on the grounds that the leaflet was designed and intended to impair the American war effort against Germany. Though in fact it was distributed by a Russian immigrant fearful of the consequences of American military involvement in the country of his birth, Russia, and though the American war effort in Europe was not directly challenged by the pamphlet or by Russia, the Court upheld the conviction as an attempt "to excite . . . sedition . . . for the purpose of embarrassing and . . . defeating the military plans of the Government in Europe."[52] This case is an example of how a law, once on the books, can be broadly and improperly applied.

Justice Holmes, joined by his brother Brandeis, was moved to write a significant dissent based upon and completing the danger doctrine. He found it impossible to believe that opinions in a "silly leaflet by an unknown man" could pose a clear and present danger to the war effort. The defendants

had, he felt, been legally justified in publishing their leaflet. Justice Holmes affirmed the legal right of the government to punish legitimate infractions of the Espionage Act but he was of the opinion that in this case criminal intent, a necessary element in any Sedition Act conviction, had not and could not be proven.

Persecution of opinions, said Justice Holmes, is a logical way to stifle opposition, but in the long run:

> the ultimate good desired is better reached by free trade in ideas-- . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.[53]

Having thus presented his general theory he tied it to the danger doctrine, saying:

> I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command 'Congress shall make no law abridging the freedom of speech.'[54]

The core of the danger test is the element of remoteness, or, approached from the other end, immediacy. This is what Justice Holmes tried to convey in the Schenck case when he characterized the danger test as a doctrine of proximity and degree." But this is undeniably vague, and in his Abrams opinion Holmes clarifies his position, stating: "Only the

emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command" of the First Amendment. Holmes is of the opinion, as he shows clearly in Schenck and Frohwerk, that the government can punish seditious words, but only if they are immediately, imminently dangerous to governmental stability and effectiveness. He is clearly rejecting the bad-tendency position, which holds that seditious words can be punished on the ground that their tendency to incite discontent might conceivably cause social or political instability at some remote time in the future.

In 1920 Justice Brandeis wrote dissenting opinions worthy of note in two Espionage Act cases. Both dissents were based on the danger test. Schaefer v. United States[55] involved the publication of criticisms of the government in a German language newspaper. Five publishers were convicted. Pierce v. United States,[56] the last Espionage Act case to reach the Court, involved the conviction of distributors of a pamphlet critical of the war. The convictions, especially in Schaefer, were supported on grounds close to "bad-tendency". Both were upheld by the Court. In both cases Brandeis maintained the

defendants had been clearly within their legal rights. Speaking in Schaefer he asserted, "Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief." In a case based upon such "impotent expressions" as Justice Brandeis considered to be here in question, the judge was legally obligated to dismiss. Brandeis warned against post-war restrictions. He referred to the danger test, which he held to be the standard in such cases, as a "rule of reason" which, correctly applied, would protect freedom of expression from abuse by "tyrannous, well-meaning majorities" as well as "irresponsible, fanatical minorities."

In Gitlow v. New York[57] (1925) the Court adopted the bad-tendency doctrine without reservation. Benjamin Gitlow was convicted under a New York Criminal Anarchy statute of 1902. Material provisions of that act define Criminal Anarchy as "the doctrine that organized government should be overthrown by force or violence" and provide punishment for any person involved in printing, publishing, editing, or knowingly circulating anything advocating that doctrine.

Gitlow was the business manager of a socialist paper called The Revolutionary Age which published a left-wing

"Manifesto" in one edition. This publication, along with Gitlow's involvement with it as business manager was proven, but there was "no evidence of any effect resulting from the publication and distribution of the Manifesto."[58] Nevertheless the Court upheld the conviction and the constitutionality of the New York statute saying in part:

> . . . the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately forseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale.

This is a criticism of, and departure from, the danger doctrine. The opinion continued in the same vein:

> A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgement as to the measures necessary to the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgement, suppress the threatened danger in its incipiency . . . .
>
> We cannot hold that the present statute is . . . arbitrary or unreasonable . . . . We must and do sustain its constitutionality.[59]

Justice Holmes, joined by Justice Brandeis, was moved to dissent. "Every idea," he remarked caustically, "is an incite-

ment"[60] implying that the rationale behind the bad-tendency doctrine, if pursued to its logical end, would forbid any thinking or ideas as dangerous to social stability. Basing his position on the danger doctrine, he asserted that Gitlow had departed from the position "sanctioned by the full Court in Schenck." He refused to accept Abrams and Schaefer as binding precedents which had "settled the law" (in these cases the Court had upheld the constitutionality of sedition legislation and had meted out punishment to individuals who violated such law during a time of war); the Hughes court would prove to be in substantial agreement on this point in the next decade (See: Near v. Minnesota; Grosjean; Herndon v. Lowry; Supra.). Finally, Holmes' dissent noted that, even granting to the state an undisputed right to punish incitement which would cause immediate danger to society, the incitement in Benjamin Gitlow's case alleged "publication and nothing more."

The most important aspect of Gitlow is not the acceptance of "bad-tendency"; rather, it is an interpretation of the Fourteenth Amendment. The precise legal question presented to the Court in this case was whether the New York Criminal Anarchy Act (1902) had been applied by the state courts in such a man-

ner as to deprive defendant Gitlow of his "liberty of expression, in violation of the due process clause of the Fourteenth Amendment."[61]

Liberty of expression, the freedoms of speech and press, are guaranteed in the First Amendment. Prior to Gitlow, this Amendment restricted actions of the federal government but not of the states. The Fourteenth Amendment protects "liberty" from arbitrary state action, but prior to 1925 the exact scope and meaning of "liberty" under the Fourteenth Amendment remained largely undefined.

If the guarantee of freedom of expression was in no way binding on the states, then the United States Supreme Court would have no direct jurisdiction under the First Amendment in cases involving freedom of speech or press which arose under state laws. But in 1920 (Gilbert v. Minnesota)[62] the Court had in effect ruled that ti did have jurisdiction in such cases when it accepted and gave a ruling on a Minnesota state Sedition law case.[63] In Gilbert the Court did not state definitely that any First Amendment freedoms were binding as protection against state action,[64] but this was held by the Court in

Gitlow, the majority opinion stating in part:

> For present purposes we may and do assume that freedom of speech and of the press--which are protected by the 1st Amendment from abridgement by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the 14th Amendment from impairment by the states . . .[65]

After the Gitlow case expanded the meaning of "liberty" under the Fourteenth Amendment, the Court continued to place other First Amendment freedoms under the protective umbrella of the Fourteenth.[66] By 1940 the Court had made all First Amendment freedoms binding upon the states.[67]

The benefit to be derived from "nationalizing" the application of First Amendment freedoms is that this (a) allows for a uniformity of rights in the nation and (b) acts as a check or limit to the power of the states. The problem of limiting temporal political power is an old one which appears here in the contemporary context of American federalism. This aspect of federalism, limiting the states and protecting rights, has a broad range. Here it is encountered narrowly in tis relationship to only one right, free expression, specifically freedom of press; and if a chief benefit of modern federalism is its ability to limit state power and thereby protect the rights of citizens, this benefit is counterbalanced by a great shortcom-

ing: the power of the federal government is awesome, and despite the putative restraints of public opinion, the ballot, the Court, the Constitution, the Bill of Rights, separation of powers and the system of checks and balances, this modern Leviathan may prove too powerful to be effectively limited. It would then be itself a threat to the very rights it seeks to protect from state absolutism. Indeed, there are some who claim that it already is.

During the thirties the Court, led by Chief Justice Hughes, treated freedom of expression cases more liberally than it had in the preceding decade. The last seditious libel case arising under Federal statute had been heard in 1920,[68] but the Court continued to hear some cases arising under state laws designed to restrict or punish printed political criticism. In 1931 the Court struck down as an unconstitutional[69] infringement of freedom of expression a newspaper gag law enacted by the state state of Minnesota (Near v. Minnesota).[70] Under this law a newspaper could be permanently suppressed by injunction, a writ which bypasses the jury process, thus effectively applying prior restraint to all future issues. In this case a Minneapolis newspaper, The Saturday Press, had charged that

city and county officials including the Mayor, the Chief of Police, and the County Attorney were receiving graft from gangsters. Subsequently the County Attorney took action to enjoin the Press from publication. The case arising out of this presented the Court with the question of whether the state law "authorizing such proceedings in restraint of publication is consistent with the conception of liberty of the press as historically conceived and guaranteed"[71] (under the First Amendment). The Court ruled that ti was not. In overturning this statute the Court severely censured prior restraint, noting that even Blackstone had allowed immunity from prior restraint and added

> recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected.[72]

The Near decision, in which a case involving a First Amendment freedom but arising under a state law was ultimately decided by a federal court, re-affirms federal jurisdiction in this area and therefore follows the line established in Gitlow. But the outcome in Near, securing freedom of the press from arbitrary state action, differs from the result in Gitlow. In

1936 the Court re-affirmed these jurisdictional precedents in deciding Grosjean v. American Press Co..[73] This case involved a special tax enacted in Louisiana, which operated to punish newspapers critical of the Long regime.[74] The Court overturned this law as an unconstitutional infringement of the liberty of the press which the due process clause of the Fourteenth Amendment protects from arbitrary state actions.

In 1937 the Hughes court once again rendered a liberal decision in a case dealing with printed matter deemed by a state to have a "dangerous tendency". Herndon v. Lowry[75] was the first such case to come to the Court from a Southern state. Herndon, a Negro, was a paid Communist organizer sent from Kentucky to Georgia to enroll members into the party and disseminate information and literature. He was arrested, after his arrival in Georgia, and because Georgia had not enacted sedition legislation during World War I, he was prosecuted under an 1832 statute for "attempting to incite an insurrection, with intent to overthrow the government of Georgia by open force."[76]

State authorities were disturbed by the literature they seized when Herndon was arrested, especially a booklet entitled "The Communist Position on the Negro Question." Though there

was no evidence that Herndon had distributed any of his literature or that he personally advocated forceful disobedience or rebellion, the Georgia Supreme Court, upholding a lower court conviction, held that

> Force must have been contemplated, but (added). . . . the statute (under which Herndon was prosecuted) does not include either its occurrence or its imminence as an ingredient of the particular offense charged.

Given a "lenient" twenty year sentence, Herndon appealed to the United States Supreme Court, setting up a defense based upon the Fourteenth Amendment. Because this defense had been raised late in the case, a procedural technicality of some importance, Herndon encountered difficulty in getting his case accepted by the Court.[77]

Herndon was absolved and released, the Court rendering a decision which turned on two issues. The first question was whether the Georgia statute, as applied and construed in this case, was constitutional under the Fourteenth Amendment. Mr. Justice Roberts, writing for the majority, held that this particular application of the statute was unconstitutional without specifically invalidating the statute, saying in part:

> The power of a state to abridge freedom of speech and assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable appre-

> hension of danger to organized government. (Note the oblique reference to the danger test.) The Judgement of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution . . . a conviction under such a law cannot be sustained.[78]

The second issue confronted by the Court was whether the statute in question furnished "a reasonably definite and ascertainable standard of guilt." Under this statute insurrection was defined as "any combined resistance to the lawful authority of the State." Another section of the same statute declared "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection."[79]

This "statute", said Justice Roberts for the majority,

> does not furnish a sufficiently ascertainable standard of guilt. The Act does not prohibit incitement to violent interference with any given activity or operation of the state . . . . Nor is any specified conduct or utterance of the accused made an offense . . . . The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change in government . . . . So vague and indeterminate are the boundaries thus set to the freedom of speech . . . that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.[80]

Thus, on the eve of World War II the Court was strongly defending freedom of expression. In 1938, the year following the Herndon decision, it indicated that all First Amendment

freedoms might be given a "preferred position", meaning that they might receive from the Court extra protection.[81] The liberalism of the Court in such cases continued, reaching, according to one scholar, a peak in the period between May, 1943, and July, 1949.[82] But during this period the Court heard no cases involving seditious writings.

World War II and the Red-Scare

In 1940, Congress passed the first peace-time sedition law in the history of the United States, the Alien Registration Act,[83] known generally as the Smith Act. This was a time when many Americans were uneasily contemplating the prospects of American entry into World War II. The military pushed for this legislation to prevent the spread of sedition and the organization of subversive groups among men in the services.[84] The Smith Act, which was modelled after the New York Criminal Syndicalism Act (1902),[85] was the subject of a lengthy debate in the House of Representatives, where its opponents pointed out that once enacted it might be broadly construed. The Act was originally proposed as a deterrent to seditious activity by aliens, but its opponents noted that its wording would allow it to be sued against citizens, for rather than referring

specifically to aliens resident in the United States the Act referred generically to "persons". Such an Act could be used to constrict the area of legitimate criticism of the government by its citizens.[86]

The Smith Act, which became law on June 28, 1940, had four titles. Title I, which was binding on "any person", citizen or alien, was explicitly aimed against several subversive practices, including, in Sections I and II, the activity historically referred to as seditious libel. Section I, designed to prevent seditious activity within or among the armed services made it a crime:

> To distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces . . .[87]

Section II, designed to prevent advocacy of the use of force or violence to overthrow the government, specifically made it unlawful for any person:

> with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.[88]

This section also made it a crime to organize or knowingly

join any group advocating forcible overthrow of the government. The Act provided maximum penalties of $10,000 fine and ten years imprisonment.

During the war years many states, cities, and municipalities enacted similar legislation. In the period after the war more did so in order to combat the popularly imagined "red-menace".[89] At the federal level the post-war red-scare brought forth legislation designed to suppress a broad range of Communist activity. This included the Taft-Hartley (1947), McCarran (1950), and Communist Control (1954) Acts, all of which in some ways supplemented the Smith Act. The new federal legislation of the post war years was not generally directed against sedition. The anti-Communist provisions of Taft-Hartley forbid Communists from holding any office within a trade union. The McCarran (Internal Security) Act of 1950 was directed against espionage. Under this law it is illegal

> for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship

directed by foreign powers. Communists are barred from employment within defense facilities or by the federal government.

A Subversive Activities Control Board was established by the Act to insure its enforcement. Communist organizations are required to register with this board. The Communist Control Act, though it did not make membership in the Communist party a crime in itself, had the substantial affect of outlawing that group as a functioning political party in the United States.[90] The McCarran Act contained a sedition section, but there were no prosecutions under it.[91]

No Smith Act cases involving seditious publications reached the Supreme Court. The Act was used only twice during the war, in 1941 and 1942.

> In 1941 eighteen members of the Trotskyite Socialist Worker's Party were convicted under its conspiracy provisions, and in 1942 twenty-eight alleged Nazi sympathizers were indicted under the provisions against interference with the armed forces, but after an incomplete trial and a lapse of almost three years, the indictment was dismissed for failure to prosecute.[92]

Then, in 1948, the Department of Justice took action through Federal Courts in New York against the leaders of the American Communist Party.[93] The prosecution ultimately led to the Supreme Court case Dennis v. United States.[94] The Dennis case did not involve seditious writings, but it did seek to punish seditious activity, and in the absence of a clear case

of seditious libel Dennis should give a good indication of how the court would have treated such a case. Both types of cases turn on the same issue: freedom of expression.

In Dennis the Court upheld lower court convictions secured under the Smith Act and, while nominally accepting the danger doctrine, based its decision upon a "sliding-scale" formula used by Appeals Court Judge Learned Hand in his affirmation of the District Court's convictions.[95] This in fact amounted to replacing the danger test with something approximating bad-tendency. The heart of the danger test, which had been accepted as the standard in expression cases since 1943, is the element of remoteness. Justice Hand had replaced "remoteness" with "improbability", saying "In each case . . . (courts) must ask whether the gravity of the 'evil', discounted by its improbabilty, justifies such invasion of free speech as is necessary to avoid danger."[96] Justice Vinson, speaking for the Court, accepted this statement as the rule, after affirming the legitimate power of Congress to quash rebellion, and added that the government was under no compulsion to allow a conspiracy to mature into open rebellion before taking action against it. "Given the same probability, it

would be wholly irrational to condone future evils which we should prevent if they were immediate."[97]

The Court Takes a More Tolerant Position

During the tense years of Cold War, Korean War, and McCarthyism the Department of Justice prosecuted numerous small time Communists in all parts of the country under the Smith Act.[98] So long as Dennis stood as the official statement of the Court's position, it appeared that political expression could be limited if there was even a remote probability that it might incite insurrection. But in the mid-fifties the Court took a more tolerant position.

In Pennsylvania v. Nelson[99] (1956) the Court moved to forbid state prosecutions for sedition against the federal government. This took much of the substance from a string of decisions beginning with Gilbert v. Minnesota[100] (1920) in which the Court had upheld the constitutionality of state sedition legislation. In Pennsylvania v. Nelson the Court ruled that the federal government had decisively pre-empted the field in the area of sedition laws. In the face of pervasive federal regulation and a dominant federal interest, said the Court, state activity might pose "a serious danger of

conflict with the administration of the Federal program."[101]

In Yates v. United States[102] (1957), heard the next year, the Court overturned the Smith Act convictions of several small time Communists and established a new standard for freedom of expression cases. The new standard did not explicitly overturn Dennis, but it contained rigorous evidence requirements which made it unlikely that many Smith Act prosecutions could stand high Court scrutiny.[103] The Yates opinion made it clear that direct incitement to illegal action was proscribed, but it also rejected a "probable danger" test. The Court stated that the advocacy of "abstract doctrine" was to be allowed. Under the new test, which did not rely on Schenck,[104] "the essential distinction is that those to whom advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."[105] Advocacy which does not urge action is not criminal and must not be restricted or punished. Following Yates the Smith Act fell into disuse as a vehicle for suppressing sedition.

In 1964 the Court heard New York Times v. Sullivan,[106] a case similar to Near v. Minnesota because it involved a state attempt to punish a critical newspaper. In Sullivan

a state government official sued a newspaper for libelling him in a paid advertisement. Portions of the advertisement were clearly false, and the lower court awarded damages.

Originally the law of seditious libel was directed against criticism of the government or of government policies or officials, but in this important case the Court overturned a conviction for libel precisely because the plaintiff was a government official. To allow such prosecutions, it was held, would stifle legitimate criticism of government actions and officials. A democracy needs "open and robust debate" on public issues. Further, said the Court, a law such as this is repugnant to the First and Fourteenth Amendments. Speaking for the Court, Mr. Justice Brennan said in part:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . . .[107]

In subsequent cases courts attempted to define the meaning of the term "public official" under the Sullivan ruling.[108] In Rosenblatt v. Baer[109] (1966) the Court rejected state definitions, but failed to give a rigid definition, suggesting that

it wished to reserve flexibility for itself in later cases. The Rosenblatt decision did define "public official" broadly enough to include all those having "substantial responsibility for or control over the conduct of governmental affairs."[110]

In cases since Sullivan it has proven difficult to establish "actual malice".[111] Garrison v. Louisiana[112] (1964) ruled that a plaintiff-public official could not establish "actual malice" simply because of a publisher's negligence. Further, adverse affects on a man's private life or reputation due to published criticisms of his official conduct do not make the "actual malice" test inapplicable. The plaintiff must show that the publisher knowingly printed a falsehood with intent to defame through falsehood. Merely showing intent to defame does not meet the "actual malice" requirement. In 1967 the Court held that "actual malice" can be established upon basis of proof that a publisher defendant was acting unreasonably and irresponsibly.[113] A decision the following year established that a defendant is not entitled to automatic acquittal for contending that he published false and defamatory material in the belief that it was true. The truth of the defendant's defense in such cases is a matter for the

jury.[114] In this area of libel law we encounter there exists a problem that appears to have no final solution, a conflict between the public interest and the right of individuals to privacy. Both are to be protected by law; neither is an absolute. As shown above in this paragraph, it is possible for the two to come into conflict and for one to prevail over the other. Does a public person loose the right to privacy in many situations, some of which appear to be remote from the public interest? The answer is obviously yes. Do not the laws protect public and private citizen alike? They are supposed to. Is it fair to a public official to deny him equal protection of his privacy under a doctrine which makes it extremely difficult to employ the law of libel even in cases affecting his private life? At this point it is tempting to say no, it is not fair. But there is validity to another question: Does a public man really have a separate private life? And, if so, how does one make a neat separation? This problem cannot be adequately covered in a paragraph, and unfortunately it will not get further treatment here. It is a problem, however, of which the reader should be aware.

The latest Supreme Court case dealing with an issue which would have been called seditious libel until that term fell into disfavor is New York Times v. United States[115] (1971). In 1971 copies of a Pentagon report entitled "History of U. S. Decision-Making Process on Viet Nam Policy" were made available to the Washington Post and the New York Times. The study, which came to be known publicly as the "Pentagon Papers", was classified. When the government took action to prevent publication of these documents in two federal district courts, both courts refused to enjoin publication. The case went on appeal to the Supreme Court, which granted certiorari. After deliberation the Court issued a brief per curiam opinion and nine separate opinions.[116]

The Court upheld the right of the Times to publish the material in question. The per curiam opinion, citing and quoting previous and related decisions including Near v. Minnesota,[117] stated in part:

> 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' . . . The Government 'thus carries a heavy burden for showing the enforcement of such a restraint.'[118]

The Court held that "the Government had not met that burden."

Such a decision, though liberal, was not revolutionary, nor should it have been particularly surprising. Before the American Revolution Blackstone had noted that Anglo-American law exempted presses from prior restraint. As Mr. Justice Brennan noted, no federal law, including the Sedition Act of 1798, had ever attempted to impose prior restraint.

The arguments of the majority were clearly related to the arguments put forth by liberal Democratic-Republicans such as Madison and Gallatin during the controversy over the first Sedition Act. Justices Black, Douglas, Brennan, Stewart, and White specifically mentioned the First Amendment as a basis for their separate opinions upholding the right of the paper to publish. Speaking to this point Justice Black stated:

> the First Amendment . . . gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. . . . (prior restraint was permanently abolished) . . . The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.[119]

The government had maintained that prior restraint was justified in the interest of "national security", a broad and vague interpretation of the War Power of the executive branch of government which was used to justify a wide range of

questionable activity under the Nixon regime. Justice Douglas conceded that the disclosures might "have a serious impact. But," he continued, "that is no basis for sanctioning a previous restraint . . . ." To buttress his point he cited Near v. Minnesota.

At the heart of the "national security" issue was a question of separation of powers: Could the executive, under a broad application of the war power, arrogate all the powers of government and still remain within the mandate of the Constitution? Several Justices noted that the enactment of laws to protect the national security was the constitutional responsibility of the Congress. They also noted that the Congress had enacted criminal laws to punish the publication of material dangerous to national security, but had refrained from passing legislation allowing previous restraint. These justices concluded that the executive branch was attempting to exceed its legitimate constitutional power. Mr. Justice Marshall, speaking to this point, said in part:

> Either the government has the power under statutory grant to use traditional criminal law to protect the country or if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either

> case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially law that Congress has refused to pass . . .[120]

As compared to the restrictive tendencies of the Court during and after both World Wars, this decision, coming at the end of America's longest war, does appear quite liberal. Still, it should be recalled that the Court has never been friendly to cases involving prior restraint. Seen in this light, it is apparent that this case simply follows precedent which can be traced back in the annals of Anglo-American law at least as far as Blackstone. Call it liberal, perhaps, but certainly not radical.

It would be dangerous to assume that the issue has been permanently settled. The Court could change its position in a future case. Mr. Justice Stewart, concurring, pointed out that the publication of materials like the "Pentagon Papers" might legitimately be attacked in advance "if Congress should pass a specific law authorizing civil proceedings in this field" and if the Court held that law constitutional. Also notable is the fact that three Justices, including Mr. Berger, C.J., dissented. These men attacked First Amendment

absolutism, and were quite willing to delay publication on "national security" grounds. The purpose of such delay would be to carefully scrutinize all materials in question in order to prevent publication of anything that might have a "pernicious influence", and the de facto result would be prior censorship.

Chapter V Footnotes

[1]United States v. Hudson and Goodwin, 7 Cr. 32 (1812).

[2]Ibid.

[3]Harold L. Nelson, Freedom of the Press from Hamilton to the Warren Court, 2nd printing (New York: Bobbs-Merrill Co., Inc., 1967), pp. 229-231.

[4]Ibid., p. 231; Also: Jack W. Pelatson, Constitutional Liberty and Seditious Activity (n.p.: Carrie Chapman Catt Memorial Fund, Inc., 1954), pp. 14-15.

[5]Nelson, pp. 231-232.

[6]Ibid., p. 231.

[7]Ibid., pp. 120-121.

[8]Ibid., p. 132; generally pp. 125-132.

[9]Zechariah Chafee, Jr., Free Speech in the United States (New York: Atheneum, 1941), p. 38.

[10]Milligan, Ex Parte, 4 Wall. 2 (1866).

[11]Robert S. Hirshfield, The Constitution and the Court (New York: Random House, 1962), p. 93.

[12]Chafee, pp. 36-38.

[13]Ibid., p. 37.

[14]Espionage Act, 40 Stat. 217 (1917).

[15]American Jurisprudence, vol. 47 (San Francisco: Bancroft-Whitney Co., 1963), p. 613.

[16]40 Stat. 219(1917).

[17]Frohwerk v. United States, 249 U. S. 204 (1919).

[18]An Act to amend section three, title one, of the Act entitled "An Act to punish acts of interference. . . .", 40 Stat 553 (1918).

[19]Ibid.

[20]Hirschfield, p. 94.

[21]Abrams v. United States, 250 U. S. 616 (1919).

[22]Chafee, pp. 40-42.

[23]Gitlow v. New York, 268 U. S. 652 (1925).

[24]Paul F. Brissenden, The I. W. W.: A Study Of American Syndicalism, 2nd ed., 2nd printing (New York: Russell and Russell, 1957), pp. 381-386.

[25]David R. Warner, "Criminal Syndicalism", note, 14, Nebraska Law Review 365 (1935-1936).

[26]Ibid., p. 378.

[27]Chafee, p. 576; Also: Appendix III generally.

[28]Warner, p. 377.

[29]When making reference to public opinion an author always runs the risk of reifying that abstraction; Readers are advised to see: Irving Dilliard, ed., The Spirit of Liberty: Papers and Addresses of Learned Hand (New York: Knopf, 1953), pp. 47-56 generally, and especially pp. 49-50.

[30]Chafee, p. 69.

[31]Ibid.

[32]Schenck v. United States, 249 U. S. 47 (1919).

[33]Masses Publishing Co. v. Patten, 245 Fed. 102 (1917).

[34]Schenck v. United States, 249 U. S. 47 (1919).

[35]Frohwerk v. United States, 249 U. S. 204 (1919).

[36]Abrams v. United States, 250 U. S. 616 (1919).

[37]Schaefer v. United States, 251 U. S. 466 (1920).

[38]Gitlow v. New York, 268 U. S. 652 (1925).

[39]Herndon v. Lowry, 301 U. S. 242 (1937).

[40]Grosjean v. American Press Co., 297 U. S. 233 (1936).

[41]Near v. Minnesota, 283 U. S. 697 (1931).

[42]Schenck v. United States, 249 U. S. 47 (1919).

[43]Ibid.; Also: Edward L. Coyle, "Limiting The Freedom Of Speech By Suppressing The Advocacy Of Direct Action", 4, University of Cincinnati Law Review, p. 212 (1930).

[44]Wallace Mendelson, "Clear and Present Danger--From Schenck To Dennis", 52, Columbia Law Review, p. 315 (1952).

[45]Coyle, p. 212.

[46]Frohwerk v. United States, 249 U. S. 204 (1919).

[47]Hirschfield, pp. 96-97.

[48]Frohwerk v. United States, 249 U. S. 204 (1919).

[49]Frohwerk v. United States, 249 U. S. 204 (1919); Abrams v. United States, 250 U. S. 616 (1919); Schaefer v. United States, 251 U. S. 211 (1920); Also: Mendelson, p. 314.

[50]Abrams v. United States, 250 U. S. 616, 624 (1919); Schaefer v. United States, 251 U. S. 468, 482 (1920); Pierce v. United States, 252 U. S. 239, 253 (1920); Gilbert v. Minnesota, 254 U. S. 325, 334 (1920); Gitlow v. New York, 268 U. S. 652, 672 (1925); Whitney v. California, 274 U. S. 357, 372 (1927); Also: Mendelson, p. 315.

[51]Abrams v. United States, 250 U. S. 616 (1919).

[52]Ibid.

[53]Ibid.

[54]Ibid.

[55]Schaefer v. United States, 251 U. S. 468 (1920); Also: Chafee, pp. 86-92. (There was a 6-3 decision on this case by the United States Supreme Court. Two dissenting opinions were written, Brandeis' (joined by Holmes) being the most famous because it helped complete the danger doctrine and attempted to deal philosophically with the fundamental issues of freedom of expression presented in the case. The other dissent, by Justice Clarke, is based primarily upon a procedural technicality. "On a single indictment, containing nine counts, five men, Peter Schaefer, Paul Vogel, Louis Werner, Martin Darkow, and Herman Lemke, were convicted and sentenced to the penetentiary (by a lower court) for printing seventeen articles, in a German language newspaper, published at Philadelphia, between June 24 and September 17, 1917." Each count was taken from some section of the Espionage Act of 1917; not every count was charged against every defendant. Schaefer and Vogel were indicted only under the count alleging conspiracy. The majority agreed that the evidence was insufficient to sustain a conviction in their cases and therefore reversed their convictions. The majority upheld the convictions of Werner, Darkow, and Lemke.

The crime of these men was to publish several articles which had already appeared in other publications, and to make minor alterations, some of which appear probably to have been inadvertent, in those articles. Justice Clarke was of the opinion that: "The indictment and the record in general make it very plain that the district attorney, in framing the indictment, and during the trial, believed that the statute prohibiting the making and conveying of a false report and statement would be violated by the publication of any article which had been published elsewhere if, in the publication, it was changed, either by addition or omission, and this without any proof that the original publication was true and the second publication false, and seemingly without regard to whether or not the publication had any tendency to promote the success of the enemy. The trial court accepted this construction of the statute and submitted the (case) to the jury on this theory of the law." (Justice Clarke was objecting to the jury's charge when he penned this paragraph.)

The dissenting Justices held that the publications were harmless, and therefore, that the defendants were innocent. They further maintained, in their opinions, that the alterations in question had not been wilfully made with intent to falsify and misrepresent.

The opinion of the majority was diametrically opposed: "They (the articles in question) were the publications of a newspaper, deliberately prepared, systematic, always of the same trend, more specific in some instances, it may be, than in others. Their effect on the persons affected could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for offense, --their 'intent' and 'attempt', for those are the words of the law, and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, . . ." The reader will note the close relation of these lines to the bad tendency doctrine and is invited to compare this selection from the majority opinion in Schaefer to the selection in Chapter V from Gitlow: see at footnote 51 in the text.)

[56]Pierce c. United States, 252 U. S. 239 (1920); Also: Chafee, pp. 92-97.

[57]Gitlow v. New York, 268 U. S. 652 (1925); An important precursor of this case is Debs v. United States, 249 U. S. 211 (1919). The Debs case is not considered in this paper because it concerned oral, not written sedition, but in both types of sedition cases the fundamental issue, freedom of expression, is identical. The significant point about the Debs case, which was decided roughly six years prior to Gitlow, lies in the fact that the court upheld a conviction in the earlier case on grounds of natural tendency, a synonym of bad tendency. Also notable is the fact that the majority opinion in Debs was written by Justice Holmes. Holmes dissented vigorously in Gitlow.

[58]Gerald Gunther and Noel T. Dowling, Constitutional Law, 8th ed. (Mineola, New York: The Foundation Press, 1970), p. 1075.

[59]Gitlow v. New York, 268 U. S. 652 (1925).

[60]Ibid.

[61]Ibid.

[62]Gilbert v. Minnesota, 254 U. S. 325 (1920).

[63]Chafee, pp. 294-297.

[64]Ibid., p. 321.

[65]Gitlow v. New York, 268 U. S. 652 (1925).

[66]Whitney v. California, 274 U. S. 357 (1927); Stromberg v. California, 283 U. S. 359 (1931); Near v. Minnesota, 283 U. S. 697 (1931); Grosjean v. American Press Co., 297 U. S. 233 (1936); DeJonge v. Oregon, 299 U. S. 353 (1937); Cantwell v. Connecticut, 310 U. S. 296 (1940).

[67]Chafee, p. 388.

[68]Pierce v. United States, 252 U. S. 239 (1920).

[69]Chafee, pp. 375-381.

[70]Near v. Minnesota, 283 U. S. 697 (1931).

[71]Ibid.

[72]Ibid.

[73]Grosjean v. American Press Co., 297 U. S. 233 (1936).

[74]Chafee, p. 382.

[75]Herndon v. Lowry, 301 U. S. 242 (1937).

[76]Chafee, p. 309.

[77]Ibid., p. 390.

[78]Herndon v. Lowry, 301 U. S. 242 (1937).

[79]Gunther and Dowling, p. 1089.

[80]Ibid., pp. 1092-1093.

[81]United States v. Caroline Products Co., 304 U. S. 144 (1938); see fourth footnote to opinion.

[82]Mendelson, p. 320.

[83]An Act to prohibit certain subversive activities, 54 Stat. 670 (1940).

[84]Chafee, pp. 450-453.

[85]Robert E. Cushman and Robert F. Cushman, Cases in Constitutional Law, 3rd ed., (New York: Appleton-Century-Crofts, 1968), p. 816.

[86]Chafee, pp. 453-454 and 459.

[87]54 Stat. 670 (1940).

[88]54 Stat. 671 (1940).

[89]Pelatson, pp. 48-49.

[90]John Ferguson and Dean McHenry, The American System of Government, 12 ed. (New York: McGraw-Hill, 1973), pp. 157-158.

[91]Ibid., p. 44.

[92]Hirschfield, pp. 102-103.

[93]Alfred H. Kelly and Winfred A. Harbison, The American Constitution, 4th ed. (New York: Norton and Co., 1970), pp. 889-890.

[94]Dennis v. United States, 341 U. S. 494 (1951).

[95]Hirschfield, p. 103.

[96]Mendelson, p. 330, quoting 341 U. S. 510 (1951).

[97]Dennis v. United States, 341 U. S. 494 (1951).

[98]Kelly and Harbison, p. 891.

[99]Pennsylvania v. Nelson, 350 U. S. 497 (1956).

[100]Gilbert v. Minnesota, 254 U. S. 325 (1920); Gitlow v. New York, 268 U. S. 652 (1925); Whitney v. California, 247 U. S. 357 (1927); Stromberg v. California, 283 U. S. 359 (1931).

[101]Pennsylvania v. Nelson, 350 U. S. 497 (1920).

[102]Yates v. United States, 354 U. S. 298 (1957).

[103]Kelly and Harbison, p. 977.

[104]Schenck v. United States, 249 U. S. 47 (1919).

[105]Yates v. United States, 354 U. S. 298 (1957).

[106]New York Times v. Sullivan, 376 U. S. 254 (1964).

[107]Ibid.

[108]Robert C. Blunt, "A Law Enforcement Officer Sues for Defamation", vol. 43, no. 2, F.B.I. Law Enforcement Bulletin, p. 19.

[109]Rosenblatt v. Baer, 383 U. S. 75 (1966).

[110]Ibid.

[111]Blunt, pp. 19-20.

[112]Garrison v. Louisiana, 379 U. S. 64 (1964).

[113]Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967).

[114]St. Amant v. Thompson, 390 U. S. 727 (1968).

[115]New York Times v. United States, 403 U. S. 713 (1971).

[116]Alpheus T. Mason and William M. Beaney, American Constitutional Law, 5th ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1972), pp. 546 and 615.

[117]Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 70 (1963); Near v. Minnesota, 283 U. S. 697 (1931); Organization for a Better Austin v. Keefe, 402 U. S. 415 (1971).

[118]New York Times v. United States, 403 U. S. 713 (1971).

[119]Ibid.

[120]Ibid.

CHAPTER VI

FREEDOM OF EXPRESSION AND SOCIAL CONTROL[1]
(Review and Conclusions)

I

The law of seditious libel was firmly established under the House of Tudor and continued to exist under the Stuarts and even during the interregnum. During this time it was firmly established as part of the English common law, and even after 1688 the law of seditious libel continued in force.

Seditious libel has some roots that pre-date even the Tudors, but the offense rose to prominence under them at the same time that they were centralizing the nation and taking control of the national church. The purpose of the law from the time of Henry VIII was to prevent criticism of the government so as to increase its stability. Truth was no defense for one charged with seditious libel. From the beginning, however, intent was an element of the crime. It was therefore incumbent, at least in theory, for the prosecution to establish that the accused published the alleged seditious libel with intent to defame the government, its agents, or its policies. This guarantee of defendants' rights was sometimes honored in the breach.

To augment the law of seditious libel the Crown controlled all presses under a system of licensing. This systematic imposition of prior restraint allowed the state to censor all publications. By way of comment it is notable that, although such a system is repugnant to democratic values, it does allow a very high degree of predictability: an author generally needs not fear prosecution for a publication that has been reviewed and approved by the government prior to his printing it. Licensing was begun under a statute passed during the reign of Elizabeth Tudor. James I re-inacted the same statute. The practice was briefly discontinued during the interregnum, in 1641, but was re-instituted in 1643. In 1694, some years after the "Glorious Revolution," licensing was finally ended.

After the end of licensing the state still retained the right to punish seditious libel. A fairly modern seditious libel law had appeared on the books during Elizabeth's reign, and another similar law had been passed during the interregnum. There may well have been others. In 1769, long after the triumph of the Whigs, Blackstone correctly defined freedom of the press as freedom only from prior restraint, noting that anyone writing, publishing, or distributing seditious matter could be prosecuted for seditious libel.

Following Blackstone, the law was liberalized. In his day cases were tried to a jury, but the jury was legally competent to pass only on the matter of publication. This left a very substantial amount of discretion in the hands of the

judge, and, therefore, in the bosom of the government. The jury could, and sometimes after 1752 did, render general verdicts of 'not guilty', but from about 1770 there was a growing pressure to expand the jury's competence so as to allow it to decide some questions of law inseparably intertwined with the fact of publication (see Chapter II). This competence was given to the jury in 1792 by Fox's Libel Act. Truth, which had never been a legal defense, was allowed in defense under the provisions of Lord Campbell's Act in 1843.

The American colonists brought with them English institutions and practices including the law of seditious libel, which remained in force in theory, though not always in practice, until the Revolution. (See Chapter III). One result of the Revolution, a result firmly and finally established in 1812 (United States v. Hudson), was the repudiation of criminal common law, including the law of seditious libel, sometimes referred to as criminal libel.

All of this is generally agreed upon. Aside from bringing it together and treating it in greater detail than is done in this re-cap, does this thesis make any contribution to the body of knowledge on the subject? The author maintains that the answer to this question is yes.

In no treatment of seditious libel known to the author, for example, is any coverage given to the seditious libel act of the interregnum period which is discussed in Chapter II of this work.[2] Further, while the existence of this law in England

during and prior to the American colonial era is accepted without serious question, it is generally treated as only a tool of the Crown, enforced by Royal agents and judges. This thesis has attempted to show the full scope of the law of seditious libel, and in so doing has shown that the law was used by the government, including the interregnum government, the Parliament when that body attained sovereignty, and even by the mini-Parliaments, the colonial assemblies. With such broad application it is naive to view this law as merely the tool of despotic monarchy.

One cannot help but feel that this simplistic interpretation holds sway, and it does hold sway, in the popular mind because the American interpretation of history, in dealing with the Revolution and our nation's birth, has tended to paint in blacks and whites. The Founding Fathers are seen almost as divinely inspired apostles of liberty, while the British are portrayed as villains led by a ruthless tyrant, the George III of the American Declaration of Independence.

Perhaps such a popular view of our history is functionally necessary in order to socialize many men of limited understanding into a strong attachment to the nation, but it is hopelessly simple minded and inadequate. The average man, if he knows of the Sedition Act of 1798, considers it to be the misguided act of a few overly zealous patriots of conservative persuasion. (This sounds familiar in another, more recent context--Watergate.) Those who opposed the Act are considered as pure champions of liberty. At any rate, and for present purposes

this is by far the most significant of these historical fallacies, it is generally held that when the Sedition Act expired in 1801 America was freed from the fetters of the law of seditious libel; the Act had not been consistent with the First Amendment, and from 1801 that Amendment protected and continues to protect freedom of political expression. The general absence of federal restraint during the period from 1801 until World War I has probably strengthened this conviction, but anyone who says today that political expression has been completely free in America since 1801 is either ignorant of, or chooses to ignore, several federal laws and Supreme Court cases, including the so-called "Sedition Act" of 1918. (The author is aware that professional historians do not hold these simplistic popular views, and that some good books have treated various aspects of these problems in detail.[3] Still, general histories gloss past most of this material, and outside of the legal profession it appears that there are few that would seriously challenge the view that seditious libel came to an end in 1801.)

This thesis points out, in contrast to these positions, that during the Revolution freedom of expression was generally denied to British partisans, a not surprising but generally overlooked fact. Further, the detailed analysis in this thesis of the Sedition Act and its enforcement shows that its enactment was more than a chance happening instigated by misguided partisans: it was a clear and undemocratic attempt to capture complete control of the American government by muzzling legitimate opposition. Furthermore, its opponents had partisan motives of their own.

II

In contrast to the belief that the whole law of seditious libel is a thing of the past in America, this thesis shows, in Chapter V, that it is not. Despite an interesting argument by Mr. Justice Black[4] that the whole Bill of Rights is an absolute, and that therefore the First Amendment guarantee of freedom of the press must be viewed as an absolute prohibition enjoining the United States government from placing any form of restriction on political expression, the evidence shows us undeniably that as a practical matter of fact the Congress (and many state legislatures) has enacted in this century laws punishing some kinds of political expressions and the federal courts have upheld the validity of these laws. (For more detail see Chapter V.) Whether this situation is right or wrong, the topic of the last section of this chapter, we must admit that it in fact exists.

Whether a law is called a seditious libel law or a "Smith" Act, if it punishes that activity which is traditionally known as seditious libel, it is in fact a libel law. The heart of a libel law is that it punishes certain types of publications in an attempt to secure the success and stability of the government and, thereby, to promote domestic tranquility. If a law does this, despite the fact that the particulars of its operation, scope, and harshness differ in some ways from the sedition laws of the Tudors, or Stuarts, or of the American colonies, it is still a seditious libel law. If it proves to be enforceable we must conclude that the nation in which it was enacted has an

operable law of seditious libel. From such a conclusion there can be no escape.

Granting the validity of this argument, Chapter V of this thesis establishes that the United States has had, and continues to have, the means to punish seditious libel in this century, and has used those means, primarily during and in the aftermath of major wars. The Espionage Act (1917), the Sedition Act (1918), and the Smith Act (1940), all of which were held valid by the Court in actual cases, all contained provisions punishing seditious libel. Beginning with Schenck v. United States (1919) the Supreme Court has upheld the power of the United States to punish seditious libel.

The government may not exercise prior censorship of publications,[5] but it may punish authors, publishers, or distributors of publications for their content. In essence this was the position of Blackstone (ca. 1769). It is true that punishments are less harsh today for convicted libellers than they were two hundred or more years ago, but inasmuch as criminal punishments today are generally less harsh this fact loses much significance.

It is true that a broader range of criticism is allowed--a much broader range--today than was the case prior to the American Revolution. In large part this is probably due to the greater degree of social and political security, and to the great ability of the government to absorb criticism and still function properly. One likes to think that it is also due to the fact that our government is a democratic one. But it is also true that the purpose of our modern sedition laws remains

the same as the purpose of their historical pre-cursors: to help maintain political stability. Sedition laws have been enacted and used most during periods of war, periods when the government was straining under a heavy burden. Even the liberals, Holmes for example, have held that, when properly applied, these sedition laws are completely legitimate.[6]

How are these laws to be applied? One may compare Holmes' views in Schenck and Gitlow. In neither did he attempt to deny categorically to the government the power to punish seditious libels, but in his Gitlow dissent he rejected punishment under the "Bad-Tendency" doctrine as too harsh, and therefore inappropriate. Inasmuch as Holmes has formulated the most liberal position of the Court in these cases and still accepted the right of the government to punish sedition, and to increase the scope of its sedition punishment during periods of stress, it appears quite possible that in times of extreme stress our liberties could be denied us. Is there any guarantee that seditious libel laws will be used only as a last resort in times of extreme stress?

It would be nice if it were possible to make a neat comparison between "Bad-Tendency," as representing the doctrine which prevailed in conjunction with seditious libel prior to 1801, and the "Danger Doctrine," as representing the enlightened and progressive views of our age and as marking out a quantum jump forward in the protection of civil liberty. Unfortunately this cannot be realistically done. In 1925 (Gitlow) the Court accepted a "Bad-Tendency" standard. It has since

moved back from this position (see Chapter V for detail), but it has never accepted the "Danger Doctrine" or any other liberal position as its unconditional standard. In the light of Yates (1957) it appears that the academic discussion of subversive doctrines, if divorced from advocacy, is not punishable. But realists must always keep in mind that (1) the government can punish seditious libel (as, for example, under the Smith Act), and that (2) what may be punishable will change from time to time as actual social and political conditions change and as the composition of the high court is changed. The personal predilection of the judges, as Chief Justice Hughes taught us (just in case we could not observe it ourselves) plays a key role in our legal system. Some intrepid (and perhaps quite reactionary) future Court may, in deciding a seditious libel case in which some professor has published an academic tract on Marxism quite devoid of advocacy but too objective to be sufficiently critical, turn Justice Holmes' dissent "Every idea is an incitement" up on its head by concluding that every idea is indeed an incitement. Obviously this would rob the Yates opinion of its substance.

The willingness of the Supreme Court to protect freedoms of speech and press during the turbulent Viet Nam war era, most notably in the Pentagon Papers Case (1970), is admirable. The law is subject to change in the future however. The government has established for itself a power to punish seditious libel, it indeed has the brute strength to enforce such a law, and it has not, despite the liberalism of the Court in this area since

1957 (Yates), relinquished any part of this power. Therefore the substance and operation of this law in America could become more restrictive in the future.

III

Nobody can study seditious libel without realizing that it is, of course, only one particular part of the broader issue of freedom of expression and the social value thereof; that, viewed in slightly different perspective, it is only one particular area of the whole issue of freedom versus authority (or, if you sill, change versus stability), and, therefore, of obligation; and that the questions raised in the study of seditious libel about the propriety, legitimacy, proper scope and function, possible social benefits, and dangers of this law are without final answers. In making this last assumption the author is attempting to be realistic. This paper repudiates any concept of complete universalism as incompatible with social realities. The following brief remarks should be viewed in a context of a universal-relationalism in which it is assumed that different social-political-legal orders may differ one from another at any time, and that the same systems may differ in different times, as to needs and capabilities, but that the central purpose of the state remains constant.

In discussing seditious libel and its social role it is necessary to ask first whether man needs society. The author's answer is yes. Next it is important to ask what kind of society man needs. In answer to this let it suffice to say that man

needs a social order in which he is secure and in which his opportunity for individual self-development and fulfillment is maximized. The reader will note that one component of self-fulfillment is free expression of all kinds, including political expression.

But in order to secure maximum self-fulfillment, or liberty, or freedom, for individuals, men must institute a social order, a body politic. This political order must have some rule making power, some legitimate authority, if it is to order society in such a manner that men are collectively and individually better off than they would be without it. This improvement of the human condition is the proper function of the state, and if it functions properly it is legitimate. The establishment of a political order establishes a conflict between its legitimate authority and some kinds of personal liberty. Individuals in the political system are forced to accept limits to their personal autonomy.

Can and should limits be placed on personal expression, especially political expression? A strong order can generally place sanctions on certain kinds of political expression, but might alone does not make right, and furthermore, this may simply drive dissent underground and might even make it more effective, especially when the limitations are imposed by a repressive order. Since oppressive orders are generally objectionable the important problem is to consider seditious libel in the context of generally acceptable states.

The good state, the state attempting, and so far as is humanly possible, succeeding in improving the conditions of human existence, must be given the legitimate power to punish seditious libels. The very existence of such a state is the precondition of all other social goods, and it therefore must have the power to prevent its own destruction.

But this authority to limit freedom in the area of political expression must be granted subject to some sort of limitation for at least two reasons. First, in a democratic system such as the United States attempts to be, the citizens have a primary right to criticize their government in order to prevent it from blundering in honest attempts to represent them, and also to prevent it from becoming corrupted. Second, in any system wise rulers will find that they must allow criticism and the social change that sometimes accompanies it in order to prevent social decay. Responsible criticism is necessary if a society is to retain the flexibility needed to adapt to changing social needs. An emphasis only on immediate security which results in stifling political criticism completely is shortsighted and unwise.

There is no final way to determine just how much freedom of political expression must, on the one hand, be allowed as a minimum, or can, on the other hand, be compromised. Wise, and hopefully fair and disinterested, legislators and judges must make these determinations for their states taking into account each state's particular needs. A strong state can, and therefore should, allow more dissent than a weak one (assuming that

both are good states whose existence is the precondition of a better human existence than would be possible in their absence.) The limitation of freedoms by the legitimate authority of the state, and especially of the vital freedom of political expression which maintains structural vitality within a political order, should never be allowed except as a final action utterly necessary to preserve domestic peace. As Justice Holmes pointed out, for example, a state may justly and necessarily curtail this freedom more during wartime than during peacetime.[7] This is because the system is not as secure in war as in peace and needs added protection.

The problem which unavoidably attends any grant of authority is that it may be abused. Once officials are empowered to enact laws limiting political expression they may place strict and unwarranted limits in a short-sighted attempt to preserve their present order unchanged. This was the case with the Sedition Act of 1798. But the possibility of abuse must not be allowed to result in the complete denial to policymakers of an authority which, properly used, may at times be vitally necessary.

Proper use, however, must mean sparing, cautious, and reluctant application in this case. The bad-tendency approach may have been necessary in Tudor England. Today it might, under emergency circumstances, be necessary within a war zone. But, as a general rule this doctrine is obsolete due to the increased security of most modern political orders. Modern states, given

their strength and security at home, cannot justify the punishment of a seditious libel on the grounds of bad-tendency. Nor can they justify prior restraint.

Insofar as modern states can punish seditious libel they should adhere to something close to the danger doctrine: only writings which clearly advocate and encourage subversive activity, and which pose an imminent danger to the peace of the community and the welfare of its citizens, should be punished; and even in these cases offenders should not be punished with undue harshness. Punishment in seditious libel cases, as in all cases of criminal conduct in a strong and secure state, should be humane and equitable with a stress on rehabilitation of the offender.

Chapter VI Footnotes

[1]This thesis set out to trace the historical development of the law of seditious libel. This has been the primary concern and function of Chapters II, III, and V, with Chapters I and IV intended to provide background material which the author felt necessary. In order to make of this thesis project more than an exercise in documenting and patching together bits of historical data, the concluding chapter will address itself to three questions: I) What has been found and presented in earlier chapters, especially Chapters II and III?; II) What can be said about the law of seditious libel in twentieth century America (in light of Chapter V)?; III) What is a proper relationship between freedom and authority, in the area of freedom of expression, as relates specifically to political expression (i.e., to sedition and seditious libel)?

[2]Joseph R. Tanner, English Constitutional Conflicts of the Seventeenth Century 1603-1689 (Cambridge: The University Press, 1962), pp. 161-162.

[3]The author is aware that the Sedition Act of 1798 has been the subject of intensive prior research and writing. Some very good books on this topic which were used during the preparation of this thesis are: Leonard W. Levy, Legacy of Suppression, 2nd printing (Cambridge, Mass.: Belknap Press, 1964), p. 20; John C. Miller, Crisis in Freedom: The Alien and Sedition Acts (Boston: Little, Brown, and Co., 1951), p. 15; James Morton Smith, Freedom's Fetters (Ithaca, New York: Cornell University Press, 1956), p. 107.

[4]Hugo Black, "The Bill of Rights," 35 New York University Law Review 865.

[5]Near v. Minnesota, 283 U. S. 697 (1931).

[6]Schenck v. United States, 249 U. S. 47 (1919).

[7]Ibid.

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