

## New Seditious Libel

Judith Schenck Koffler

Bennett L. Gershman

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Judith Schenck Koffler and Bennett L. Gershman, *New Seditious Libel*, 69 Cornell L. Rev. 816 (1984)

Available at: <http://scholarship.law.cornell.edu/clr/vol69/iss4/5>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# THE NEW SEDITIOUS LIBEL

*Judith Schenck Koffler*†  
& *Bennett L. Gershman*††

Let all men take heede how they complayne in wordes against any  
magistrate, for they are gods.

—Star Chamber saying

You've just got to trust us.

—Richard Helms,  
former CIA Director

## INTRODUCTION

Seditious libel is the crime of criticizing the government. It transforms dissent, which the first amendment has traditionally been thought to protect, into heresy. Fundamentally antidemocratic, the distinguishing feature of seditious libel is, as its nomenclature suggests, injury to the reputation of government or its functionaries. Those who impugn authority's good image are diabolized and their criticisms punished as blasphemy. In this way, the doctrine lends a juristic mask to political repression.

Seditious libel is alive and well despite attempts of judges and scholars to knock it on the head once and for all.<sup>1</sup> It is difficult to recognize, however, for it wears the mantle of official secrecy and waves the banner of national security. It creeps into legislative chambers, inspiring measures to silence those who accuse the Central Intelligence Agency of treachery and deceit.<sup>2</sup> It captures the mind of a president who admonishes that those who exercise first amendment rights have "the responsibility to be right."<sup>3</sup> More insidiously, it has infiltrated the

---

† Fellow, Society for the Humanities, Cornell University; Professor of Law, Pace Law School.

†† Visiting Professor of Law, Syracuse University College of Law; Professor of Law, Pace Law School.

The authors would like to thank Professor Owen Fiss for his valuable suggestions.

<sup>1</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>2</sup> See, e.g., Intelligence Identities Protection Act of 1982, 50 U.S.C.A. §§ 421-426 (West Supp. 1983); see also *N.Y. Times*, Oct. 5, 1983, at A1, col. 1 (Senate Intelligence Committee unanimously approves bill to exempt certain CIA files, including files involving covert action, counterintelligence, and high-technology spying devices, from Freedom of Information Act).

<sup>3</sup> See Gross, *Showdown at the White House*, *THE NATION*, AUG. 6, 1983, at 97, 115; see also *N.Y. Times*, Dec. 16, 1983, at A27, col. 1; *N.Y. Times*, Oct. 20, 1983, at A17, col. 1 (discussing President Reagan's March 11, 1983 directive and other recent efforts aimed at forcing thousands of federal employees to submit to random lie-detector tests).

courts, where it threatens to sabotage the vital core of the first amendment.

What matters most about the doctrine is its life in the courts, for only the judiciary can deliver the *coup de grace* to a force that corrodes constitutional freedoms of speech and press. Legislators may revive the crime of seditious libel, and presidents may deploy it to persecute their rivals, but as long as courts have believed that the fundamental purpose of the first amendment is to protect the right of political dissent, seditious libel has been beaten back. Whenever courts have become frightened, confused, or forgetful, seditious libel has reemerged to do its mischief.

Ever since medieval days, authority has attempted to suppress rumors and scandalous discussions about itself on the grounds that such discussions cause a disturbance of the peace. Authority has had a point. For dissent calls into question official orthodoxy, and critics put themselves on an equal footing with the authority criticized. Historically, whenever scandalmongers and disaffected persons vilified their superiors, they could indeed create conditions of unrest.

In these days of nuclear weapons, one of the most awesome roles of established authority is that of guardian of national security—the current idiom for what was once the king's peace. National security, whatever else it may mean, has lately been invoked to silence public discussion of information deemed by the authorities to be secret or "classified."<sup>4</sup> Yet some dissidents have questioned the fitness of established authority to be the guardian of national security. Several former government officials and even a curious journalist or two, not content with the paternal "you've just got to trust us,"<sup>5</sup> have sought, despite attacks on their loyalty, to test whether the shield of secrecy is a veil for incompetence, corruption, or deceit.<sup>6</sup>

Surely the government is entitled to some secrets in these days of potential instant annihilation. The point is whether the government is entitled to those secrets simply because secrecy is necessary to enhance its reputation. To penetrate this secrecy state for the purpose of public

---

<sup>4</sup> See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981); *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982); *Baez v. United States Dep't of Justice*, 647 F.2d 1328 (D.C. Cir. 1980); *Halperin v. CIA*, 629 F.2d 144 (D.C. Cir. 1980); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980).

Estimates as to the percentage of documents that are improperly classified as "secret" range from Arthur Goldberg's estimate of 75% to former Department of Defense classification policy expert William G. Florence's estimate of 99.5%. See Katz, *Government Information Leaks and the First Amendment*, 64 CALIF. L. REV. 108, 118 n.34 (1976).

<sup>5</sup> Address by Richard Helms to the National Press Club, quoted in P. AGEE, *INSIDE THE COMPANY: CIA DIARY 9* (1975) and *Barnet*, *Book Review*, N.Y. REV. OF BOOKS, Dec. 30, 1971, at 6 (reviewing Marchetti's, *The Rope Dancer*).

<sup>6</sup> See *Agee v. Muskie*, 629 F.2d 80, 105, 113-14 (1980), *rev'd*, 453 U.S. 280 (1981); *Agee*, *Where Myths Lead to Murder*, *COVERTACTION INFORMATION BULL.*, July 1978, at 4.

discussion would seem, on democratic principles, a duty of the highest order. How else will citizens be certain that those to whom they have entrusted so much power—megatons of destructive force in the case of the hydrogen bomb or the worldwide network of espionage and “intelligence” activities in the case of the CIA—have not become intoxicated by it? Yet the assault on official secrecy has lately been treated as a kind of *leste majesté*.

This article traces the dark roots of seditious libel, its obscure history in this country, and its ominous revival in three recent court opinions. Examining the early history of seditious libel, we attempt to isolate its elements and tacit premises. As we shall demonstrate, authoritarianism, political insecurity, diabolization of dissenters, and a hysterical fear of opposition have traditionally accompanied waves of prosecution for seditious libel. A belief in official infallibility, originally an explicit premise of seditious libel, remains its implicit ideological mainstay, as we shall see when we trace our nation’s dark tradition of repression. With the light of history, we then explore the three recent decisions that resurrect this ignominious judicial tradition.

The first two decisions involve former CIA officials who exposed the machinery of official espionage as incompetent or corrupt. In *Snepp v. United States*,<sup>7</sup> the political dissident, who had published the shabby details of the CIA’s last days in Vietnam, was punished under the pretext that he had violated a secrecy agreement.<sup>8</sup> In *Haig v. Agee*,<sup>9</sup> another dissident official was punished for disclosing secrets about the CIA’s “dirty work” on the unfounded claim that his revelations had incited murder. In *United States v. The Progressive, Inc.*,<sup>10</sup> a journalist exposed the prevailing public illusion that the design of the hydrogen bomb was as impenetrable as the ark of the covenant. Flaunting official orthodoxies, all three dissenters claimed the right to discredit publicly the secrecy state. Flaunting the first amendment, the courts barred their way.

In the concluding section of the article, we speculate how courts should decide these cases under an enlightened view of freedom of speech and suggest the outlines of a first amendment theory that would spell the death of seditious libel.

---

<sup>7</sup> 444 U.S. 507 (1980).

<sup>8</sup> *Cf. McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (court, in rejecting former CIA agent’s challenge to CIA censorship, asserted that “reviewing courts should conduct a *de novo* review of the [censorship] decision, while giving deference to reasoned and detailed CIA explanations of that . . . decision).

<sup>9</sup> 453 U.S. 280 (1981).

<sup>10</sup> 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

## I

## SEDITIONOUS LIBEL IN HISTORICAL PERSPECTIVE

## A. English Roots

"All silencing of discussion," wrote John Stuart Mill, "is an assumption of infallibility."<sup>11</sup> If Mill is correct, debates about freedom of speech ultimately are debates about power and its legitimacy—about authority. Historically, the power to silence unorthodox political expression has required an autocratic regime with a license to suppress dissent.

The legal equation of dissent with treason was, however, a relatively modern development. In medieval times, for example, the crime of treason, despite the efforts of a few monarchs to enlarge its definition, generally encompassed only an actual armed attack against the government. Hence, the medieval ideas of kingship produced a fairly moderate law of treason.<sup>12</sup> But with the rise of later monarchs who sought absolute power and set themselves up as the vicar of God, vague and more repressive uses of treason developed. Under the later Stuarts, for example, the judicially created doctrine of constructive treason proved a powerful engine for suppressing political dissidents. Those who defied the orthodoxy enforcing licensors of the crown were considered traitors and were frequently tortured; if unlucky, they were hanged, disemboweled, and quartered.<sup>13</sup>

The crime of seditious libel did not take hold until the early seventeenth century. As Frederick Siebert explains, the treason laws, designed to combat armed rebellion, "were too cumbersome to be used to suppress the fleabites of political or religious pamphleteers."<sup>14</sup> Consequently, the Stuarts turned to the criminal doctrine of seditious libel, which prohibited the publishing of scandalous or discordant opinions about the crown, its policies, or its officers, to combat these pamphleteers. Yet, the idea underlying the law of seditious libel was the very same notion of royal infallibility that underlay Queen Elizabeth's use of the treason laws against dissenters. As the historian Sir James Stephen

---

<sup>11</sup> J. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 15 (R. McCallum ed. 1946).

<sup>12</sup> See J. BELLAMY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 9, 214-15 (1970).

<sup>13</sup> See B. CHAPIN, THE AMERICAN LAW OF TREASON 3-4 (1964); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 265-69, 366-67 (1965). The odious doctrine of constructive treason, which converted written or spoken expressions into overt acts, was set forth by Chief Justice Holt in Charnock's Case, 91 Eng. Rep. 533 (1696). For a general discussion, see J. HURST, *English Sources of the Law of Treason*, in THE LAW OF TREASON IN THE UNITED STATES 14 (Contributions in American History No. 12, 1971). It has surfaced in our own time as well. See, e.g., Schaefer v. United States, 251 U.S. 466, 493 (1920) (Brandeis, J., dissenting).

<sup>14</sup> F. SIEBERT, *supra* note 13, at 117.

explained: "If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good . . . it must necessarily follow that it is wrong to censure him openly . . ." <sup>15</sup> Accordingly, the doctrine of seditious libel prohibited any person from casting blame upon the ruler or taking any action that might diminish his authority even when the ruler was in error. The Stuarts punished seditious libelers by whipping, branding, and mutilation. Thus, although dissenters were spared the extreme punishment reserved for traitors, the marks they bore upon their bodies served as impressive public advertisements of the dangers of dissent—perhaps an even more efficacious warning to the populace than the onetime spectacle of a hanging. With his nose slit or his ears cut off, the dissenter would serve as a living witness to the infallible power of authority. <sup>16</sup>

The justification for these punishments lay in the Tudor-Stuart view that the crown was the exclusive authority governing the welfare and happiness of the body politic and that the people stood in relation to the crown as children to a beneficently despotic parent, under a tutelage of trust and fear. To question authority was not allowed, not simply because the crown prohibited it, but because authority existed for the people's own good and because only the crown had the capacity to judge what was right and wrong in matters of state and religion. This principle was graphically recognized by the dissident who, after the authorities cut off his right hand, raised his left hand in a public salute to authority. <sup>17</sup> This paternalistic (and sometimes maternalistic) view of the legitimacy of political suppression of heterodoxy could trace its heritage to Plato, whose utopian programs justified rigorous censorship and banishment of nonconforming poets. <sup>18</sup> But whereas Plato's *Republic* im-

<sup>15</sup> 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 299 (1883). In 1606, the Star Chamber ruled that a libel against a public official merited criminal punishment regardless of its truth or falsity; the mere creation of a scandal was the offense. The Case De Libellis Famosis, 77 Eng. Rep. 250 (1606), cited in 2 J. STEPHEN, *supra*, at 304-05.

<sup>16</sup> See F. SIEBERT, *supra* note 13, at 118-26. William Prynne, for example, lost his ears for his mild reproach of Charles I for what Prynne thought was Charles's too tolerant attitude toward the theater and disregard for Puritanism. See *id.* at 122-25; see also S. ORGEL, THE ILLUSION OF POWER 43-44 (1975).

<sup>17</sup> John Stubbs, the author of an attack on the prospective marriage of Queen Elizabeth to a Frenchman, was tried in 1579, together with his printer, Singleton, and publisher, Page, in a proceeding that Common Pleas judge, Robert Monson, denounced as illegal. In response to that denouncement, Monson himself was sent to Fleet prison. When he refused to recant, he was removed from the bench. After the henchman had chopped off Stubbs's right hand, he lifted his hat with his left hand, cried out before the market place at Westminster, "God save the Queen," and was carried off insensible. See P. MCLANE, SPENSER'S SHEPHEARDES CALENDAR: A STUDY IN ELIZABETHAN ALLEGORY 16-19 (1961). When the cauterizing iron was applied to Page's bleeding stump, he cried out: "There lies the hand of a true Englishman." *Id.* at 19 (quoting DICTIONARY OF NATIONAL BIOGRAPHY, *John Stubbs* 118-19 (L. Stephen & S. Lee eds. 1963-64)).

<sup>18</sup> See generally PLATO, THE REPUBLIC bks. II & X, reprinted in 2 THE DIALOGUES OF PLATO 1 (B. Jowett trans. 4th ed. 1953). Elsewhere, Plato asserted that the ideal legislator

posed censorship as a pedagogical device to prepare youths for adulthood, the Tudor-Stuart doctrine of sovereignty rested upon the implicit notion that the people live in a state of perpetual childhood.

The idea that one could *defame* political authority, as the term "seditious libel" denotes, implies that the image of authority had assumed distinct characteristics in the day of the Tudors and the Stuarts. Borrowed from the law of defamation, seditious libel postulated that utterances alone could inflict harm on the sovereign. As a legal doctrine, seditious libel revealed the vitality of the metaphor, familiar to audiences of Shakespeare, of the state as individual, of the body politic as a human body.<sup>19</sup> An attack on the dignity or respectability of authority was deemed to undermine its credibility and to subvert the affection of its subjects in the same manner that libel or slander injured an individual's reputation. Similarly, seditious libel was thought to disturb the inner tranquility of the state and throw its members into a distemper just as defamation was thought to disturb the inner tranquility of a person. Furthermore, the metaphor of the state as body reinforced the notion of natural subordination, the domination of the appetitive, nonrational parts of the body—the people—by the head—the sovereign's reason and central intelligence. The metaphor was also useful in that dissenters could be analogized to unruly limbs insolently and unnaturally aspiring to overthrow the head; hence, they justifiably could be plucked out.

But this metaphor, if it indeed does underlie the doctrine of seditious libel, reveals its own obscuring power. Just as we consider despicable and weak the person who forcibly silences his critics, so may we consider any authority that suppresses dissent. If the doctrine of seditious libel unavoidably conjures up the metaphor of the state as human body, then we are in a better position to understand the contemporary judicial axioms about the government's "right to defend itself"—a power not granted by the Constitution but, nevertheless, one deemed as self-evident as an individual's right to self-defense.<sup>20</sup> Such language may

---

would use all his efforts to "contrive all manner of devices to ensure that the whole of such a community shall treat the topic in one single and selfsame lifelong tone, alike in song, in story, and in discourse." PLATO, *THE LAWS* bk. II, 41-42 (A. Taylor trans. 1934). Should such legislative persuasion fail, Plato's scheme contemplated that the poets would be coerced to express only such ideas as were acceptable to the government. *See id.* at 37.

<sup>19</sup> *See generally* E. KANTOROWICZ, *THE KING'S TWO BODIES* 24-41 (1957).

<sup>20</sup> *Cf.* Biklé, *The Jurisdiction of the United States Over Seditious Libel*, 41 AM. L. REG. 1 (1902) (*American Law Register* was predecessor to what is now *University of Pennsylvania Law Review*). Biklé, agreeing with Blackstone and accepting the broad definition of seditious libel as "[a]ll writings . . . which tend to bring into hatred or contempt . . . the Government, or the constitution . . . [and] to promote insurrection, or to encourage the people to resist the laws," defended the Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801). *Id.* at 1 (paraphrasing H. FOLKARD, *SLANDER AND LIBEL* \*614 (1877)). Biklé derived the power of the federal government to punish seditious libels from the axiomatic principle that the government, like an individual, has an inherent right to self-preservation. *Id.* at 2-4, 13.

conceal the idea that a particular administration's instinct for survival acquires the status of an imprescriptible right to life; an idea at complete variance with the democratic notion that the people have the right to terminate the existence of a particular administration and to amend or abolish their form of government.

Political discourse under the Tudor-Stuart view of sovereignty, then, was thought to consist of an official monologue of power, expressed through rigid licensing of the press and enforced by harsh penal laws. The idea of a political dialogue, in which the subjects could participate in formulating the ideas of statecraft and in judging the aims and policies of the government, lay centuries dormant, buried in the dust of democratic Athens. That is hardly surprising, however, for given the Tudor-Stuart notion of the people as politically puerile, permitting them to participate in a political dialogue would be as silly as allowing children to sit in Parliament.

In the eighteenth century, Parliament supplanted the crown's solitary authority in matters of state, occasioning a change in the ideology of repression. The doctrine of sovereignty that inspired parliamentary suppression of dissent arose not from any notion of paternalistic duty toward a body of puerile citizens but rather from the notion of Parliament's right to punish abuses of the press as a matter of its unfettered sovereignty.<sup>21</sup> Criminal prosecution for seditious libel, punishable by heavy fines and sentences of indefinite imprisonment, proved a most effective method of making the press conform to orthodoxy. The courts, for their part, provided a generous latitude to the doctrine of seditious libel, becoming in the process accomplices in the political repression. In 1704, for example, Chief Justice Holt pronounced the law in the leading case of *John Tutchin*, whose publication had charged officials with bribery and corruption:

To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. 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.<sup>22</sup>

The worst of all offenses against established government, explained Justice Holt, was the attempt to stir up animosities against an administration: "[T]his has been always looked upon as a crime, and no government can be safe without it . . . ."<sup>23</sup>

Justice Holt's implication that the doctrine of seditious libel was immutable established that political protest and criticism of officials un-

<sup>21</sup> See F. SIEBERT, *supra* note 13, at 270.

<sup>22</sup> This quotation is taken from the full trial transcript of *Rex v. Tutchin*, reprinted in 14 A COMPLETE COLLECTION OF STATE TRIALS 1095, 1128 (1704) (T. Howell comp. 1816).

<sup>23</sup> *Id.*



dermined the basic safety of the government, not because protesters told lies, but because their criticism threatened appearances.<sup>24</sup> Publicizing the discrepancy between the public opinion of government and the ugly truth about official misdeeds threatened the legitimacy of power by showing that appearances were often deceiving. But Justice Holt's language revealed a new element. Portraying critics as "possessing the people with an ill opinion of the government" suggests something demonic about the power of criticism. Evidently Justice Holt saw a connection between witchcraft and dissidence, both, after all, being forms of heresy. By diabolizing dissidents and assimilating criticism to heresy, Holt's doctrine of seditious libel made it easier not only to prosecute critics as enemies of the people but also to deify secular authority.

The religious overtones of seditious libel were revealed in the famous trial of the New York printer John Peter Zenger in 1735. Citing the *Tutchin* case, the prosecutor asserted that the malicious defamation of an official, whether it was true or false, deserved more severe punishment than the defamation of a private person; the defamation of an official occasioned not only a breach of the peace but also a scandal injuring the government, which itself was sacred. Indeed, as the prosecutor reminded the court, citing the authority of Paul, libeling the state is an offense against the laws of God, "[f]or it is written, thou shalt not speak evil of the ruler of the People."<sup>25</sup> Thus, even though the doctrine of the divine right of kings had died, the doctrine of seditious libel had retained some quasi-religious elements such as blasphemy and the association of government with divine authority.

Writing in 1768, Sir William Blackstone, who had celebrated the abolition of censorship by licensing, made no objection to the crime of seditious libel. Blackstone thought that, although in theory any person might lay whatever sentiments he wished before the public, the government could subsequently punish any such utterance that proved to be of a seditious nature.<sup>26</sup> Blackstone's definition of the liberty of the press—the absence of *previous* restraints upon publication—reveals a generous acceptance of the idea that government may silence criticism. Licensing was evil, he believed, because it subjected all freedom of sentiment to the arbitrary and infallible authority of the licensor. Although Blackstone's rationale against prior restraint is widely accepted, it is difficult to understand why subsequent punishment for the same utterance is not just as evil as a prior restraint, particularly when the decision to punish

<sup>24</sup> This is the very same sentiment that the courts in *Snepp*, *Agee*, and *The Progressive* voiced several centuries later. See *infra* notes 118-223.

<sup>25</sup> J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 64 (1963) (quoting *Acts* 23:5); cf. H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 15-16 (1965), cited in G. ANASTAPLO, THE CONSTITUTIONALIST 510 (1971).

<sup>26</sup> See 4 W. BLACKSTONE, COMMENTARIES \*150-52. For modern agreement with Blackstone, see Bikle, *supra* note 20, at 1.

originates with another practically infallible and not demonstrably less arbitrary authority, the judge.<sup>27</sup> Blackstone failed to address this question. He simply asserted that the malicious defamation of a magistrate for the purpose of exposing him to public hatred, contempt, and ridicule, threatened a breach of the public peace "by stirring up the objects . . . to revenge, and perhaps to bloodshed."<sup>28</sup> In short, Blackstone's view of seditious libel as an invitation to public violence analogized protest to "fighting words," a view that continues to find judicial acceptance.<sup>29</sup>

Blackstone recognized, as had Machiavelli much earlier, the importance of maintaining the good affection of the governed and the reputation of the governors. History taught Machiavelli that popular dislike and contempt were the ruin of emperors. Hence he stated in *The Prince* that it was vital for authority to avoid whatever made it appear hateful or contemptible to the populace.<sup>30</sup> When Blackstone noted the propriety of punishing discontents for their "licentious" use of the press, he too understood and legitimized that princely prerogative. Prosecutions for seditious libel for propaganda and public relations purposes helped to maintain the facade that authority was above criticism, always right and ever true to its subjects, and reinforced the idea that authority was ever alert to threats to the public safety—notwithstanding that it might be a safety comfortably equated with the safety of the administration in power. Although Blackstone might have lacked Machiavelli's candor, he clearly was not deluded by the doctrine of official infallibility. At least under the Blackstonian view, a dissenter could get his message to the public first and worry later about the consequences, rather than run the gauntlet of a board of expurgators.

## B. American Background

Seditious libel was liberalized in England with the passage of Fox's Libel Act in 1792.<sup>31</sup> In the United States, the framing of the Constitution, the adoption of the first amendment, and the controversy aroused

<sup>27</sup> For a contemporary elaboration on this point, see Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 287-92 (1982).

<sup>28</sup> 4 W. BLACKSTONE, *supra* note 26, at \*150.

<sup>29</sup> See, e.g., *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting); *Feiner v. New York*, 340 U.S. 315, 319-21 (1951).

<sup>30</sup> See N. MACHIAVELLI, *THE PRINCE* ch. XIX, reprinted in *THE PRINCE AND THE DISCOURSES* (Modern Lib. ed. 1966).

<sup>31</sup> An Act to remove Doubts respecting the Functions of Juries in Cases of Libel (The Libel Act, 1792), 1792, 32 Geo. 3, ch. 60. For a discussion of Fox's Libel Act, see Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* ch. XIII (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 99 (1970); L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* 252-54 (1963).

by the Sedition Act of 1798<sup>32</sup> gave rise to doubt about the continuing validity of the doctrine of seditious libel. Even in its unamended form, the Constitution recognized principles of representative government under which the people were the masters of the government rather than the servants, and under which the doctrine of limited powers made officials answerable to public opinion.<sup>33</sup> Thus, whereas the concept of seditious libel underscored the political tenet that the people were the underlings of the state and that their rulers knew what was best for them, the opening phrase of the Constitution, "We the People," emphasized a concept totally at variance with this tenet.

In contrast to the abject relationship between the governed and their governor which underlies the doctrine of seditious libel, the *Federalist Papers* condemned the king of England's total unaccountability to the public and applauded the Constitution's safeguards for the press.<sup>34</sup> These safeguards were said to consist in the concept of enumerated powers: because Congress was given no power to interfere with the press, the liberty of the press could not be assailed. The security for such a right was said to depend upon the general spirit of the people and of the government.<sup>35</sup> Of what use was a definition of rights if that document imposed no corresponding constitutional safeguard from the tyrannical concentration of power in the hands of the executive? In England, the king is a perpetual magistrate, Hamilton explained; he is responsible to no one, and his person is sacred. But in a republic like that envisaged in the Constitution, "every magistrate ought to be personally responsible for his behaviour in office."<sup>36</sup> The proponents of the Constitution ar-

<sup>32</sup> Ch. 74, 1 Stat. 496 (1798) (expired 1801).

<sup>33</sup> *See* THE FEDERALIST NO. 10 (J. Madison).

<sup>34</sup> THE FEDERALIST NO. 84 (A. Hamilton) (J. Cooke ed. 1961).

<sup>35</sup> What signifies a declaration that "the liberty of the press shall be inviolably preserved?" What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this, I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.

*Id.* at 580 (footnote omitted).

<sup>36</sup> THE FEDERALIST NO. 70, at 478 (A. Hamilton) (J. Cooke ed. 1961). Hamilton stressed the need to subject the executive to a narrow watch and a ready suspicion. In tones later echoed in *The Pentagon Papers* (New York Times Co. v. United States, 403 U.S. 713 (1971)) and *Nixon* (United States v. Nixon, 418 U.S. 683 (1974)) cases, Hamilton envisioned the following scenario:

"I was overruled by my council. The council were so divided in their opinions, that it was impossible to obtain any better resolution on the point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, . . . how easy is it to cloath the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

THE FEDERALIST NO. 70, at 477 (A. Hamilton) (J. Cooke ed. 1961). The thrust of *The Federal-*

gued that the greatest securities against the executive's irresponsible exercise of power were "the restraints of public opinion" and the public's "opportunity of discovering . . . the misconduct of the persons they trust."<sup>37</sup> If these restraints were to be effective, public scrutiny of official behavior and unrestricted public discussion would be essential, indeed, self-evident. Hence, even in the absence of a constitutional safeguard for freedom of speech and press, the right of citizens to sit in judgment of their officials was understood, at least by some, as self-evident. Plainly, such a perspective did not leave room for the operation of seditious libel.

Even if the Constitution itself did not expressly outlaw the doctrine of seditious libel, leading scholars have found its interdiction in the first amendment. Assailing Blackstone's conservative theory as antithetical to freedom of speech and press, Thomas Cooley urged that

the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as . . . the liberty of the press might be rendered a mockery and a delusion . . . if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.<sup>38</sup>

By "harmless publication," Cooley understood any discussion of government, its officials, or matters of public concern.<sup>39</sup> The first amendment, he explained, was designed to protect "such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."<sup>40</sup> Cooley's attack on Blackstone drew the support of Zechariah Chafee, who called it "unanswerable."<sup>41</sup> In a noble attempt to knock Blackstone's theory of sedi-

*ist No. 70* is the role public opinion plays in ensuring the faithful exercise of power by elected officers. Public opinion and the opportunity of discovering the misconduct of officials holding the public trust was adduced as the greatest support for accountability.

Read in light of *The Federalist No. 10*, *The Federalist No. 70* embodies an abiding distrust of power and an unshakeable conviction in the depravity of human nature, its love of power, its pride, and its ambition. See A. LOVEJOY, *The Theory of Human Nature in the American Constitution And the Method of Counterpoise*, in REFLECTIONS ON HUMAN NATURE 37, 50-52 (1961).

<sup>37</sup> THE FEDERALIST NO. 70, at 477-78 (A. Hamilton) (J. Cooke ed. 1961).

<sup>38</sup> T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 421 (1868).

<sup>39</sup> The guarantees of free speech "secure[d] their right to a free discussion of public events and public measures, and [enabled] every citizen at any time to bring the government and any person in authority to the bar of public opinion." *Id.* at 422.

<sup>40</sup> *Id.* Cooley's argument that the first amendment outlawed seditious libel was not universally shared. Some constitutional scholars continued to adhere to the Blackstonian distinction between liberty from licensing and punishable licentiousness of the press. They vindicated the power of Congress to punish seditious utterances. See, e.g., Carroll, *Freedom of Speech and of the Press in the Federalist Period: The Sedition Act*, 18 MICH. L. REV. 615 (1920) (asserting constitutionality of Sedition Act); Corwin, *Freedom of Speech and Press under the First Amendment: A Resume*, 30 YALE L.J. 48 (1920) (defending seditious libel); Hall, *Free Speech in Wartime*, 21 COLUM. L. REV. 526 (1921) (convocation address at University of Chicago, Mar. 15, 1921; defending seditious libel in wartime).

<sup>41</sup> Z. CHAFEE, FREEDOM OF SPEECH 11 (1920).

tious libel "on the head once for all," Chafee insisted that when the first amendment was adopted, the English sedition law was repudiated by every American; and he boldly asserted that the authors intended to "make further prosecution for criticism of the government . . . forever impossible in the United States of America."<sup>42</sup>

This liberal view of the common understanding and purpose of the first amendment has run into problems. Leonard Levy has argued that the framers understood the first amendment to leave in full force the common law doctrine of seditious libel, an interpretation he proffers as against the traditional view of Chafee and Cooley.<sup>43</sup> Indeed, one of the earliest acts of congressional repression was the Sedition Act of 1798, making criminal any "scandalous" publication about the federal government or its president.<sup>44</sup> The Federalists used this act to eliminate their political rivals, the Republicans, and to suppress the egalitarian sentiment that threatened like a contagion from revolutionary France.<sup>45</sup> Rumors of French plots and spies nourished hysteria in the Adams administration, and the attacks by the Republican press provoked the Federalists to retaliate.<sup>46</sup> The Sedition Act expired within two years, just as Jefferson and his party came to power. But in 1806, six of Jefferson's critics found themselves indicted for common law seditious libel,<sup>47</sup> with Jefferson's apparent blessing.<sup>48</sup>

<sup>42</sup> CHAFEE, *supra* note 31, at 9, 21.

<sup>43</sup> See Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIST. REV. 22, 27-28 (1962).

<sup>44</sup> Ch. 74, 1 Stat. 596 (1798) (expired 1801).

<sup>45</sup> See 1 N. DORSEN, P. BENDER & B. NEUBORNE, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 25-28 (4th ed. 1976) [hereinafter cited as DORSEN, BENDER & NEUBORNE].

<sup>46</sup> One victim of this hysteria was Republican Congressman Matthew Lyon, who, because he had publicly railed against the Adams administration's "ridiculous pomp, foolish adulation, and selfish avarice," was convicted under the Sedition Act, fined, and tossed into a filthy jail from which he was later reelected. *Id.* at 27. Those in Dedham, Massachusetts, who erected a liberty pole inscribed with such inflammatory words as "downfall to the Tyrants of America" were convicted and marched off to prison. *Id.*

<sup>47</sup> The Connecticut prosecutions are discussed in L. LEVY, *LEGACY OF SUPPRESSION* 301-07 (1960). Two of the cases ultimately reached the Supreme Court, which sustained the defendant's demurrer on the ground that the federal courts lacked common law libel jurisdiction. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

<sup>48</sup> L. LEVY, *supra* note 31, at 299-301. Jefferson's personal views on seditious libel are far from clear. Consider, for example, his comments and actions in relation to the Sedition Act prosecutions, and the impeachment of Justice Chase. In 1801, he pardoned all persons who had been convicted under the Sedition Act. In a letter to Abigail Adams he explained "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image. . . ." Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), reprinted in 4 *WRITINGS OF THOMAS JEFFERSON* 556 (H. Washington ed. 1869), quoted in Wallace, *Constitutionality of Sedition Laws*, 6 VA. L. REV. 385, 386 (1920). Several years later, Jefferson stated, in reference to the Connecticut indictments *supra* note 47:

As to myself, conscious that there was not a *truth* on earth which I feared should be known, I have lent myself willingly as the subject of a great experi-

The constitutional status of the Sedition Act of 1798 has never been settled. Even revisionist Levy could clearly distinguish principle from practice. That liberty's most vehement advocates, such as Jefferson, might have forgotten their constitutional manners and stooped to repressive tactics once they came to power did not mean that posterity should bind itself to a niggardly interpretation of freedom. The disparity between principle and practice only proved to Levy that the Jeffersonians had set the highest standards of freedom for themselves and posterity, not that they were strong enough to follow these standards: "Their legacy was the idea that there is an indispensable condition for the development of freedom in a free society: the state must be bitted and bridled by a bill of rights which is to be construed in the most generous terms and whose protections are not to be the playthings of momentary majorities."<sup>49</sup> Even Levy agreed that, regardless of whether the Sedition Act violated the Constitution, it defeated the fundamental purpose of the first amendment—the free and unfettered discussion of public affairs.

Seen in the dismal light of the Sedition Act of 1798, this history cautions against equating first amendment principles with the deeds of the fallible human beings who set them forth. As Thomas Emerson reminds us, these men fought a revolution against autocratic power and sought to establish a popular form of government and to remove the abuses to which the law of seditious libel so readily lent itself. The framers underscored this purpose even before the adoption of the first amendment by confining the definition of treason to the commission of

---

ment, which was to prove that an administration, conducting itself with integrity and common understanding, cannot be battered down, even by the falsehoods of a licentious press . . . . I have never therefore even contradicted the thousands of calumnies so industriously propagated against myself. But the fact being once established, that the press is impotent when it abandons itself to falsehood, I leave to others to restore it to its strength, by recalling it within the pale of truth.

Letter from Thomas Jefferson to Thomas Seymour (Feb. 11, 1807), *reprinted in* 5 WRITINGS OF THOMAS JEFFERSON 43, 43-44 (H. Washington ed. 1869) (emphasis in original).

Yet, in 1803, Jefferson gave the signal for impeachment of Justice Samuel Chase on the basis of Chase's attacks against the government before a grand jury in Baltimore. Jefferson inquired whether "this seditious and official attack on the principles of our Constitution [ought] . . . to go unpunished." Letter from Thomas Jefferson to Mr. Nicholson (May 13, 1803), *reprinted in* 4 WRITINGS OF THOMAS JEFFERSON 484, 486 (H. Washington ed. 1854); *see also* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804); *reprinted in* 4 WRITINGS OF THOMAS JEFFERSON 560, 561 (H. Washington ed. 1854) (referring to "overwhelming torrent of slander, which is confounding all vice and virtue, all truth and falsehood, in the United States"). Ironically, Chase, who had specifically upheld the Sedition Act, was impeached, in part, for improper conduct in several vindictive sedition and treason trials under the Sedition Act. Ultimately, however, he was not convicted. *See* 1 CHASE'S TRIAL 5-8 (1805) (transcript of impeachment proceedings before Senate) (setting forth the articles of impeachment); Bikle, *supra* note 20, at 19 n.51. For a discussion of Jefferson's role in the impeachment of Justice Chase, *see* J. ELSMERE, JUSTICE SAMUEL CHASE 159-80 (1980).

<sup>49</sup> Levy, *supra* note 43, at 37.

overt acts, thus taking pains to prevent the authoritarian equation of dissent with disloyalty.<sup>50</sup> The Framers underscored this purpose even before the adoption of the first amendment by confining the definition of treason to the commission of overt acts, thus taking pains to prevent the authoritarian equation of dissent with disloyalty.

After the expiration of the Sedition Act of 1798, seditious libel did not emerge again until the time of the Civil War, when it surfaced not in the lineaments of legislation but under the heavy hand of the commander in chief, President Lincoln. The Lincoln administration, hoping to persuade those who were not irretrievably lost to the southern cause of the justice of the union cause, shied away from repressive legislation, although less for constitutional than for practical reasons.<sup>51</sup> Open acts of rebellion against the government were frequent, however, and Lincoln, following the maxim *inter arma silent leges*, suspended the writ of habeas corpus.<sup>52</sup> Thousands of suspected or known dissenters and suspected "dangerous" men were thrown into military prisons without charges and without trial. Thus, although seditious libel was missing from the statute books, it animated an executive dragnet that resulted in the arrest of thousands of men.<sup>53</sup> Lincoln's executive fiat was

---

<sup>50</sup> See T. EMERSON, *supra* note 31, at 99. This, of course, was a direct rejection of the English experience dating back to the time of Elizabeth I when the treason laws were expanded to include constructive treasons, including treason by words, to help stamp out resistance. The English experience is recounted *supra* note 12 and accompanying text. To prevent a return to the English system, or the advent of any "new-fangled and artificial treasons," the Framers inscribed in article III of the Constitution a constitutional definition of the crime of treason. See THE FEDERALIST NO. 42 (J. Madison); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1791 (1833) (Because charge of treason is so opprobrious as to subject accused to suspicion and hatred, it is essential that "true nature and limits" of this crime be exactly ascertained.); Biklé, *supra* note 20, at 10 (citing THE FEDERALIST NO. 42 (J. Madison)); Wallace, *supra* note 48, at 390-91 (arguing that definition of treason not only prohibited constructive treason, but also precluded prosecution for seditious libel, which after all, is only another name for same offense); cf. J. ARCHER, TREASON IN AMERICA: DISLOYALTY VERSUS DISSENT 184 (1971) (warning against falling into trap of "confusing dissent with disloyalty" when defining treason); Case of Fries, 9 F. Cas. 924, 930-31 (C.C.D. Pa. 1800) (No. 5127) (Justice Chase instructed jury in second treason trial of John Fries that actual use of force was essential element of crime of treason); TRIAL OF JOHN FRIES FOR TREASON 197 (1799) (indictment and transcript of trial proceedings) (reporting Justice Chase's charge to the jury). The court had granted Fries a second trial on the ground that one of the jurors in the first trial had been prejudiced against Fries prior to the commencement of the trial. Case of Fries, 9 F. Cas. 826, 916-23 (C.C.D. Pa. 1799) (No. 5126). Notwithstanding Justice Chase's instructions in the second trial, the jury again found Fries guilty of treason and he was sentenced to hang. 9 F. Cas. at 932, 934. For an early discussion of the American law of treason, see Tucker, *Appendix* to 4 W. BLACKSTONE, COMMENTARIES 11 (1803).

<sup>51</sup> See Hall, *supra* note 40, at 527-28 (arguing that regulating seditious conduct through uniform legislation was impossible because of differing circumstances and sentiments among northern and border states).

<sup>52</sup> The circumstances surrounding President Lincoln's decision to suspend the writ of habeas corpus are discussed in Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95 (1958).

<sup>53</sup> The War Department records indicated that 13,535 persons were arrested and confined during the war, but these records were probably incomplete. See 4 J. RHODES, HIS-

more despotic and crushing than the statutory form of seditious libel;<sup>54</sup> its broad sweep rendered virtually insignificant in comparison the estimated twenty-five arrests under the Sedition Act of 1798. Furthermore, Lincoln's actions forged a precedent for the resuscitation of seditious libel whenever the executive feels it necessary to protect the national security, thereby retaining, at least in periods of felt crisis, the myth that only an irrefragable authority can save the people.<sup>55</sup>

Apart from the short-lived Sedition Act of 1798 and President Lincoln's repression of dissent during the Civil War, there were no major federal efforts to curb dissent prior to World War I. Since then, however, two prominent periods of national hysteria, the Great Red Scare following World War I and McCarthyism following World War II, have given seditious libel major transfusions. These periods, like the Adams era and the Civil War, are often dismissed as exceptions to the general rule of liberty of expression, mere aberrations or understandable retreats from normalcy. But this view is fundamentally mistaken. Along with a judicial tradition that protects the fundamental rights of criticism and dissent in less hysterical times—one has only to think of the bold *Pentagon Papers* decision—there persists a dark tradition of repressing criticism and dissent in times when judicial protection matters most. Before we can fruitfully examine the recent decisions of *Snepp*, *Agee*, and *The Progressive* in the context of seditious libel, we must explore the repressive underside of the first amendment. This is the uncharted modern tradition of seditious libel.

## II

### THE MODERN TRADITION OF SEDITIOUS LIBEL—DARK SHADOWS

The history of the first amendment has been the history of intolerance of political dissent, a story of dark shadows of fear and orthodoxy illumined periodically by brilliant rays of enlightenment. The Sedition Act of 1798 and Lincoln's Civil War repression helped to forge a hidden link between the Tudor authoritarian tradition and a more irrational modern tradition—the use of seditious libel to persecute dissenters in the twentieth century.

Two eras in first amendment jurisprudence demonstrate that the Supreme Court is not immune to epidemics of fear and orthodoxy. First

---

TORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE MCKINLEY-BRYAN CAMPAIGN OF 1896, at 230 n.2 (1920). Other estimates on the number of dissenters arrested during this period range as high as 38,000. *Id.* See Hall, *supra* note 40, at 528.

<sup>54</sup> See Hall, *supra* note 40, at 527-28.

<sup>55</sup> Would it strain credulity to suggest that the wartime concentration camps for Japanese-Americans continued the executive's prerogative of criminalizing the expression of those whose voices and very existence threaten the state? See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).



was the “Red Menace” era, arising in the aftermath of World War I, when the right to freedom of speech not only underwent severe legislative assaults but also suffered its first Supreme Court beatings. The second was the McCarthy era, when the communist witch-hunt mentality infected judicial decisionmaking. In characterizing these eras, the least that might be said of the Supreme Court’s performance is, in the words of Justice Douglas, “[t]he Court has not always been consistent in its protection of . . . First Amendment rights and has . . . permitted men to be penalized not for any harmful conduct but solely for upholding unpopular beliefs.”<sup>56</sup> In these times of crisis, the Court, like a serene caryatid that does not see that which she supports, has upheld the spirit of the Sedition Act of 1798. Although the Court has not explicitly asserted the power of government to criminalize dissent, it has repeatedly spun elaborate fictions, judicial *fleurs du mal*, to disguise its complicity in repression. The purpose of this section is to deflower the rhetoric in these opinions and to examine their seeds of seditious libel.

#### A. The Rhetoric of Seditious Libel

Authoritarianism, public hysteria, political insecurity, diabolization of dissent, and an ideology of official infallibility—these historical accomplices of seditious libel have no place in a system embracing freedom of expression. Nevertheless, these very elements figure into the Supreme Court’s earliest and most enduring efforts to pronounce a stable first amendment doctrine. These foundation stones, studied today as the libertarian origins of the Court’s attempts to protect expression, are embedded in the tradition of seditious libel. These decisions reveal the Court at its weakest, vulnerable to periodic inflamed public hysteria about dissenters despite the outward appearance of detached, dispassionate adjudication. It is all the more remarkable that these monumental decisions flowed from the pen of Justice Oliver Wendell Holmes, a jurist who could display his political detachment with artist-like aplomb, posturing as one standing far from the madding crowd, aloof and nonchalant.<sup>57</sup> The hysteria in these cases is not shrill. It is barely audible, for it lies submerged within the apparently placid sea of Holmes’s judicial rhetoric, hidden beneath the smoothly sententious maxims that cover a multitude of judicial fears.

The trilogy of Red Menace cases, all decided in 1919, involved the antiwar protests of Charles Schenck, Jacob Frohwerk, and Eugene

---

<sup>56</sup> *Branzburg v. Hayes*, 408 U.S. 665, 716-17 (1972) (Douglas, J., dissenting).

<sup>57</sup> *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 392 (1927) (Holmes, J., joining in Justice Brandeis’s concurring opinion); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting).

Debs.<sup>58</sup> In none of these cases did the defendants threaten force or physical violence. Schenck, a socialist, helped to print a leaflet<sup>59</sup> deploring the draft; Frohwerk's newspaper accused the government of murder for sending American troops to France; Debs's speech deplored the war and prophesied a sane socialist society. Applying the "clear and present danger" test, under which sufficiently "dangerous" speech could be outlawed, the Court upheld the convictions of all three pursuant to the Espionage Act of 1917,<sup>59</sup> finding that their verbal attacks on the government had obstructed the draft.

The presumption of innocence is absent from the Red Menace trilogy. Read with a skeptical eye, each decision reveals the apprehended "clear and present danger" to have been speech typically associated with seditious libel. Schenck, Frohwerk, and Debs had, by written or spoken word, defamed the government. Holding the administration up to hatred, contempt, and ridicule, they, like Snepp and Agee some sixty years later, had attacked official judgment as corrupt and mercenary; they had accused the government of deception; and they had, like Howard Morland in *The Progressive*, aimed to reveal to the public the real state of events obscured by official orthodoxy. Although none had set foot on the bailiwick of the recruiting office, each had set foot within the consciences of their hearers, and each had trespassed upon the hawk-like public mentality that authority required to be kept clear of intruders. Justice Holmes's assertion in *Frohwerk* that "[w]e do not lose our right to condemn either measures or men because the Country is at war,"<sup>60</sup> rings hollow in light of the Court's judgments sustaining the convictions in all three cases.

As Holmes's three opinions reveal, he had to forge a rhetoric capable of masking political repression. He could not speak of the dissenters' diabolic "possession," as had Justice Holt in the *Tutchin* case,<sup>61</sup> nor could he mimic the Star Chamber's assertion that officials were infallible gods.<sup>62</sup> He could not even appeal, as had Peter Zenger's prosecutor,<sup>63</sup> to scriptural injunctions against questioning authority. What he could do, however, was abandon the ordinary judicial restraints—logic, evidence, and precision—and evade the safeguards normally attaching to criminal proceedings, such as the strict construction of penal statutes and the necessity of finding a mens rea. Then, in a manner befitting his judicial

<sup>58</sup> *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

<sup>59</sup> Ch. 30, 40 Stat. 217 (1917), repealed by Act of June 24, 1948, ch. 645, § 21, 62 Stat. 864.

<sup>60</sup> 249 U.S. at 208.

<sup>61</sup> See *supra* notes 22-23 and accompanying text.

<sup>62</sup> See the epigraph from the Star Chamber, *supra* p. 816. This passage is quoted in Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 735 n.35 (1942).

<sup>63</sup> See *supra* note 25 and accompanying text.

statesmanship, he masterfully concealed his evasions with a powerful rhetoric fully capable of playing to the hysterical fears of the day.

1. *Decoding Dissenters' Intent.*

Consider, for example, Holmes's approach to finding the requisite mens rea. Not content to rest upon the express words of the protesters, which were essentially harmless, Holmes looked to innuendo, insinuation, and intimation. This ferreting for interpretive shreds of guilt casts shadows on the objectivity of Holmes's approach. More significantly, however, this approach suggests that the dissenters were double-meaning agitators, speaking in a tongue that might appear harmless to the unwary, but which subtly incited the speaker's sophisticated audience to rebellion. Thus, Holmes inferred that Schenck's leaflet, which passionately urged repeal of the conscription act as a violation of the thirteenth amendment, "intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."<sup>64</sup> This interpretation appears superficially harmless, until one realizes that Holmes is using his hermeneutic talent to dilute criminal law standards of intent into the loose standards of tort law. Hence, Holmes could leap from the leaflet's dubious "intimation" to his conclusion that "the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."<sup>65</sup> Blithely ignoring any presumption of innocence and hardly mindful of his logic-chopping, Holmes settled for guilt by intimation.

*Frohwerk* afforded Holmes a similar opportunity to display his dramatic sense of irony. Frohwerk's newspaper article, which "deplored the draft riots in Oklahoma and elsewhere," was written, Holmes revealed, "in language that might be taken to convey an *innuendo* of a different sort."<sup>66</sup> In short, the apparently benign words of the newspaper were, like Marc Antony's speech, cryptic triggers for civil revolt.<sup>67</sup> With this sinister "innuendo" revealed, the decision surreptitiously manufactures mens rea from ambiguity or, more precisely, equates guilt with suppleness and complexity of text. When Frohwerk complained that he had not been charged with intentional violation of the Espionage Act, Holmes unambiguously retorted: "[I]ntent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to

---

<sup>64</sup> *Schenck*, 249 U.S. at 51 (emphasis added). In reality, the leaflet at, its most subversive point asserted that conscription violated the thirteenth amendment: "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Frohwerk*, 249 U.S. at 207 (emphasis added).

<sup>67</sup> W. SHAKESPEARE, *JULIUS CAESAR*, Act III, scene 2.

accomplish it."<sup>68</sup> In light of this statement, one wonders whether the Court had clandestinely substituted strict liability for mens rea in cases involving ambiguous speeches or articles critical of the government's actions.

Holmes employed the same technique in confirming proof of Eugene Debs's sinister intent. Debs's most offensive language was his praise of comrades imprisoned for draft resistance. To Holmes, this speech "intimat[ed] to [Debs's] hearers that they might *infer* that he meant more."<sup>69</sup> Again the decision finds the requisite intent but only through the dubious technique of criminalizing not the speaker's express language but the meaning the words conveyed to one quickened by fear of dissent. Under this approach, the jury could find Debs guilty if they thought that his words had as their "natural tendency and reasonably probable effect to obstruct the recruiting service [and if he] had the specific intent to do so in his mind."<sup>70</sup>

Judicial recourse to hidden meanings renders impossible any objective examination of the government's case against these dissenters. But it also raises even more acutely the problem of authorial intent: not the intent of the *defendant*, but rather the intent of the *judge*. Through interpretation, the Court has politically appropriated the statements of dissenters and turned them to its own purposes. Translated into the idiom of intolerance, the privileged libels of these socialists somehow became more dangerous than physical force. For Holmes's decisions reveal that the more ironic and subtle the speaker's language and the more thoughtful and deliberative his audience, the more effective and, hence, indictable the speech. Under Holmes's "innuendo" approach, it is the invitation to self-reflection, rather than the verbal propulsion to reflex action, that constitutes the evil, the "clear and present danger." From the perspective of the authority, this is undoubtedly the most feared discourse, for when citizens act from deeply held convictions, their threat to the state is incalculably more diabolic than that of mindless mob action.

## 2. *The Metaphysics of "Obstruction."*

Holmes's facile interpretation of intent in these early cases was supplemented by his generous construction of the word "obstruct" in the Espionage Act. Again, his interpretation of this term revealed an almost mystical belief in the dissenters' powers over cause and effect. The word "obstruct," under a strict construction of the statute, clearly denotes physical force. But in the metaphysics of socialist conspiracy, it denoted something at least four ontological levels removed from physical force. For example, Schenck was convicted of (1) a conspiracy (2) to attempt

<sup>68</sup> *Frohwerk*, 249 U.S. at 209.

<sup>69</sup> *Debs*, 249 U.S. at 213 (emphasis added).

<sup>70</sup> *Id.* at 216.

(3) to influence his audience (4) to oppose the draft laws by peaceful and constitutional measures, namely, by petitioning government to repeal the draft laws. The Court did not stop to consider the possible meanings of the word "obstruct" nor to heed cautionary maxims guiding the interpretation of penal laws.

As is evident from Schenck's case, a socialist could obstruct the draft if his words *tended* to interfere with its administration; he could be hauled off to prison without proof of obstruction if his words could be deemed conspiratorial toward promoting obstruction.<sup>71</sup> The same metaphysics of socialist conspiracy led the Court to uphold Frohwerk's ten year jail sentence. Holmes did reveal some misgivings when he wrote that the newspaper apparently had not made any special effort to reach men subject to the draft:

[A]nd if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a [German language] newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed.<sup>72</sup>

Ultimately, however, Holmes's natural inclinations did not obtrude any more than did his juridical inclinations for careful scrutiny of statutory language.

With these two glosses on the statute, the Court also upheld Debs's conviction with little difficulty. The cagey innuendoes from the lips of a man who had garnered nearly a million votes for president<sup>73</sup> constituted outright obstruction. One could argue that Debs virtually conceded the question of his intent in his ringing declaration to the jury: "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."<sup>74</sup> But since Debs had the temerity to deny that his speech constituted the prohibited statutory obstruction, Holmes was pressed to reply: "The statement [to the jury] was not necessary to warrant the . . . finding that one purpose of the speech . . . was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting."<sup>75</sup>

The problem with Holmes's determination is that it is so vague and indeterminate as to defy any standard of proof whatsoever. Whether or

<sup>71</sup> For a discussion of the proper definition of "obstruct" in the Espionage Act of 1918, see Carroll, *Freedom of Speech and the Press in War Time: The Espionage Act*, 17 MICH. L. REV. 621, 647-48 (1919). This conversion of expression into criminal conduct recalls the judicial doctrine of constructive treason. See *supra* note 13 and accompanying text.

<sup>72</sup> *Frohwerk*, 249 U.S. at 208-09.

<sup>73</sup> See *V. NAVASKY, NAMING NAMES* 26 (1980).

<sup>74</sup> *Debs*, 249 U.S. at 214.

<sup>75</sup> *Id.* at 214-15.

not Holmes himself was possessed by fears of socialist conspiracy, his opinions allowed public fear and political insecurity to supply the empirical links between cause and effect. All this was accomplished through a metaphysical interpretation of the word "obstruct"—an interpretation to which the court returned in *Agee*.

### 3. *Rhetoric versus Reality.*

Holmes's rhetoric reveals the distance between his professed detachment from, and his actual involvement in, the prevailing intolerance of the day. The main theme of Debs's speech, Holmes candidly acknowledged, "was socialism, its growth, and a prophecy of its ultimate success." He quickly added, however, that "[w]ith that we have nothing to do . . ." <sup>76</sup> Using a rhetorical device known as paralipsis, Holmes nevertheless suggested that the opinion had everything to do with the socialist content of Debs's speech. If Holmes was unconcerned about the socialist content of the speech, why did he even mention it? Cicero taught that we use paralipsis when we say that we are passing over, or refusing to say, precisely that which we are now saying.<sup>77</sup> Paralipsis is a subtle technique used to create suspicion rather than insist directly on a statement that can be refuted; by indirection, it can call attention to an illegitimate or inflammatory matter. Here, Holmes's use of paralipsis, insincerely professing ideological detachment, reveals an attitude that is hardly neutral.

### 4. *Authoritarian Appeal.*

The authoritarian thrust of Holmes's rhetoric is apparent in the maxims he enunciated, some of which have proven to be among the most quoted maxims in first amendment jurisprudence. Courts have tended to quote these maxims not reflectively but reflexively, more like knee jerk reactions than considered deliberations. Ignoring his famous declaration that "[g]eneral propositions do not decide concrete cases,"<sup>78</sup> Holmes decided *Schenck* on the basis of apparently innocuous principles whose very vagueness and generality seem to induce a sleepy acquiescence on the part of the listener. For example, he observed that although "in many places and in ordinary times the defendants . . . would have been within their constitutional rights[,] the character of every act depends upon the circumstances in which it is done."<sup>79</sup> Invoca-

<sup>76</sup> *Id.* at 212.

<sup>77</sup> *Webster's Third New International Dictionary of the English Language Unabridged* defines paralipsis as "a passing over with brief mention in order to emphasize rhetorically the suggestiveness of what is omitted." Cicero offers a classic example of paralipsis: "I do not mention that you have taken monies from our allies; I do not concern myself with your having despoiled the cities, kingdoms, and homes of them all. I pass by your thieveries and robberies, all of them." CICERO, AD C. HERENNIVM, DE RATIONE DICENDI (RHETORICA AD HERENNIVM) 321 (Loeb Classical Lib. ed. 1968).

<sup>78</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>79</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

tion of such a seemingly self-evident principle suggests, however, that Holmes may have been pondering platitudes for other purposes.

The psychological observations of classical rhetoricians may further illuminate Holmes's judicial rhetoric. Aristotle observed that "hearers are pleased to hear stated in general terms the opinion which they have already specially formed."<sup>80</sup> Cicero, aware of the limits of using such rhetorical tricks, cautioned that maxims should rarely be used. Too frequent use of maxims, he believed, made a speech sound more like preaching than arguing.<sup>81</sup> Holmes's technique of persuasion—and perhaps of self-persuasion—consists partly in flattering his audience with seductive maxims, the better to immunize orthodoxy.

As the courts would rediscover in the *Snepp*, *Agee*, and *The Progressive* cases, appeals to fear, to the symbols of national security, and to the spectre of war furnish persuasive images that fuel belief in official infallibility. These images "possess" us with a force that virtually resists logic.<sup>82</sup> Consider, for example, Holmes's statement: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight."<sup>83</sup> Inattentive to Holmes's evasive use of the passive voice and the pleasing qualities of antithesis, we nod assent even though Holmes does not explain just why some utterances will not be endured. This antithesis is virtually a syllogism, for as Aristotle observed, the contrast between war and peace provided a pleasing and popular form of refutation even in ancient times.<sup>84</sup> Indeed, the invocation of a war situation has elsewhere furnished the Court with a fatalistic justification of otherwise intolerable assaults on freedom—one need only recall Justice Black's vindication of wartime concentration camps for Japanese-Americans.<sup>85</sup> The rhetorical effect of conjuring up a wartime scene is to win half the argument and the effect can be magnified further by dramatizing the war image. As the analysis of *The Progressive* case will suggest, the effect of thrusting a picture of nuclear holocaust before the eyes dispenses with argument altogether.

But what did Holmes mean when he stated that some utterances in wartime "will not be endured so long as men fight"? Is it that the government will not endure criticism of war because soldiers or citizens may respond to dissent and refuse to fight? That citizens may see the futility

<sup>80</sup> ARISTOTLE, *THE "ART" OF RHETORIC* 287 (Loeb Classical Lib. ed. 1967).

<sup>81</sup> See CICERO, *supra* note 77, at 291.

<sup>82</sup> For a brilliant analysis of the symbols of fear, see Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290 (1937).

<sup>83</sup> *Schenck*, 249 U.S. at 52.

<sup>84</sup> See ARISTOTLE, *supra* note 80, at 393, 397-99.

<sup>85</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944); see K. BURKE, *A GRAMMAR OF MOTIVES* 13 (1969) (Supreme Court justified *Korematsu* by referring to demands of wartime conditions).

of war and question its true causes? That soldiers may suspect that their blood is being shed merely to line the purses of the powerful? That some may define their patriotism in an idiom of peace? If Holmes had in mind any of these ideas—which we cannot know because he gives us no responsible “enduring agent” in his grammar—then the symbolism of war would seem to supply fallible officials with the infallibility they so desperately need to punish dissent.

##### 5. *Fire Imagery.*

More prominent than Holmes’s appeals to the images of war is the fire imagery invoked for the first time in the first amendment trilogy. The enduring metaphor of the *Schenck* case comes in the celebrated sentence: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”<sup>86</sup> This powerful—indeed despotic—metaphor has affected first amendment thinking ever since, and its use merits extended discussion.

The threshold question is whether the false shouting of fire in a crowded theater is relevant to the matter at hand. What, after all, has antidraft agitation to do with a miscreant’s deliberate and malicious creation of panic among an unsuspecting audience? Conceptually, the *false* shouting of fire in a theater is the verbal equivalent of setting off a fire alarm and causing a riot in the dark of a crowded theater. Such an act is not speech and should not be analyzed as such. Yet, it is the very essence of a metaphor to leap over argument, to thrust before the eyes a vivid picture rather than to take the reason step by step through an analytical comparison and discrimination of the elements of two disparate entities.

A metaphor like Holmes’s compels the mind by direct appeal to the sensuous imagination: the horrifying image of panic-stricken theatergoers, rushing for the exits in darkness and confusion, the weak falling under the stampede of the strong—a nightmare equal to the mind of a Thomas Hobbes. Just so does Holmes’s metaphor replace thought and set the passions in motion: the alarm-pulling evildoer provokes anger, indignation, and an urge for revenge. Raise up these emotions through metaphor and see how easily they transfer themselves to a defendant like Charles Schenck, already despised for his views. Envision the imaginary theater at home as the theater of war, the miscreant shouting “Fire!” as the forces of dissent, and see how an entire civilization can fall. The word “fire,” inspiring panic in Holmes’s imaginary theater audience, recreates that panic in the real theater of his legal audience. Submit the metaphor to dispassionate analysis, however, and it reduces itself to casuistry, to an *ad hominem* attack on the protester. Nevertheless, images of flames, metaphors casting language as pyrotechnics and

---

<sup>86</sup> *Schenck*, 249 U.S. at 52.



incendiarism, and judicial portraits of dissent as inflammation run through the epic of first amendment jurisprudence like Homeric formulas.<sup>87</sup> One could, perhaps, construct a veritable poetics of judicial hysteria from these decisions. The point here is to uncloud this smoke-filled rhetoric to discern its power to manipulate fear.

In *Frohwerk*, Holmes employed another fire metaphor to justify refusal to "test every question of law very thoroughly" before upholding Frohwerk's harsh sentence. Holmes asserted that "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."<sup>88</sup> Judicial pyrotechnics of this sort deserve scrutiny. Did Holmes properly identify the causal relationship? Which was the "flame" and which was the "breath"? Even assuming his statement of the causal relationship is correct, Holmes did not specify how responsibility might be ascribed.

The incendiary metaphor is not the only aspect of the *Frohwerk* opinion that merits scrutiny. Note also Holmes's use of the evasive double negative. Holmes does not say that it was possible to find that the writing would have presented a clear and present danger; rather, he asserts that it is "impossible to say that it might *not* have been found."<sup>89</sup> Holmes's imagery, designed to appeal to an already inflamed public mind rather than to the facts and logic, reveals a gap between the Court's professed detachment and its seditious libel mentality.

Connections between the Holmes trilogy and seditious libel have not gone undetected. George Anastaplo, himself an unsung martyr of seditious libel, has noted the mischievousness of *Schenck*, a mischievousness obscured by the appealing "clear and present danger" formula and the rhetorical flourishes that have since become judicial clichés.<sup>90</sup> The task remains for judges to find their way clear of the dragnet of Holmes's eloquence if the mentality of seditious libel is to be rooted out.<sup>91</sup>

This exercise is intended not as an ad hominem attack upon Holmes but rather as praise by imitation of his methods. After all, he

<sup>87</sup> See, for example, the fire imagery in *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

<sup>88</sup> *Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

<sup>89</sup> *Id.* (emphasis added). See George Orwell's prescribed remedy for the insidious practice of using the double negative and evasive, loose metaphors in his essay, "Politics and the English Language." The practice of using the double negative was, in Orwell's view, integrally connected to political language in its worst form: evasion, lies, and defense of the indefensible. G. ORWELL, *Politics and the English Language*, in A COLLECTION OF ESSAYS 157, 167-71 (1953).

<sup>90</sup> See G. ANASTAPLO, THE CONSTITUTIONALIST 44, 444 n.14 (1971).

<sup>91</sup> Grace of language, notes Anastaplo, suggests a high level of reasoning. He reminds us of Hobbes's remark, "Eloquence is power, because it is seeming prudence." *Id.* at 445 n. 16, (quoting T. HOBBS, *LEVIATHAN* 79 (Lib. of Liberal Arts ed. 1958)). The tendency to confuse eloquence with wisdom obscures the repressive nature of Holmes's decisions.

did teach that courts must look behind the deceptive veil of language to ascertain the true intent of the speaker. Deploying against Holmes's rhetoric his own strategy of discovering hidden meaning in a text may prove as congenial to freedom of speech as it is to repression of dissent.

## B. The McCarthy Era

Through the groundwork laid by Holmes, seditious libel became firmly but invisibly embedded in the foundations of the first amendment. Paradoxically, however, it was Holmes's own dissents that later erected the temple to freedom upon those foundations. As the hysteria of the Red Menace period subsided, Brandeis's and Holmes's dissents became blueprints for tolerance.<sup>92</sup> The Court developed respect for the first amendment rights of agitators and constructed the lofty principle that the first amendment protects the expressions of even the most execrable ideologies—at least to the point of incitement to insurrection.<sup>93</sup> When the witch-hunts of the McCarthy era began, however, the temple collapsed.

A prominent instrument in this collapse was the *Dennis* case,<sup>94</sup> in which the Court sustained the convictions of twelve Communist Party members for conspiracy to violate the Smith Act.<sup>95</sup> The statute made it a crime to help organize any group of persons "who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence," and also proscribed the advocacy of these doctrines.<sup>96</sup> The *Dennis* decision witnessed the Court's return to and strengthening of the invisible tradition of seditious libel. One of the most influential decisions of the postwar period,<sup>97</sup> *Dennis* has never been overruled and has been cited as precedent in the Court's boldest tributes to the first amendment.<sup>98</sup>

The evidence in *Dennis* showed only that the defendants had organized people to teach "doctrines of Marxism-Leninism" as set forth in

<sup>92</sup> See *infra* notes 224-41 and accompanying text.

<sup>93</sup> See, e.g., *Herndon v. Lowry*, 301 U.S. 242 (1937). The Court, in *Herndon*, invalidated the conviction of a black communist organizer for attempting to incite insurrection under Georgia law. The conviction was based upon Herndon's possession of literature urging equal rights for Negroes and self-determination for the "Black Belt." Justice Roberts stated that "[t]he statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others." *Id.* at 263-64.

<sup>94</sup> *Dennis v. United States*, 341 U.S. 494 (1951); see G. ANASTAPLO, *supra* note 90, at 446-51, 629-31, 762-63. For an excellent discussion of the *Dennis* case within the context of the times and as an example of the patriotic status of the informer, see V. NAVASKY, *supra* note 73, at 27-31.

<sup>95</sup> Ch. 439, 54 Stat. 670 (1940) (current version at 18 U.S.C. §§ 2385, 2387 (1982)).

<sup>96</sup> Ch. 439, 54 Stat. 670, 671 (1940).

<sup>97</sup> T. EMERSON, *supra* note 31, at 113.

<sup>98</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

such standard works as *The Communist Manifesto*. There was not a shred of evidence indicating that any of them had advocated any immediate or specific acts of violence.<sup>99</sup> The indictment charged that the defendants had transformed a peaceful Communist group into one that worked toward the overthrow of the government by force and violence. The group had formed "a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action."<sup>100</sup> The Court portrayed the Communist party not as an ordinary political party but as the equivalent of a satanic conspiracy possessing the uncanny power to turn human beings into automatons: "[T]he Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language. . . . [It] is rigidly controlled; . . . Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces . . . ."<sup>101</sup>

With this characterization as its premise, the Court proceeded to analyze the constitutional issue with the same suspicious rhetoric of sententious maxim and hyperbole as emerged in the *Schenck-Debs-Frohwerk* trilogy. "That it is within the *power* of the Congress to protect the Government . . . from armed rebellion is a proposition which requires little discussion,"<sup>102</sup> wrote Justice Vinson. This irrelevant but appealing overture set the tone for the ensuing discussion of freedom of speech. Although a survey of the decisions from *Schenck* through the more recent liberal freedom of speech opinions demonstrated to Justice Vinson that the Holmes-Brandeis dissents had won the day, Vinson was convinced that the times<sup>103</sup> and the impending threat of communism demanded an exceptional response. Holmes and Brandeis had faced only isolated and limited threats, and thus had given no thought to more serious threats to the national security. By contrast, Justice Vinson faced what he perceived to be an "apparatus designed and dedicated to the overthrow of the Government" in an environment of "world crisis after crisis."<sup>104</sup>

"Speech is not an absolute," wrote Vinson, the proof of which resided in yet another sententious maxim: "Nothing is more certain in modern society than the principle that there are no absolutes."<sup>105</sup> For Vinson, the liberalized clear and present danger test, which protected nonviolent dissent, had to give way to the felt necessities of the day. "To those who would paralyze our Government in the face of impending

<sup>99</sup> *Dennis*, 341 U.S. at 581 (Douglas, J., dissenting).

<sup>100</sup> *Id.* at 511 (plurality opinion).

<sup>101</sup> *Id.* at 498.

<sup>102</sup> *Id.* at 501 (emphasis in the original). For a discussion of the effect that maxims produce, see *supra* notes 80-81 and accompanying text.

<sup>103</sup> See *infra* text accompanying note 116.

<sup>104</sup> *Dennis*, 341 U.S. at 510.

<sup>105</sup> *Id.* at 508.

threat by encasing it in a semantic straitjacket we must reply that all concepts are relative."<sup>106</sup>

The imagery of the last statement conjures up a picture of government as the helpless victim, not so much of communism, but of tolerance. The identifiable villains were the Court's recent liberal first amendment decisions that would lock up authority like a lunatic while allowing the "impending threat," the truly demonic forces of communism, to wreak destruction. Vinson did not pursue the straitjacket metaphor; the image itself captured the judicial mind. Its persuasive power was evident in Justice Jackson's concurring opinion, which cautioned that the liberal language of precedents might "hold our Government captive in a judge-made verbal trap."<sup>107</sup> The rhetorical force of the "our" before "government" embodies the Justices' subtle disclaimer of their complicity with communism. If adherence to precedent would make the Court look "soft" on communism and hostile to the administration, one can understand the recourse to imagery and evasive language.

Stripped of its rhetoric, what connection does the *Dennis* case bear to the doctrine of seditious libel? Advocacy of communism does not defame the government or its officials in the way that ordinary scandalmongering does. But it certainly does make statements "likely or designed to diminish" government's authority. As Frederick Siebert reminds us, "During the entire period [of the late seventh century] any reflection on the government in written or printed form was a seditious libel."<sup>108</sup> Marxist doctrine was a threat because it suggested that the prevailing system did not have a monopoly on ideas of freedom and human liberation. As a practicable theory, Marxism had demonstrated international appeal not only for authoritarian terror, but also for the struggles of the oppressed. In short, Marxism made the establishment tremble in its boots.

The *Dennis* decision was not entirely devoid of principle. Justice Vinson did make a valiant effort through use of logic to justify saving the government—"our Government"—from "paralysis." He began, as would *The Progressive* Court later, with a self-evident proposition only indirectly relevant to the issue at hand: the government must have the power to protect itself from armed internal attack for otherwise "no subordinate value" could be protected.<sup>109</sup> From this proposition the Court reasoned that the government could put down any "clear and present danger" of violent overthrow. Applying this logic to the issue in

---

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 568 (Jackson, J., concurring).

<sup>108</sup> F. STEBERT, *supra* note 13, at 271 (emphasis added).

<sup>109</sup> *See Dennis*, 341 U.S. at 509 (plurality opinion).

*Dennis*, Vinson concluded that Marxist ideologues teaching their doctrines posed a clear and present danger and hence could be outlawed:

Obviously, the words of the [clear and present danger test] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.<sup>110</sup>

Vinson's reference to "the putsch," with its chilling reminders of Nazi Germany, lent color as well as persuasive force to the logic. The most striking aspect of his reasoning, however, is the question-begging manner in which he equated authority with freedom and dissent with sedition—reasoning harking back to the law of seditious libel in the age of autocracy. Established government, in Vinson's rhetoric, as in that of the Tudors and Stuarts,<sup>111</sup> took on the aspect of divinity in the combat between the forces of darkness and light.

Not argument but naked assertion makes all values "subordinate" to established authority; not evidence but prejudice supplies the link between communist doctrine and armed attack. Vinson's description of communist ideas as "indoctrination" suggests mental inoculation and denies to Marxist doctrine the privileged status of ideas. Moreover, the opinion ascribes the power of these doctrines to alchemy, thus evading any connection between ideas and domestic disaffection. Vinson portrayed communist doctrines as verbal clubs with which the party members were beaten into submission and prepared for mindless obedience in some future violent revolution. Recalling Holmes's cryptography of socialist innuendo, Vinson explained that communist propaganda required decoding. Communists do not use language and advocacy as ordinary people do but rather as hypnotists. The very notion of "indoctrination" implies a breakdown in the critical faculties of party members, if not a condition of somnambulism, corresponding to the mesmerizing power that Justice Vinson implicitly ascribed to party leaders.<sup>112</sup>

<sup>110</sup> *Id.* Perhaps the metaphor of the state as person, having an inviolate right to self-preservation, underlies this statement. See *supra* note 19 and accompanying text.

<sup>111</sup> See *supra* notes 12-20 and accompanying text.

<sup>112</sup> Curious things were done with language and interpretation in the *Dennis* case. For a discussion of one prosecution witness's "Aesopizing" of communist literature, see V. NAVASKY, *supra* note 73, at 32. The sophist Gorgias had one of the earliest appreciations of the narcotic effects of language, arguing in his Encomium to Helen: "Words can drug and bewitch the soul." K. FREEMAN, *ANCILLA TO THE PRE-SOCRATIC PHILOSOPHERS* 133 (1952); cf. G. ORWELL, *supra* note 89, at 168 (observing that "ready-made phrases . . . anaesthetise a portion of one's brain"). On the communicable disease of corrupt language in another context, see Koffler, Book Review, 1 PACE L. REV. 403, 403 (1981) (describing "decay of political and moral language as cause of decline of Athenian democracy").

The party leaders' supposedly diabolical nature may help to explain why Justice Vinson was undeterred by the gaping absence of evidence of any plans or conduct of armed revolt. As he conceded, no specific threat could be perceived; it sufficed that "the revolutionists would strike when they thought the time was ripe."<sup>113</sup>

The *Dennis* Court seemed untroubled by the longstanding principle that mere preparation for a crime is not an accepted ground for punishment.<sup>114</sup> In response to the defendants' argument that a conspiracy to advocate, as distinct from advocacy itself, comprised only the preparation and thus was not punishable, Justice Vinson was again categorical. The conspiracy itself, he asserted, created the requisite danger even though no overtly violent act occurred.<sup>115</sup> The Court substituted for the overt act "the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned . . . ."<sup>116</sup> As in the *Schenck-Frohwerk-Debs* trilogy, the fire imagery evoked fear and helped suspend the critical faculties. The un verbalized apprehensions that domestic communists were invisibly connected with violent communist activities abroad helped supply the missing proof of "danger."

From images of fire Vinson proceeded to a more scientific metaphor: "If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."<sup>117</sup> Trapped in judicial literalisms, the Court reasoned that its decision would prevent an explosion in the global laboratory.

### III

#### SEDITIONOUS LIBEL IN THE SECRECY STATE: *SNEPP, AGE*, AND *THE PROGRESSIVE*

Against the background we have traced, it is not surprising that seditious libel should reemerge given our present national mentality. Just as the government during the Red Menace and McCarthy eras invoked national defense to defend the indefensible, so today does the secrecy state invoke national security to disguise fear and authoritarianism. In our present national state of insecurity, the mere labeling of dissenters and critics as menaces and the government as in-

---

<sup>113</sup> *Dennis*, 341 U.S. at 510.

<sup>114</sup> On mere preparation for a crime, see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 431-38 (1972); see also *Hyde v. United States*, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting) ("There must be dangerous proximity to success.")

<sup>115</sup> See *Dennis*, 341 U.S. at 510-11.

<sup>116</sup> *Id.* at 511.

<sup>117</sup> *Id.*

fallible protector suffices to set in motion the judicial engines of repression.

The *Snepp*, *Agee*, and *Progressive* cases reveal the dark tradition to be in the ascendancy. The courts in those cases inflicted unprecedented penalties upon governmental critics who had exposed secrecy as a sham and security as an illusion. Under the reasoning employed in these cases, the ideology of dissent no longer matters; criticism is libel per se. If secrecy is the cost of the nuclear age, as other signals from the administration suggest, then seditious libel threatens permanently to dislodge freedom of speech.

#### A. *Snepp v. United States*

In *Snepp v. United States*,<sup>118</sup> decided in 1980, the Supreme Court purported to resolve an apparently simple question of contract law: Whether an agreement by a former CIA official "not . . . [to] publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment. . . without specific prior approval by the Agency" is enforceable.<sup>119</sup>

Frank Snepp had signed such an agreement when he began working for the CIA in 1968. After leaving his post as a CIA officer in Vietnam, he published *Decent Interval*, a narrative exposing incidents of malfeasance, dishonesty, and corruption he had witnessed in the CIA, particularly in its role in the U.S. withdrawal from Vietnam. Snepp claimed that his book revealed no classified information. The Agency did not challenge his claim, but it sued him for violating the secrecy agreement.<sup>120</sup> According to the government's theory, the book's defamatory content did not matter. Snepp's wrong was his failure to clear his manuscript with the Agency's censors. The reality of the case, however, is otherwise. Persuading the trial court that the book had caused the government "irreparable harm and loss,"<sup>121</sup> the CIA scored an unprecedented victory when the court imposed a constructive trust on Snepp's profits. In addition, the Agency won an injunction prohibiting Snepp from speaking or writing about the CIA without the Agency's permission for the rest of his life.<sup>122</sup> The appellate court agreed but set aside the constructive trust as an unwarranted restriction of Snepp's first

---

<sup>118</sup> 444 U.S. 507 (1980).

<sup>119</sup> *Id.* at 508.

<sup>120</sup> The government conceded "for the purposes of this litigation" that Snepp's book disclosed no classified information. *Id.* at 510. It also conceded that the book contained no information concerning the CIA that the Agency had not already made public. *See id.* at 516 n.2 (Stevens, J., dissenting).

<sup>121</sup> *United States v. Snepp*, 456 F. Supp. 176, 180 (E.D. Va. 1978), *aff'd in part and rev'd in part*, 595 F.2d 926 (4th Cir. 1979), *rev'd in part and remanded*, 444 U.S. 507 (1980).

<sup>122</sup> *Id.* at 182.

amendment right to publish unclassified information.<sup>123</sup>

The Supreme Court, without hearing oral argument and without taking briefs on the issues, disposed of the case in an extraordinary per curiam decision, reinstating the constructive trust and affirming the injunctive relief.<sup>124</sup> But for a footnote, the first amendment was ignored.<sup>125</sup> The Court's decision spelled a crippling fine of \$140,000 for Snepp.<sup>126</sup> Furthermore, its injunction revived in new guise the odious licensing system of our English past. Before Snepp may publicly criticize the CIA, he must obtain the permission of the very officials he seeks to criticize.<sup>127</sup> In an even more significant response, the Court indicated that Snepp would have been subject to sanctions even if he had *not* signed the secrecy agreement, an issue the government never raised.<sup>128</sup>

The Court did not account for its bizarre imposition of a constructive trust; it merely asserted that because Snepp had breached an obligation of confidentiality, "the trust remedy simply requires him to disgorge the benefits of his faithlessness."<sup>129</sup> This forcible disgorging suggests vindictiveness in the Court's rhetoric, just as its repeated accusation that Snepp had "deliberately and surreptitiously"<sup>130</sup> violated the secrecy agreement intimates a certain lack of detached adjudication.

<sup>123</sup> *Snepp*, 595 F.2d at 937.

<sup>124</sup> The Supreme Court's decision in *Snepp* has attracted extensive comment. *See, e.g.*, Franck & Eisen, *Balancing National Security and Free Speech*, 14 N.Y.U. J. INT'L L. & POL. 339 (1982); Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775 (1982); Whatley, *Case Comment: Snepp v. United States*, 30 CLEV. ST. L. REV. 247 (1981); Comment, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 COLUM. L. REV. 662 (1981) [hereinafter cited as Comment, *The CIA Secrecy Agreement*]; Comment, *Snepp v. United States—Short Shrift for the Prior Restraint Doctrine*, 59 N.C.L. REV. 417 (1981) [hereinafter cited as Comment, *Short Shrift for Prior Restraint*].

<sup>125</sup> *Snepp*, 444 U.S. at 509 n.3.

<sup>126</sup> This harsh fine is nearly three times the criminal penalty imposed by the recent Intelligence Identities Protection Act of 1982, § 601, 50 U.S.C.A. § 421 (West Supp. 1983). Snepp's book would not have violated this statute even if it had been in force at the time his book was published because the statute forbids only the intentional disclosure of classified information that identifies a covert agent. *Id.*

<sup>127</sup> The district court had enjoined Snepp "from any further violation of his secrecy agreement by requiring him to submit to the Central Intelligence Agency for pre-publication review any manuscript which [Snepp] authors which concerns the Central Intelligence Agency." *United States v. Snepp*, 456 F. Supp. at 182. *See* Medow, *supra* note 124, at 818-21 (arguing that delay caused by preclearance diminishes open discussion and that preclearance by CIA itself will inherently lead to strict censorship); *cf.* Arendt, *What is Authority?*, in BETWEEN PAST AND FUTURE 91, 99-100 (1961) (connecting total lack of spontaneity of expression with totalitarianism).

<sup>128</sup> *See* 444 U.S. at 511 n.6 ("apart from the . . . agreement . . . Snepp's duties and his . . . access to confidential sources and materials could establish a trust relationship").

<sup>129</sup> *Id.* at 515. The Court asserted that the trust remedy was "the natural and customary consequence of a breach of trust" that "deals fairly with both parties" because "[i]f the agent secures prepublication clearance, he can publish with no fear of liability." *Id.* The Court's argument ignores the fact that the agent who presubmits may yet be unable to publish because of delay and unjustified CIA censorship. *See* Medow, *supra* note 124, at 818-21.

<sup>130</sup> 444 U.S. at 511.



Emphasizing that Snepp's profits were a direct result of his treachery to the CIA,<sup>131</sup> the Court painted him as a mercenary cad. By diabolizing his motives,<sup>132</sup> the Court trivialized Snepp's first amendment rights.

The Court's rhetorical tone of opprobrium indicates how it settled on the constructive trust remedy. For the Court conflated three distinct ideas under the term "trust": (1) "trust" in the nontechnical sense, namely, that the government trusted Snepp so far as to give him confidential information; (2) the legal relationship of a "trust," as between a trustee who holds property and a beneficiary for whom the property is held; and (3) the technical "trust agreement," a document establishing the legal trust relationship. The Court jumped from the nondebatable premise of point one to the remedy of a constructive trust by labeling the written secrecy oath a "trust agreement," thereby seizing upon an ambiguity to clinch its conclusion.<sup>133</sup> Snepp's promise, by itself, was not shown to have constituted a "trust agreement," nor was Snepp shown to have held property for the government as a trustee for a beneficiary. Indeed, if such a "trust" existed, the Court never identified the trust corpus. The Court's unstated premise must have been that Snepp's unapproved dissemination of his opinions constituted a misappropriation of "property" belonging to the government. Because the book consisted of Snepp's recorded experiences as a CIA official, that "property" could only have been his memory. To establish its right to the constructive trust remedy, then, the government would have to claim a proprietary interest in the minds of its former officials inasmuch as the information and views set forth in Snepp's book stood outside the domain of possessable government secrets.

The reasons for the Court's not basing its decision exclusively on the contractual claim of the government are only partly explained by its condemnation of ill-gotten gains. First, there is a serious question whether the document Snepp signed when he joined the CIA was enforceable even under contract principles.<sup>134</sup> Second, even assuming that

---

<sup>131</sup> See *id.* at 515-16 (observing that trust remedy reached only funds attributable to Snepp's breach).

<sup>132</sup> That Snepp accepted profits from selling the book hardly demonstrates illicit motive. As Samuel Johnson would be quick to retort, "No man but a blockhead ever wrote, except for money." 3 BOSWELLS LIFE OF JOHNSON 614 (Apr. 5, 1776) (G. Hill ed. 1964).

<sup>133</sup> See 444 U.S. at 510-11.

<sup>134</sup> See Medow, *supra* note 124, at 811-14 (arguing that contracts are enforced only if they serve public policy regardless of the intent of the parties); Comment, *National Security and the First Amendment: The CIA in the Marketplace of Ideas*, 14 HARV. C.R.-C.L. L. REV. 655, 659-72 (1979) (arguing that courts scrutinize restrictive covenants and enforce only those that are reasonable). See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983).

Professor Whatley, in his article on *Snepp*, notes that there is ample authority for treating such an employment contract as an adhesion contract. See Whatley, *supra* note 124, at 262. An adhesion contract is typically characterized by: (1) a standardized form, (2) presented on

the agreement was a valid contract, attempted enforcement through censorship implicates the first amendment.<sup>135</sup> Third, resolving this case solely on the contractual grounds would make all of the government's subsequent claims to secrecy dependent upon whether the official insider had signed the relevant document.<sup>136</sup> Finally, the CIA's unwillingness to enforce similar agreements against other governmental officials, such as Henry Kissinger, who have published secrets without permission, strongly suggests that the real motive underlying the *Snepp* prosecution was the CIA's desire to silence arbitrarily a hostile critic.<sup>137</sup>

Of these points, the last indicates most clearly the trend toward seditious libel. Although dozens of former CIA employees have published books about the CIA without first having submitted their manuscripts to the censors,<sup>138</sup> the CIA has elected to prosecute only Snepp

a take-it-or-leave-it basis, (3) in situations where there is a gross inequality in bargaining power. All these elements were present in *Snepp*. Courts may review adhesion contracts for fairness and refuse to enforce the contractual terms that are unfair to the disadvantaged party. *See id.* (citing 3 A. CORBIN, CONTRACTS § 559A(B) (Supp. 1982)).

<sup>135</sup> The enforceability of the secrecy agreement in *Snepp* is open to question on first amendment grounds. Contractual provisions cannot override first amendment constraints. *See* Medow, *supra* note 124, at 812. Medow illustrates this point with an analogy. Assume that Congress, rather than the CIA, had attempted to restrain Snepp by passing a statute that imposed the same restrictions found in the CIA secrecy agreement. Even if Snepp accepted CIA employment under those conditions, Medow asserts that no one could contend that Snepp had thereby waived his first amendment rights:

Logically one could argue that by taking their jobs with this knowledge, the agents had consented to the restrictions and had hence waived any objection thereto. Yet the very absurdity of this proposition is perhaps best evidenced by the fact that neither litigants nor judges have seen fit to raise it in suits challenging the constitutionality of statutorily imposed First Amendment restrictions. . . . [A] statute stands or falls on its merits.

*Id.* at 813. Drawing upon the unstated premise in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), that an individual's purported "waiver" of his first amendment rights cannot save an invalid statute, Medow contends that the same rule should apply to private contractual agreements. Medow, *supra* note 124, at 813; *see also* Whatley, *supra* note 124, at 267-82; Comment, *supra* note 134, at 689-92.

<sup>136</sup> The Court, of course, did not rest its opinion in *Snepp* solely on the contractual issue, thereby avoiding this problem. *See supra* note 128 and accompanying text.

<sup>137</sup> *See* Medow, *supra* note 124, at 820 n.273; Snepp, *The CIA's Double Standard*, NEWSWEEK, Jan. 25, 1982, at 10.

<sup>138</sup> Former CIA Director Richard Helms stated that to "my own knowledge, former Agency employees who did not submit articles for publication include Thomas Braden, Miles Copeland, and Thomas Maloy." Brief for Appellant at 14 n.\*\*, *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *quoted in*, Brief for Defendant-Appellant at 42, *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979). In addition, Henry Stimson, Dean Acheson, Arthur Schlesinger, John Kenneth Galbraith, George Ball, and former president Richard Nixon have all published books or articles without subjecting them to prepublication review and yet have not been charged with a breach of fiduciary duty. *See* Brief for Defendant-Appellant at 44, *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979). During the proceedings at the district court level, the CIA acknowledged that it did not require former CIA officers to submit their books for prepublication review. *See* Joint Appendix at 83, 232-33, *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978).

and Victor Marchetti,<sup>139</sup> both strident critics of the Agency. The CIA subsequently admitted in congressional hearings that it had selectively enforced the prepublication review requirement solely to silence critics.<sup>140</sup> Nonetheless, the Court ignored the selective enforcement argument when *Snepp* attempted to raise it as a defense to the CIA's suit against him.<sup>141</sup>

The importance of the *Snepp* decision to the discussion of seditious libel lies in the nature of the harm the book was said to have caused. The trial judge found that a former intelligence agent's disclosures "can be detrimental to vital national interests even if the published information is unclassified."<sup>142</sup> Ignoring the speculative nature of the word "can," the Supreme Court recounted the evidence, concluding that it established "irreparable harm and loss."<sup>143</sup>

The "undisputed evidence" consisted of testimony by CIA Director Admiral Stansfield Turner who "testified without contradiction" that

<sup>139</sup> When CIA critic Victor Marchetti sought to publish his book, *The CIA and the Cult of Intelligence*, the CIA went to court to attempt to halt publication. See *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972). An ensuing injunction enabled the CIA to review the manuscript and to censor 339 items, including such sensitive entries as the following: "Henry Kissinger, the single most powerful man at the 40-Committee meeting on Chile" and a reference to Richard Helms's mispronunciation of "Malagasy" when referring to that republic at a National Security Council meeting. See Lewis, *Introduction*, to V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 307 (1980); Medow, *supra* note 124, at 785. After three years of litigation, Marchetti's book finally went to press with 168 deletions. See Whatley, *supra* note 124, at 254-56.

<sup>140</sup> See *Prepublication Review and Secrecy Requirements Imposed Upon Federal Employees: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Judiciary*, 96th Cong., 2d Sess. 19-20 (1981) (statement of Charles Marson, Assoc. Professor of Law, Stanford Univ.) (describing CIA overreaching in prepublication reviews) [hereinafter cited as *Pre-publication Review Hearing*]; see also Comment, *The CIA Secrecy Agreement*, *supra* note 124, at 697 n.227 (arguing that CIA deliberately abuses its secrecy agreement programs through selective enforcement).

<sup>141</sup> *Snepp v. United States*, 444 U.S. 507 (1980). The court of appeals had likewise refused to consider the selective enforcement defense on the grounds that the CIA was seeking civil rather than criminal penalties and that *Snepp* had voluntarily signed the agreement. See *United States v. Snepp*, 595 F.2d 926, 933 (4th Cir. 1979). *But cf.* *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980) (motion for summary judgment). The district court in *Agee* held that it was inappropriate to impose a constructive trust over the proceeds of a former CIA agent's two books in view of the agent's discriminatory enforcement arguments:

A reading list of books concerning the CIA, prepared by the CIA itself for recruitment purposes, noted five works as "more critical of the Agency." Four of these works have spawned suits by the Government to enforce the agreement, whereas no suits have been filed against other authors whose works were not listed as "more critical," even though some of those authors concededly did not submit their material for prepublication review. Plaintiff thus has raised a factual issue as to whether the Government's past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security.

*Id.* at 509.

<sup>142</sup> *Snepp*, 444 U.S. at 511-12.

<sup>143</sup> *Id.* at 512-13.

Snepp's book and "others like it" had caused the CIA to lose face abroad:

We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot estimate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us.<sup>144</sup>

A closer look at the "undisputed evidence" will help to determine whether *Snepp* is a seditious libel case masquerading as a breach of contract case. First, Turner's testimony was "undisputed" only in the sense that the trial court forbade Snepp's attorneys to cross-examine him.<sup>145</sup> Although Turner admitted at trial that Snepp's book was not the exclusive cause of the withering of intelligence sources abroad, the trial court barred Snepp's counsel from cross-examining him to determine the identities of other agents who had published unauthorized books and whether their books contained classified information.<sup>146</sup> Thus, Turner's testimony was little more than a conclusory assertion that the CIA had lost face with its foreign contacts following publication of Snepp's book. His testimony does little more than speculate upon a causal relationship between the two.<sup>147</sup> Second, apart from any harm to the reputation of the CIA resulting from adverse criticism, the government offered no evidence that showed demonstrable harm to the national security. In short, the harm explicitly identified was the injury to the good name of the CIA, to its *appearance* of control over secrecy, rather than to any actual loss of control over secret information.<sup>148</sup>

If actual loss of confidential information had been the standard for relief, the government would have had no case because Snepp disclosed no classified information.<sup>149</sup> Indeed, under that theory, Snepp's strict guarding of classified secrets may well have enhanced the reputation of the CIA, by conveying an image of continuing faithfulness on the part of a former CIA agent despite his violent disagreement with the Agency's operations. From this perspective, Snepp was not a radical seeking to destroy the CIA, but rather a reformer who recognized the importance of the CIA's function in American government and refused to exploit and sensationalize classified information.

---

<sup>144</sup> *Id.* at 512-13.

<sup>145</sup> The trial judge sustained the government's objections to cross-examination, thus preventing Snepp's attorneys from asking Turner to identify which particular foreign sources had stopped cooperating as a direct result of Snepp's book. *Id.* at 523 n.13 (Stevens, J., dissenting).

<sup>146</sup> *See id.* at 522-23 nn.12-13.

<sup>147</sup> *See id.* at 522-23.

<sup>148</sup> *See id.* at 512-13; *id.* at 522-23 (Stevens, J., dissenting).

<sup>149</sup> *See id.* at 516-17.

Starting from this premise, then, the CIA, rather than punish Snapp, more properly would have commended him to encourage other whistle-blowers to display the same degree of caution and loyalty to secrecy that Snapp displayed. The Court, however, chose not to analyze this case from the perspective of a dispassionate arbiter but from the perspective of offended authority, blind to the implications of its demand for retribution. Snapp's offense, in the Court's eyes, was that he had relied "on his own judgment"<sup>150</sup> in determining what information was detrimental rather than yielding to the infallible authority of the CIA.

The most telling part of the opinion lies in the Court's vast silence about freedom of speech. Snapp had claimed that the CIA could not enforce its claims of censorship over his publication of unclassified information because publication of unclassified information was protected by the first amendment. Snapp's claim was reasonable in light of the ruling in the *Marchetti* litigation in 1972.<sup>151</sup> In *Marchetti*, a federal appeals court explicitly refused to enforce a secrecy oath on the ground that the first amendment protected the disclosure of unclassified information.<sup>152</sup> Why, then, did the Court treat Snapp as a willful, deliberate, and surreptitious oath violator with no first amendment protection?

Applying a psychopathology of footnotes,<sup>153</sup> some expert might give us an analysis of the Court's enigmatic footnote three, in which the Court lightly disposed of Snapp's first amendment claim by noting that he had not signed the agreement under duress. The government, the Court asserted, had a "compelling interest in protecting . . . the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."<sup>154</sup> Commentators have detailed the grotesqueness of the Court's arguments and its bizarre use of precedent in that footnote.<sup>155</sup> A logician might tell us that the Court's response to Snapp's argument was a classic example of *ignoratio elenchi*, an exemplary begging

<sup>150</sup> *Id.* at 512.

<sup>151</sup> *Marchetti v. United States*, 466 F.2d 1309, 1317 (4th Cir. 1972); see Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1294 n.424 (1976) (discussing grounds of holding in *Marchetti*).

<sup>152</sup> 466 F.2d at 1313, 1317 ("Thus *Marchetti* retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment . . .").

<sup>153</sup> See Bersani, *Theory and Violence*, 3 RARITAN 54, 65 (1983) (suggesting that Freud's footnotes play the role of the psychoanalytic unconscious).

<sup>154</sup> *Snapp*, 444 U.S. at 509 n.3 (emphasis added).

<sup>155</sup> See, e.g., Medow, *supra* note 124, at 818 (arguing that Court misapplied precedents and confused issue of whether standard of review was reasonableness or strict scrutiny); Whatley, *supra* note 124, at 275-77 (arguing that Court twisted traditional first amendment doctrine by encouraging government to pursue prior restraints rather than subsequent punishment and that Court ignored question of whether extent of restrictions on first amendment were reasonable in light of government's intent).

of the question. As the Court well knows, it is a cardinal rule of argument that one does not assert what needs to be proved.

By its silence, the Court denied that *Snepp* had a right to speak against governmental policy; by its soft-pedaling of *Snepp*'s first amendment argument in the margin of the page, it denigrated the right of dissent to marginal status. Such question-begging of constitutional claims fortunately is infrequent. But when it occurs, it often signals that the Court has answered the question begged in a monumentally important way. One is reminded of Justice Black's flat denial in *Korematsu v. United States*<sup>156</sup> that he was dealing with a case of racial prejudice. Would that the Court had been so explicit about its premises in *Snepp*. A more honest opinion, for example, might have asserted that the first amendment does not operate in the area of national security, and that, like obscenity, certain sensitive political matters are beyond the pale of its protection. At least when the Court makes explicit such premises, they can be examined, evaluated, and exposed as congenial to seditious libel. When, however, the Court refuses to confront the issue and turns its back on a constitutional claim of the right to criticize the government, it has smoothed the path for orthodoxy and facilitated the reemergence of seditious libel in a disguised form.

The Court's true perception of the issue as one of seditious libel seems evident in its footnote remark: "The problem is to ensure *in advance*, and by proper procedures, that information detrimental to national interest is not published."<sup>157</sup> Thus, it is not danger to the national security nor loss of sensitive secrets but adverse reflections on government that constitute the forbidden evil. By sanctioning the idea that authority can outlaw injury to its reputation and punish those who bring it into public contempt, scorn, or disrepute, the *Snepp* decision delivers a discouraging blow to the first amendment.<sup>158</sup> This new sedi-

---

<sup>156</sup> *Korematsu v. United States*, 323 U.S. 214, 223 (1944) ("cast[ing] this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue").

<sup>157</sup> *Snepp*, 444 U.S. at 513 n.8 (emphasis in original).

<sup>158</sup> Apart from its dangerous doctrine, the practical effect of the *Snepp* decision was a green light to CIA censors to delay, intimidate, and harass its inside critics into near madness or total silence. Consider the example of former CIA officer Ralph McGehee, whose recent book, *Deadly Deceits*, aims to expose the CIA as an "anti-intelligence agency, producing only that information wanted by policy makers to support their plans and suppressing information that does not support" them. R. MCGEHEE, *DEADLY DECEITS* xi (1983). CIA censors first made 397 deletions in McGehee's manuscript. Then they insisted that even publicly revealed material could not be published if it had not been "officially released," *id.* at 196-98 app., and that even officially released information could be expurgated in a case where the executive wanted to "reclassify" it. *Id.* at 200-01 app. The CIA procedures put the burden on McGehee to prove that everything the censors questioned had in fact been officially released; the dominant presumption is that everything the censors want censored is in fact classified, unless and until the author can prove its nonclassification and nonreclassification. *Id.* at 198-200 app. Readers of Orwell's *1984* may justifiably recall how Big Brother insisted on "vaporizing" the past by the process of expurgation.

tious libel is not the more enlightened doctrine whereby the truth of the criticisms and honest motives would exonerate the defendant.<sup>159</sup> Indeed, the very truth of the criticisms would seem to magnify the offense of the libeler.<sup>160</sup>

### B. *Haig v. Agee*

The case of Philip Agee, a CIA agent who quit his job with the CIA and embarked on an international campaign to discredit the Agency as "the Gestapo and SS of our time" presented a more dramatic case of seditious libel.<sup>161</sup> Unlike Snepp, Agee was neither temperate nor cautious in his attacks on the CIA. He conceived of the CIA not as an institution for gathering intelligence against hostile nations but as a "sinister secret police force" committing crimes abroad in the name of the American people. These "crimes" included infiltrating government, the military, the police, and trade unions of foreign nations, and propping up friends and beating down enemies, particularly the enemies of American multinational companies.<sup>162</sup> His repeated exposures of the identities of CIA operatives abroad were deliberate attempts to embarrass, defame, and ultimately destroy the network of secrecy cloaking the CIA in worldwide "military *coups*, torture chambers, and terrorism."<sup>163</sup> Deeming the CIA's existence a threat to national and world peace, Agee made good use of his training in undercover operations to reveal in detail to an international public the nature and size of "the enemy" among them.

Like Snepp, Agee had signed a secrecy oath. Unlike Snepp, he divulged classified information. He initially thwarted the CIA censors by traveling and publishing abroad. There were indications, however, that the CIA intended to strike back. In West Germany, after having been deported from Britain, France, and Holland, Agee received word that the secretary of state had revoked his passport on the ground that Agee's activities were "causing or [were] likely to cause serious damage to the national security or the foreign policy of the United States."<sup>164</sup> In his

<sup>159</sup> Under Fox's Libel Act, 1792, 32 Geo. 3, ch. 60, the jury could determine the question of the defendant's intent. See L. LEVY, *supra* note 31, at 258-59. Under the Sedition Act of 1798, § 3, 1 Stat. 596, 597, a defendant could plead truth as a defense and the determination of law and fact was reserved to the jury. On Fox's Libel Act, see *supra* note 31 and accompanying text. On the Sedition Act of 1798, see *supra* notes 44-49 and accompanying text.

<sup>160</sup> "[T]he greater the truth, the greater the libel," as Lord Mansfield coined the phrase. Riesman, *supra* note 62, at 735.

<sup>161</sup> Agee, *supra* note 6, at 7.

<sup>162</sup> See *id.* at 4-5.

<sup>163</sup> *Id.* at 6-7; see also DIRTY WORK: THE CIA IN WESTERN EUROPE 286 (P. Agee & L. Wolf eds. 1978); Agee, *Exposing the CIA, CounterSpy*, Winter 1975, at 19; Agee, *Why I Split the C.I.A. and Spilled the Beans*, ESQUIRE, June 1975, at 128; *A Spy Out In the Cold*, NEWSWEEK, Jan. 28, 1980, at 32.

<sup>164</sup> *Haig v. Agee*, 453 U.S. 280, 286 (1981).

notice to Agee, the secretary of state explained:

Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have travelled in various countries . . . and your activities in those countries have caused serious damage to the national security and foreign policy of the United States.<sup>165</sup>

In Alice in Wonderland fashion, the letter, in effect, informed Agee that his actions damaged the national security because they damaged the national security. The executive revoked Agee's passport notwithstanding that his disclosures, according to the Justice Department, had violated no federal statutes and that traveling with the intent to "disrupt" CIA activities was not a ground for passport revocation.<sup>166</sup>

Agee immediately brought suit against the Secretary of State, arguing that the passport revocation violated his right to travel and his first amendment right to criticize the government. Both the trial and appellate courts, deciding the case on statutory rather than constitutional grounds, agreed that the executive's action was unauthorized and ordered the Secretary of State to reinstate Agee's passport.<sup>167</sup> Agee's victory in the court of appeals was fashioned over the elaborate and impassioned dissent of Judge MacKinnon, who, acting in the tradition of the grand inquisitor, helped design the set for the ensuing drama in the Supreme Court. He depicted Agee as a threat to the national security, an oath violator, a traitor, a collaborator with terrorists in Iran, and a cheerleader for attacks on U.S. embassies in Pakistan, Libya, and Colombia.<sup>168</sup> Judge MacKinnon established a new precedent by appending to his opinion a detailed statement of Agee's illegal conduct together with a draft indictment of grand jury charges against him.<sup>169</sup>

Chief Justice Burger, writing for the majority, reversed the judgment of the lower courts on the statutory issue and dismissed the constitutional claims. In the opinion, Burger strained to legitimize the executive's exercise of power in the face of strong precedent to the contrary. To that end, he described in detail the extensive efforts of Agee and his collaborators to expose the identities of CIA employees abroad.<sup>170</sup> Agee's first amendment claim received little more than a

<sup>165</sup> *Id.*

<sup>166</sup> The Justice Department informed Agee that criminal prosecution would not be forthcoming under the Espionage Act, 18 U.S.C. §§ 792-799 (1982), because no ground for prosecution could be found. *See* N.Y. Times, Mar. 21, 1977, at 7, col. 1, *cited in* Note, *International Travel Restrictions and the First Amendment: To Speak or Not to Speak?* Haig v. Agee, 453 U.S. 280 (1981), 4 W. NEW ENG. L. REV. 449, 452 n.21 (1982).

<sup>167</sup> Agee v. Vance, 483 F. Supp. 729 (D.D.C.), *aff'd sub nom.* Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980).

<sup>168</sup> Agee v. Muskie, 629 F.2d 80, 88-90 (D.C. Cir. 1980) (MacKinnon, J., dissenting).

<sup>169</sup> *Id.* at 110-17.

<sup>170</sup> Chief Justice Burger characterized one of Agee's books as a *Who's Who* of CIA em-



"*Snepp* footnote" treatment in the concluding part of the opinion.<sup>171</sup> The Court's analysis of the statutory issue has been carefully and persuasively refuted elsewhere.<sup>172</sup> Our analysis does not aim to level counterarguments against the Supreme Court's rationale in upholding the revocation of Agee's passport. Rather, we aim to explore the significance of the Court's marginal statements on the first amendment issue and to probe the reasons for its silences about Agee's status as dissenter. As in *Snepp*, it is in the Court's footnotes, ellipses, and lacunae that seditious libel emerges.<sup>173</sup>

Justice Burger opened his opinion with an exordium that accused Agee of soliciting murder through his campaign to expose the atrocities of the CIA abroad.<sup>174</sup> In the familiar idiom of seditious libel, he portrayed Agee as a diabolic international sneak, a contract breaker, and an accomplice to murder,<sup>175</sup> stressing that Agee's "identifications . . . have been followed by episodes of violence against the persons and organizations identified."<sup>176</sup> This statement was graphically amplified in a footnote with examples of murder and machine-gun fire directed at CIA

---

ployees listing detailed biographical information and the current location of many employees. See *Haig v. Agee*, 453 U.S. at 284 n.3.

<sup>171</sup> *Id.* at 309 n.61.

<sup>172</sup> Professor Daniel Farber has demonstrated the particularly unwholesome flaws in the Court's reasoning. See Farber, *National Security, the Right to Travel, and the Court*, 1981 SUP. CT. REV. 263. The Court distorted *Kent v. Dulles*, 357 U.S. 116 (1958), one of the principal civil liberties pillars in protecting the right to travel. Although the Court in *Kent* had held that the president did not have the power to restrict the movement of ideologues whose views he did not like, see Farber, *supra*, at 264, the Court circumvented that holding on the ground that the Secretary of State had revoked Agee's passport because of his conduct, not because of his speech.

Professor Farber also contends that intervening legislative developments and the historical record indicated congressional support for an extensive right of international travel and immunity from a particular administration's policy. See *id.* The Supreme Court's opinion conspicuously ignored this recent history and built its argument on the insubstantial evidence of a few McCarthy era episodes—precedents of questionable value—and an obscure incident arising out of an airline hijacking. The Court held that these "episodes" represented a consistent administrative practice of passport revocation. See *id.* at 274-78.

<sup>173</sup> One of those marginal indications of the Supreme Court's true posture in the case as loyal supporter of the unscrutinized claims of the CIA, is found in footnote 21. *Agee*, 453 U.S. at 291 n.21. The lower court had indicated that a case involving the curtailment of an important civil liberty required a narrow construction of the Secretary of State's delegated powers. *Agee v. Vance*, 483 F. Supp. 729, 730 (D.D.C. 1980). The Supreme Court, however, concluded that "[t]his case does not involve a criminal prosecution; accordingly, strict construction against the Government is not required." 453 U.S. at 291 n.21. Even if the Court's reasoning is less than sound, this nonsequitur at least reveals the Court's pro-CIA orientation. As one commentator has noted, if strict construction against the government is not required, then the government's evidentiary burden on the statutory issue is considerably lightened. See Lansing, *Freedom to Travel: Is the Issuance of a Passport an Individual Right or a Government Prerogative?*, 11 DEN. J. INT'L L. & POL'Y 15, 26 (1981).

<sup>174</sup> See *Agee*, 453 U.S. at 285 & n.7.

<sup>175</sup> See *id.* at 283-85.

<sup>176</sup> *Id.* at 284-85 (footnote omitted).

personnel abroad.<sup>177</sup>

Despite a complete lack of evidence indicating a causal link between Agee's activities and this violence, the Court denounced Agee's revelations as "thinly-veiled invitations to violence."<sup>178</sup> One CIA official asserted that these revelations "markedly increased the likelihood of individuals so identified being the victims of violence, [and] could, in [then current] circumstances, [have] result[ed] in someone's death."<sup>179</sup> In a manner reminiscent of Holmes's metaphysics of socialist "obstruction,"<sup>180</sup> the Court conjured up a conspiratorial web linking criticism of the CIA with physical attacks on CIA personnel.<sup>181</sup>

As we have seen from our discussion of the historical roots of seditious libel, ad hominem assaults on the dissenter's integrity, loyalty, and even sanity are one of the most effective ways of galvanizing opinion against dissenters.<sup>182</sup> In the *Tutchin* case, Justice Holt had characterized dissenters as devils "possessing" the populace with ill-opinion of government.<sup>183</sup> The word "possess" has diabolic overtones in the *Snepp* and *Agee* decisions as well. One form of "possession" that the secrecy state aspires to is appropriation of the mind. Censorship and licensing ensure control over the public mind, stifling all but official ideas and perpetuating the appearance of governmental infallibility so that the public's perceptions of what is in the national interest coincide with the official view. But once challenged by dissent, as by Agee's controversial exposures, the official version may find itself dispossessed. If government finds itself, as in *Agee*, with no legitimate means to suppress dissent, it

---

<sup>177</sup> In December 1975, Richard Welch was murdered in Greece after the publication of an article in an English-language newspaper in Athens naming Welch as CIA Chief of Station. In July 1980, two days after a Jamaica press conference at which Agee's principal collaborator identified Richard Kinsman as CIA Chief of Station in Jamaica, Kinsman's house was strafed with automatic gunfire. . . . In January 1981, two American officials of the American Institute for Free Labor Development, previously identified as a CIA front by Agee . . . were assassinated in El Salvador.

*Id.* at 285 n.7 (citations omitted).

<sup>178</sup> *Id.*

<sup>179</sup> Nonetheless, former CIA Director William Colby admitted that the murder of Richard Welch had causes independent of the disclosure of his name in *CounterSpy* magazine (see *supra* note 163) and that he attacked the people who published Welch's identity only after they had blamed his death on the CIA. "That really lifted the hair off my head, and I am afraid I lost my temper and denounced that kind of cynical exploitation . . ." *Proposals to Criminalize the Unauthorized Disclosure of the Identities of Undercover United States Intelligence Officers and Agents: Hearings Before the Subcomm. on Legislation of the Permanent House Select Comm. on Intelligence*, 96th Cong., 2d Sess. 135 (1980) [hereinafter cited as *Unauthorized Disclosure of Undercover Agents' Identities Hearings*].

<sup>180</sup> See *supra* notes 64-75 and accompanying text.

<sup>181</sup> See *Agee*, 453 U.S. at 285 n.7.

<sup>182</sup> See *supra* notes 14-28 and accompanying text.

<sup>183</sup> *Rex v. Tutchin*, reprinted in 14 A COMPLETE COLLECTION OF STATE TRIALS 1095, 1127 (1704) (T. Howell comp. 1812). For a discussion of this case and its impact, see *supra* notes 22-25 and accompanying text.

may understandably resort to illegitimate ones to maintain its control over the public mind.

When authority finds itself in such a position, one useful technique is the manipulation of fear. What cannot be "possessed" lawfully may nevertheless be possessed in a different manner, as by the rhetoric of demonology. As we have seen, the Red Menace<sup>184</sup> and the McCarthy<sup>185</sup> eras demonstrated that rhetorical possession captures not only the public mind but the judicial mind as well. In these eras, the word "communist" was an emotive epithet conjuring up, as if by incantation, the image of a superhuman power destructive to discourse.<sup>186</sup> The Court's repeated allusions to terrorist attacks in *Agee* serve the same function. Although this rhetoric laid the psychological groundwork for casting Agee's publications and conduct beyond the pale of the first amendment, it also exposed the Court's unprincipled transformation of criticism into crime.

The final section of the *Agee* opinion clearly attests to Holmes's maxim that hard cases make bad law. The Court may have placed new geographical restrictions on freedom of speech in dismissing Agee's first amendment claims.

Assuming, *arguendo*, that First Amendment protections reach beyond our national boundaries, Agee's First Amendment claim has no foundation. The revocation of Agee's passport rests in part on the content of his speech: specifically, his repeated disclosures of intelligence operations and names of intelligence personnel. Long ago, however, this Court recognized that "[n]o one would question but that a government might prevent actual obstruction . . . of the sailing dates of transports . . . ."<sup>187</sup>

Does the ominous "arguendo" mean that dissenters may only voice their criticisms within the borders of this country? The solicitor general, during oral argument, seemed to propose this new limit when he asserted that "the freedom of speech that we enjoy domestically may be different from that that we can exercise [abroad]."<sup>188</sup> The ambiguity in that final portion of the opinion casts dark shadows over the free speech claims of itinerant Americans. Is the price of a passport the choice of silence or a craven flattery of authority?

<sup>184</sup> See *supra* notes 58-91 and accompanying text.

<sup>185</sup> See *supra* notes 92-117 and accompanying text.

<sup>186</sup> The Court's vision of the magical, satanic properties of communist dissent led it to hysterical heights of rhetoric in 1925. In *Gitlow v. New York*, 268 U.S. 652, 669 (1925), the Court quite literally portrayed "The Left Wing Manifesto" as a hot cinder sparking a holocaust: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." Thus, from the tongues of dissent the Court fashioned destructive tongues of flame. See also *V. NAVASKY, supra* note 73, at 333-39.

<sup>187</sup> *Agee*, 453 U.S. at 308 (quoting *Near v. Minnesota*, 283 U.S. 697, 716 (1931)).

<sup>188</sup> *Id.* at 319 n.9.

The wholesale bulldozing of Agee's first amendment claim was even more ominous and explicit than the suggestion that the first amendment has territorial limits. The Court resorted, as it had in *Snepp*,<sup>189</sup> to *ignoratio elenchi* to evade argument. Astonishingly, the Court equated Agee's statements to wartime disclosures of troop movement,<sup>190</sup> a scenario that the Court first discussed, ironically, in *Near v. Minnesota*.<sup>191</sup> In *Near*, a state court had enjoined the publisher of a local newspaper who had accused local politicians of accepting bribes and of being "Jewish gangsters" from any further such publications under a statute that banned "malicious, scandalous, and defamatory" newspapers.<sup>192</sup> In holding the statute unconstitutional, the Court, in *Near*, announced an almost ironclad rule against censorship but still felt obliged to reconcile its decision with the tradition of restrictions on freedom of speech. Suggesting that prior restraints might be permissible in some exceptional cases, the Court, with nothing but one man's imagination to guide it, cited the example of troop movements advanced by Chafee in his book, *Free Speech in the United States*.<sup>193</sup> The great irony lies in the *Agee* Court's invocation of *Near* not for its fundamental principle, but for its supposititious exception. Whereas the *Near* decision helped kick away the foundations of seditious libel, Justice Burger used it, in *Agee*, to kick away the foundations of freedom of speech.

The use of this quote from *Near* reveals more than Justice Burger may have been willing to acknowledge explicitly. Asserting that "no one would question" the proposition advanced is a rhetorical trick implying that anyone who would question it is either a lunatic or a traitor. Suppose, for example, that a journalist wanted to expose a secret, illegal war being conducted by a mad executive. Surely such a situation would not justify application of the *Near* exception. Even assuming *arguendo* that the *Near* hypothetical case would justify an exception to the rule against prior restraints, the Court's analogy between Agee's exposures of shady CIA activities in order to embarrass the Agency and the publication during wartime of information that would trigger an enemy attack has ominous implications. If the analogy rests upon the unstated premise that we now live in a perpetual state of siege, in which the enemy might attack at any moment, then the Bill of Rights is suspended and the "emergency" exception becomes the rule. Perhaps Justice Burger had this in mind when he wrote that "grave problems of national security"<sup>194</sup> may arise even during periods in which we are not fighting in a formally declared war. Indeed, the opinion suggests that CIA secrecy is

---

189 See *supra* notes 153-55 and accompanying text.

190 See *Agee*, 453 U.S. at 308.

191 283 U.S. 697 (1931).

192 *Id.* at 706.

193 *Id.* at 716; Z. CHAFEE, *supra* note 31, at 10.

194 *Agee*, 453 U.S. at 303.

even more compelling than troop movement during wartime because the CIA operatives potentially threatened by such attacks may be found all over the world rather than in a few local areas.<sup>195</sup> If such an exceptional view of normalcy was not the Court's operating premise, some other explanation must be found for the exceptional dismissal of Agee's first amendment claim.

One possible explanation lies in the Court's alternative ground for holding that Agee's criticism of the government falls outside the protection of the first amendment. Justice Burger, echoing *Schenck*, asserted that Agee's disclosures were "clearly not protected by the Constitution"<sup>196</sup> because they had the declared purpose of "obstructing intelligence operations and the recruiting of intelligence personnel."<sup>197</sup> If the Court had adopted the methodology employed in more recent decisions such as *The Pentagon Papers* case,<sup>198</sup> it would have begun with a presumption in favor of political dissent; if it had followed a line of reasoning similar to that pursued in *New York Times Co. v. Sullivan*,<sup>199</sup> where it repudiated the doctrine of seditious libel, it would have asked whether protected speech loses its immunity when weighed against injury to official reputation. Silently reviving yet another dictum in *Schenck*, Justice Burger announced: "The mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law."<sup>200</sup> In the Court's view, Agee's discrediting of the CIA was merely a punishable form of obstruction that was adventitiously related to constitutionally protected criticism of the government. His denunciations and exposures were categorically declared to be "conduct" and were divested of any privileged status they may have had as "ideas." The Court wryly observed, however, that he remained free to criticize the government.<sup>201</sup>

In a manner representative of the Holmes trilogy, the Court obfuscated the contour between speech and conduct. Despite its assertion that Agee's disclosures were conduct rather than speech, the Court did not attempt to connect those disclosures to any concrete harm such as physical violence or assault. Instead, the court relied on the ambiguous term "obstruct," again reminiscent of the Holmes trilogy, to bridge the gap between speech and conduct. One has but to recall Eugene Debs's conviction for "obstructing" the draft—a conviction based solely on his speech on socialism—to fully appreciate how the Court could transform

---

<sup>195</sup> *See id.* at 308-09.

<sup>196</sup> *Id.* at 309.

<sup>197</sup> *Id.*

<sup>198</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971). *See infra* notes 261-67 and accompanying text for an analysis of that case.

<sup>199</sup> 376 U.S. 254 (1964).

<sup>200</sup> *Agee*, 453 U.S. at 309.

<sup>201</sup> *See id.*

expression into criminal action.<sup>202</sup>

With its diabolized portrait of Agee, its lack of evidence of specific harm, its logical deficiencies, its appeals to fear, and its insistence that national security subordinates all other interests, the *Agee* decision announces its paternity. When carefully analyzed, the nature of the harm that Agee inflicted on the government and its officials was not incitement to murder or the giving of aid and comfort to the enemy, as Judge MacKinnon stated.<sup>203</sup> The damage was to the reputation of the CIA and the persons Agee identified as its agents. Agee effectively sullied the reputation of the CIA because he had been an insider to whom the Agency had exposed its secrets and because he could identify clandestine collaborators in its operations abroad. To the extent that Agee painted a convincing picture of the CIA as dishonorable, the government rightly feared, as Agee had hoped, that its outward relations with other nations, as well as its public status at home, would begin to disintegrate.

### C. *United States v. The Progressive, Inc.*

In *Snepp* and *Agee*, the Court made no overtures toward any first amendment formula, disregarding even the "clear and present danger" test of the Red Menace and McCarthy era cases. Instead, the Court was content to dispatch freedom of speech arguments with the litany of "national security" and the "explosive" nature of foreign relations. Although these terms resist decoding within the individual context of each opinion, taken together they suggest a looming, omnipresent fear of sudden destruction.

The concrete form of that fear took on precise definition in the case of *United States v. The Progressive, Inc.*,<sup>204</sup> which involved the threatened exposure of the secrecy state's most awesome secret: the hydrogen bomb. *The Progressive* court upheld the censorship of an article that attempted to discredit the government's classification and control of information by showing that secrecy over the bomb was a sham. Following the Supreme Court's lead in *Agee*, the district court compared *The Progressive's* exposé to the publication of troop movements in wartime. The opinion not only stood the *Near* principle on its head but ingenuously disclosed the defining symbols of national security. With its concrete images of destruction and its historic defense of censorship, *The Progressive* supplies the missing link in the Supreme Court's revival of seditious libel.

The offending article, "The H-Bomb Secret: How We Got It; Why

<sup>202</sup> See *supra* notes 73-77 and accompanying text for a discussion of the *Debs* opinion.

<sup>203</sup> *Agee v. Muskie*, 629 F.2d 80, 88-91 (D.C. Cir. 1980) (MacKinnon, J., dissenting).

<sup>204</sup> 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

We're Telling It,"<sup>205</sup> was written by Howard Morland, a free-lance journalist and recent autodidact on the subject of nuclear weapons. Morland's intent was to stimulate public discussion of a forbidden but vitally important topic: the nature, composition, and reaction processes of the hydrogen bomb. This technical information, he argued, was essential for public understanding and debate over the merits of the nuclear weapons industry, "the vast industrial complex that turns out three new nuclear weapons a day."<sup>206</sup> According to Morland, the information in his article was taken exclusively from public sources, such as the *Encyclopedia Americana*, in which Dr. Edward Teller's article on the hydrogen bomb had appeared over a decade earlier.<sup>207</sup>

Morland launched his investigation upon learning of an incident in which a congressman had requested the Department of Energy to explain its reasons for a projected shortage of plutonium in the nuclear weapons program. The congressman had inquired whether the neutron bomb, then scheduled for production, would consume more plutonium than did standard nuclear weapons, and he also sought information about new multiple warhead missiles and particular production plants. The Department of Energy replied that not only could it not provide unclassified responses to the questions but that the questions themselves should be classified because they contained "secret restrictive data." In short, Morland observed, not only could energy officials withhold answers, they could also "confiscate the questions."<sup>208</sup>

Thus, Morland's objective in publishing the article was political, not scientific; he wanted to discredit the official shroud of secrecy surrounding the hydrogen bomb as a pernicious illusion: "Secrecy itself, especially the power . . . to declare some topics off limits, contributes to a political climate in which the nuclear establishment can conduct business as usual, protecting and perpetuating the production of these horror weapons."<sup>209</sup> Arguing that the price of secrecy was to stifle healthy debate about nuclear policy, Morland set out to disabuse the public of the "secret" nature of nuclear weapons and to generate public discussion about their continued production. Before the article went to press, however, the government obtained a temporary restraining order enjoining its publication in *The Progressive*. The prosecution claimed that the

---

<sup>205</sup> The article was published after the government dismissed its case in 1979. Morland, *The H-Bomb Secret: How We Got It; Why We're Telling It*, *THE PROGRESSIVE*, Nov. 1979, at 14.

<sup>206</sup> *Id.* at 22.

<sup>207</sup> Teller, *Hydrogen Bomb*, 14 *ENCYCLOPEDIA AMERICANA* 654 (1979).

<sup>208</sup> See Morland, *supra* note 205, at 15. Ronald Dworkin attacked the government's "born classified" argument—the claim of a right to censor materials about atomic weapons—as absurdly overbroad. Dworkin, *Is the Press Losing the First Amendment?*, *N.Y. REV. OF BOOKS*, Dec. 4, 1980, at 50.

<sup>209</sup> Morland, *supra* note 205, at 14.

Atomic Energy Act<sup>210</sup> authorized an injunction against the disclosure of "restricted data," including information relating to the design, manufacture, or utilization of nuclear weapons.<sup>211</sup>

The district court, without holding an evidentiary hearing, decided the matter amid a snowstorm of contending affidavits.<sup>212</sup> The publication of the article, concluded Judge Warren, was "analogous to publication of troop movements or locations in time of war"<sup>213</sup> and, therefore, posed a grave danger to the national security. That danger, in Judge Warren's words, was that the technical information set forth in Morland's article "could accelerate the membership of a candidate nation in the thermonuclear club."<sup>214</sup> The "club" metaphor, ingenuous enough, gave way to a more emotional image when Judge Warren commented from the bench, "I want to think a long, hard time before I'd give a hydrogen bomb to Idi Amin."<sup>215</sup> The words "could accelerate" also reveal the speculative and subjective nature of Judge Warren's conclusions. Indeed, no facts were advanced to show how the publication of Morland's article would even remotely pose the danger fantasized by Judge Warren.

Hysteria permeated the opinion and filled in the gaps of logic and deficiencies of evidence. The emotional pitch was revealed in the court's characterization of the conflict as a clash of constitutional titans:

Our Founding Fathers believed, as we do, that one is born with certain inalienable rights which, as the Declaration of Independence intones, include the right to life, liberty and the pursuit of happiness. . . .

The Court believes that . . . there is a hierarchy of values attached to these rights . . . .

. . . Somehow it does not seem that the right to life and the right to not have soldiers quartered in your home can be of equal import in the grand scheme of things. While it may be true in the long-run, as Patrick Henry instructs us, that one would prefer death to life without liberty, nonetheless, in the short-run, one cannot enjoy freedom of speech . . . or freedom of the press unless one first enjoys the freedom to live.<sup>216</sup>

---

<sup>210</sup> 42 U.S.C. §§ 2011-2296 (1976).

<sup>211</sup> *The Progressive*, 467 F. Supp. at 994. For a discussion of the entire legal story with its bizarre and grotesque distortions of the judicial process, see Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161 (1981).

<sup>212</sup> *The Progressive*, 467 F. Supp. at 992 ("Thus far the affidavits filed are numerous and complex.").

<sup>213</sup> *Id.* at 996.

<sup>214</sup> *Id.* at 994.

<sup>215</sup> Reported in Knoll, *supra* note 211, at 164.

<sup>216</sup> *The Progressive*, 467 F. Supp. at 995. It seems incredible that one commentator would refer to *The Progressive* court's deliberation over the first amendment issue as "painstaking." Comment, *Short Shrift for Prior Restraint*, *supra* note 124, at 424.



With such a distorted conception of the issue, the significance of the first amendment paled in comparison with the threat of nuclear annihilation, for, as Judge Warren reasoned, if he should err in ruling against the United States, "our right to life is extinguished and the right to publish becomes moot."<sup>217</sup> The level of hyperbole betrayed the pervasive hysteria; witness Judge Warren's candid comment that "You can't speak freely when you're dead."<sup>218</sup> This hysteria spread like a contagion with newspaper headlines blaring "You, Too, Can Build H-Bomb."<sup>219</sup>

While the case was on appeal, however, the first amendment issue became moot. An enterprising reporter, after spending a week in local public libraries, had written and published essentially the same information in the *Milwaukee Sentinel*.<sup>220</sup> When comparable information began to appear in other publications, the government abandoned the case.<sup>221</sup> As in *The Pentagon Papers*, the government claimed that the republic would virtually crumble unless publication was enjoined. In *The Progressive*, just as in *The Pentagon Papers*, eventual publication made the government lose face. Morland's article not only fulfilled its political aim of discrediting secrecy and promoting public debate, but it also dramatized embarrassing facts. If two scientifically unsophisticated journalists could discover dangerous "secrets" about the bomb with a little research and thought, it is difficult to imagine how the government can keep smaller fringe nations or groups out of the "thermonuclear club."

What bearing does *The Progressive* have on the resurgence of seditious libel?<sup>222</sup> Prior to the Supreme Court's decisions in *Snepp* and *Agee*, *The Progressive* stood as the one federal decision in which the *Near* exception was transformed into the rule for cases involving "national security." *The Progressive* suggests that whenever the administration can bring forth a claim sufficiently threatening to a frightened judiciary, publication of even readily available data may be censored. The case also suggests that the judiciary will not scrutinize the alleged threat but will silence the dissenter upon a showing of embarrassment to the government. The case was such an aberration that one is tempted to dismiss one's own fears as hysterical or alarmist. Because it was unprecedented and never affirmed by an appellate court, *The Progressive* would not ordinarily be thought to have disturbed the constitutional order. Inasmuch

---

<sup>217</sup> *The Progressive*, 467 F. Supp. at 996.

<sup>218</sup> Reported in Knoll, *supra* note 211, at 164.

<sup>219</sup> See *id.* at 165 (citing Lansing State J., Mar. 9, 1979, at 1).

<sup>220</sup> See *id.* at 166.

<sup>221</sup> See *id.* The court of appeals decision reporting dismissal of the case is found at 610 F.2d 819 (7th Cir. 1979).

<sup>222</sup> The superficial analysis of *The Progressive* decision in Professor Mayton's recent article suggests that, if taken at face value, the decision does not pose a genuine threat to liberty. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 140 (1984).

as it foreshadowed *Snepp* and *Agee*, however, we owe *The Progressive* decision some attention. Judge Warren's unmediated prose contains elements of seditious libel that lie concealed in the more sophisticated language of the Supreme Court in *Snepp* and *Agee*: a rhetoric of fear and hysteria, a portrait of the governmental critic as a public menace, a suspension of the rules of logic and evidence, and a bow to the infallible authority of the secrecy state.<sup>223</sup> The fact that political criticism was at the core of the censored article, when coupled with the lack of demonstrable harm to anything other than the illusion of secrecy, squarely lodges *The Progressive* in the tradition of seditious libel.

#### IV

#### SEDITIONOUS LIBEL IN THE SUN

The dark origins and modern shadows of the first amendment are not, fortunately, the entire story. Into this tradition of gloom the Supreme Court has, on occasion, cast brilliant rays of enlightenment, repudiating seditious libel, protecting dissent, and occasionally celebrating the primacy of its role in a democracy. This section traces that contrasting tradition and considers how *Snepp*, *Agee*, and *The Progressive* might have been decided in the light.

##### A. The Rays of Enlightenment

###### 1. *Pencils of Light: Subversive Dissents*

Although Justice Holmes never repudiated the Red Menace trilogy,<sup>224</sup> he announced just a few months later in his great *Abrams* dissent

---

<sup>223</sup> *The Progressive* leaves a legacy of unresolved problems that may plague future first amendment jurisprudence. First, the court never explained why it refused an evidentiary inquiry into the contested issues of fact. See Note, *United States v. The Progressive, Inc.: The Faustian Bargain and the First Amendment*, 75 NW. U.L. REV. 538, 557-58 (1980). Second, the court's assumption that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296 (1976), applied to public dissemination, as opposed to private disclosure of nuclear secrets, does not withstand close scrutiny. Cf. Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1046 (1973) (concluding that 18 U.S.C. § 793(e) (1982), prohibiting disclosure of national defense secrets, should not apply when disclosures are made to stimulate public debate, as in *The Pentagon Papers*, 403 U.S. 713 (1971)).

Third, *The Progressive* seems to contradict *United States v. Heine*, 151 F.2d 813, 816 (2d Cir. 1945), which held that a person could not be prosecuted under the Espionage Act for disclosing defense information that had already been made public. See Note, *supra*, at 562 & n.136; Comment, *United States v. The Progressive, Inc.: The National Security and Free Speech Conflict*, 22 WM. & MARY L. REV. 141, 153-55 (1980). Finally, *The Progressive* is also important because the Intelligence Identities Protection Act of 1982, 50 U.S.C.A. §§ 421-26 (West Supp. 1983), apparently has incorporated *The Progressive's* doctrine that government may criminally punish even those who disclose only information that has already entered the public domain. See *Unauthorized Disclosure of Undercover Agents' Identities Hearings*, *supra* note 179, at 24-25 (exchange between Mr. Boland and Ambassador Carlucci).

<sup>224</sup> In his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting), Holmes insisted that it was beyond doubt that *Schenck*, *Debs*, and *Frohwerk* were rightly decided.

that seditious libel was dead.<sup>225</sup> What distinguished Abrams's case from *Schenck*, *Debs*, and *Frohwerk* was an amendment to the Espionage Act of 1917 that made it a crime to urge curtailment of munitions production. Abrams received a twenty year jail sentence for printing and distributing a leaflet urging a strike. Taking issue with the majority opinion—and, indeed, with the very approach he had employed only months earlier in *Schenck*, *Debs*, and *Frohwerk*<sup>226</sup>—Holmes insisted that the statute should be strictly construed, that Abrams could be punished only on a showing of specific intent, and that no one could contend that the distribution of a “silly leaflet by an unknown man” could pose any threat to the government's war effort.<sup>227</sup> It was clear to Holmes that Abrams's only crime was criticism of the war and that this criticism was privileged under the first amendment.<sup>228</sup>

Holmes's *Abrams* dissent boldly declared that the first amendment outlawed seditious libel and that the Sedition Act of 1798 had been a travesty.<sup>229</sup> He formulated a liberal rule for the protection of dissent based on the theory of a “free trade in ideas”: “[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”<sup>230</sup> This reformulation of the first amendment owed much of its appeal to Holmes's engaging metaphor of the marketplace of ideas—a metaphor that replaced the hysterical rhetoric and fire imagery<sup>231</sup> and proffered instead a vision of ideas as commodities.<sup>232</sup> Such a vision was particularly congenial to the American mentality so solidly ensconced on free enterprise and the workings of the marketplace.<sup>233</sup> This metaphor has

<sup>225</sup> *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

<sup>226</sup> *See supra* notes 64-74, 88-89 and accompanying text.

<sup>227</sup> *Abrams*, 250 U.S. at 626-28 (Holmes, J., dissenting).

<sup>228</sup> *See id.* at 629.

<sup>229</sup> *Id.* at 630 (“I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying the fines that it imposed.”).

<sup>230</sup> *Id.*

<sup>231</sup> *See supra* notes 86-89 and accompanying text.

<sup>232</sup> *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

<sup>233</sup> Milton understood, as Holmes did not, the consequences entailed by a vulgar assimilation of ideas to commodities. *See* J. MILTON, *AREOPAGITICA* 399 (Great Books ed. 1948). Polanyi's call of many decades ago for a new thought pattern for civilization, a way out of the marketplace mentality, has still not been answered. *See* Polanyi, *Our Obsolete Market Mentality*, 3 COMMENTARY 109 (1947); *cf.* Lerner, *supra* note 82, at 1319 (arguing that new economic and social constructions are necessary to make Constitution once again an instrument for the common interest). On the other hand, Professors Thomas Emerson and Edwin Baker offer the seeds for new thought patterns. *See* Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6 (1976) (focus of marketplace of ideas theory on content of speech “fails to emphasize a possibly more important aspect of speech—its use to advance self-interest and its role in self-realization”); Emerson, *Legal Foundations of the Right to Know*,

served the cause of tolerance because if ideas are like commodities, and if the public mind is like the public market, then the best ideas are destined by the laws of competition to dominate.

The consequences of this metaphoric displacement soon became apparent. In 1925, Holmes penned another dissenting opinion in *Gitlow v. New York*<sup>234</sup> that repudiated the rhetoric of seditious libel. "Every idea is an incitement,"<sup>235</sup> he asserted, rebuffing the majority's finding that a left-wing leaflet was written in "the language of direct incitement."<sup>236</sup> He tempered this fire imagery with a sobering, indeed shocking, statement of his theory of the right of dissent: "Eloquence may set fire to reason. . . . If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>237</sup>

The radical implications of Holmes's laissez-faire analysis have yet to be appreciated. Dispassionately pursuing his vision of ideas as commodities, Holmes drew the irresistible conclusion: if the communists could make a better political mousetrap, they were entitled to a position of predominance in the market. The virtue of this free market metaphor is that it insulates even the most execrable forms of dissent from suppression and thus acts as a shield against the doctrine of seditious libel. The Court, has never pursued to its limits the Holmesian version of speech as commodity.

Even more celebrated than Holmes's dissents was Brandeis's concurring opinion in *Whitney v. California*,<sup>238</sup> which has come to be regarded as the definitive statement on freedom of speech. Brandeis, in developing an eloquent defense of the right of dissent delivered a tribute to the founding fathers and the ideals of the Enlightenment that he believed they wanted to secure in the first amendment:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed liberty to be the secret of happiness and

---

1976 WASH. U.L.Q. 1, 2 (1976) (right to communicate is significant means of seeking truth, necessary for collective decisionmaking in democratic society, and a vital mechanism for effectuating social change without resort to violence or undue coercion) [hereinafter cited as Emerson, *Legal Foundations*;] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963) (system of free expression necessary to ensure individual self-fulfillment, secure citizen participation in social decisionmaking, and maintain balance between stability and change in society) [hereinafter cited as Emerson, *Toward a General Theory*].

<sup>234</sup> 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).

<sup>235</sup> *Id.* at 673 (Holmes, J., dissenting).

<sup>236</sup> *Id.* at 665.

<sup>237</sup> *Id.* at 673 (Holmes, J., dissenting).

<sup>238</sup> 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). Although the opinion was in substance a dissent, Justice Brandeis concurred in the result on procedural grounds.

courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . .<sup>239</sup>

In Brandeis's view, *more* speech, not enforced silence, was the proper remedy to expose falsehoods. Suppression of speech was like burning witches irrational per se. According to Brandeis, even advocacy of law-breaking could not justify denial of free speech so long as the advocacy fell short of incitement.<sup>240</sup>

The Holmes dissents and Brandeis concurrence have a brilliance unmatched in any majority opinion, a liberating, ebullient anti-authoritarian style. Not only do they subvert the leaden weight of the repressive tradition, but some might even find Holmes's most radical statements to be downright subversive. These opinions have gradually—even if grudgingly, as the *Dennis* case attests—won the Court's acceptance.<sup>241</sup> Seen as part of a struggle against authoritarianism, the opinions of Holmes and Brandeis help us to view some other celebrated cases in the perspective of seditious libel.

## 2. *Shafts of Sunlight on Seditious Libel*

The first amendment case of *Near v. Minnesota*<sup>242</sup> has already figured in our discussion of *Agee* and *The Progressive*, although less for its lumi-

<sup>239</sup> *Id.* at 375; cf. Pericles's funeral oration, *infra* note 297.

<sup>240</sup> See *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

<sup>241</sup> Each opinion, however, acknowledged that there were exceptions to freedom of speech. Holmes, standing by his Red Menace trilogy despite the apparent self-contradiction, reiterated his continued acceptance of the "clear and present danger" test as demarcating the limits to which the expression of dissent was protected. See *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting); *Abrams*, 250 U.S. at 627-28 (Holmes, J., dissenting). Brandeis also subscribed to the "clear and present danger" language and cautioned that repression might be justified in an emergency. What he means by "emergency" seems to be bound up with his view that advocacy must come close to incitement and that there must be evidence that the advocacy would be immediately acted on. See *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring). Reformulating his test, Brandeis wrote: "There must be the probability of serious injury to the State." *Id.* at 378. The problem with both Brandeis's and Holmes's exceptions, however, was that a later court, taking a niggardly view of the first amendment could assimilate their views with the most repressive decisions of the Court. "Emergency" and "serious injury to the State" are terms so flexible as to fit the lexicon of hysteria as well as of tolerance.

One source of first amendment illumination that requires mention is *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in which the Court upheld the right of the Ku Klux Klan to rally and advocate publicly the need for "revengeance" against Negroes and Jews. *Brandenburg* boldly overruled the hysterical *Whitney* decision, stressing that government could punish no speech that did not rise to the level of incitement to "imminent lawless action." *Id.* at 447. Yet, insofar as *Brandenburg* cited *Dennis*, 341 U.S. 494 (1951), approvingly, see 395 U.S. at 447, one can only conclude that "incitement" means something considerably more vague in the context of revolutionary political ideas.

<sup>242</sup> 283 U.S. 697 (1931).

nous rays than for the black spot that courts have recently discovered in it. Celebrated for its rule against prior restraint, *Near* deserves equal accolades for its place in the enlightened tradition against seditious libel.

In *Near*, the Court considered the validity of a Minnesota statute that criminalized publication of "malicious, scandalous, and defamatory newspapers" on the grounds that such newspapers tended to disturb the peace of the community and to provoke assaults and the commission of crime.<sup>243</sup> The Court did not challenge the validity of the state's proffered rationale; indeed, it casually observed that one of the original defendants was apparently shot by gangsters after publication of the first issue.<sup>244</sup> Further, the Court acknowledged that a newspaper charging public officers with corruption, malfeasance, or neglect of duty naturally creates a public scandal.<sup>245</sup> Conceding the power of authority to enforce "the primary requirements of decency" against obscene publications,<sup>246</sup> the Court categorically separated the criticism of public officials from the realm of "indecencies" subject to the censor. The Court concluded that even though charges of official malfeasance "unquestionably create a public scandal," censorship would create an even more serious public evil.<sup>247</sup> Quoting Madison, the Court convincingly demonstrated the incompatibility of seditious libel with our notions of official accountability:

"To prohibit the intent to excite those unfavo[u]rable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct."<sup>248</sup>

More important than its vaunted rule against prior restraint is the Court's elaboration of the reasons for protecting criticism of public officers even when such criticism inspires violent reaction. Recognition that accusations of official corruption may create "resentment and the disposition to resort to violent means of redress"<sup>249</sup> did not, in the *Near* Court's view, warrant curtailment of the press. In words that the *Agee* Court would have done well to heed, the Court boldly warned that if

---

<sup>243</sup> *Id.* at 709.

<sup>244</sup> *Id.* at 704.

<sup>245</sup> *Id.* at 710.

<sup>246</sup> *Id.* at 716.

<sup>247</sup> *Id.* at 722.

<sup>248</sup> *Id.* at 722 (quoting J. MADISON, THE VIRGINIA REPORT OF 1799, reprinted in THE VIRGINIA REPORT OF 1799-1800 & VIRGINIA RESOLUTIONS OF DECEMBER 21, 1798, at 227 (L. Levy ed. 1970)).

<sup>249</sup> *Near*, 283 U.S. at 722.

the danger of violent reaction could justify governmental interference with the freedom of initial publication, "the constitutional protection would be reduced to a mere form of words."<sup>250</sup> The threat of a hostile and defiant organization resorting to violence did not diminish this protection.<sup>251</sup> Thus, although *Near* specifically addressed the constitutionality of prior restraints, the Court's elaborate defense of press freedoms argues compellingly against the doctrine of seditious libel.

What the *Near* decision was to seditious libel in the form of injunction, *New York Times Co. v. Sullivan*<sup>252</sup> was to seditious libel in the form of damages. This historic case gave the Court its first opportunity to repudiate the law of seditious libel. *Sullivan* involved an advertisement in the *New York Times* soliciting contributions for the civil rights campaign of Dr. Martin Luther King, Jr. The advertisement complained of police brutality toward civil rights protesters and contained factual inaccuracies. Under Alabama's libel statute, a publication was "libelous per se" if it tended to injure a person's reputation or to bring him into public contempt. Finding that the advertisement had implied public misconduct, or at least a lack of official integrity, on the part of Sullivan, the Police Commissioner in Montgomery, the jury returned a half-million dollar damage award against the Times Company.

In striking down the award, the Court declared:

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . Criticism of . . . official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes . . . official reputations.<sup>253</sup>

This bold statement of general principles furnished the premise for a consideration of the Sedition Act of 1798. The Court announced that even though the Act had never been tested in the Supreme Court, "the attack upon its validity has carried the day in the court of history."<sup>254</sup> Viewing the Alabama statute as a seditious libel law, the Court reasoned that it was not any less constitutionally offensive merely because it provided for civil rather than criminal penalties.<sup>255</sup>

---

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> 376 U.S. 254 (1964).

<sup>253</sup> *Id.* at 270, 273 (citations omitted).

<sup>254</sup> *Id.* at 276.

<sup>255</sup> *Id.* at 277. Damage awards under Alabama law had a chilling effect potentially far greater than the fear of criminal prosecution and, to this extent, *Sullivan* furnishes an illuminating parallel with *Snepp*, *Agee*, and *The Progressive*.

The *New York Times* would have had no double jeopardy limitation protecting it against multiple civil suits in Alabama in the *Sullivan* case. "Whether or not a newspaper can survive a succession of such judgments," the Court said, "the pall of fear and timidity im-

Harry Kalven celebrated this historic decision in an article in which he suggested that *Sullivan* had revolutionized first amendment theory.<sup>256</sup> He suggested that in *Sullivan* the Court, by emphasizing the doctrine of seditious libel as the key to the meaning of the first amendment, had at last understood how seditious libel strikes at the very heart of democracy. "Political freedom," he asserted, "ends when government can use its powers and its courts to silence its critics":

My point is not the tepid one that there should be leeway for criticism of the government. It is rather that defamation of the government is an *impossible* notion for a democracy. In brief, I suggest, that the presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics.<sup>257</sup>

In Kalven's view, the *Sullivan* decision set right side up for the first time the theory of the freedom of speech clause: the Court had finally discovered in the controversy over seditious libel the clue to the "central meaning of the First Amendment."<sup>258</sup> The terminology "central meaning" was unusually apt, he wrote, in view of the Court's finding that the amendment protected a core of speech essential to the working of a democracy.<sup>259</sup> After *Sullivan*, Kalven predicted, the "analysis of free speech issues should hereafter begin with the significant issue of seditious libel and defamation of government by its critics rather than with the sterile [Holmesian] example of a man falsely yelling fire in a crowded theater."<sup>260</sup>

Despite Kalven's prognostication, however, neither the courts nor other commentators responded to his call. Finally, in 1971, Kalven had cause to celebrate the apparent fulfillment of his prophecy when the court received another opportunity in *The Pentagon Papers* case<sup>261</sup> to reassess the central role of seditious libel. The Court's per curiam opinion

---

posed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278. In short, the Alabama statute, if it did not financially cripple a major newspaper, would have exerted the same paralyzing and in terrorem effects as a full-blown regime of seditious libel.

<sup>256</sup> Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

<sup>257</sup> *Id.* at 205 (emphasis added).

<sup>258</sup> *Id.* at 208.

<sup>259</sup> *See id.*

<sup>260</sup> *Id.* at 205. Kalven's view that the *Sullivan* decision had restored seditious libel to its proper place and his prophecy that it would dramatically change the idiom of free speech analysis was provocative. Neither courts nor the legal academy, however, seemed provoked. As for pedagogy, the *Sullivan* case continues to find itself among the leading cases on damage to reputation and privacy rather than among the leading cases on the right of dissent. *See, e.g.,* G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1330 (10th ed. 1980).

<sup>261</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).



upheld the right of the *Washington Post* and the *New York Times* to publish classified documents that detailed the U.S. involvement in the Vietnam war and were embarrassing to the government. The per curiam opinion rested its holding on *Near's* presumption against prior restraints. In his concurring opinion,<sup>262</sup> however, Justice Douglas citing *Sullivan*, resumed the discussion of seditious libel. The dominant purpose of the first amendment, he explained, was to stamp out the use of seditious libel to punish utterances that were "embarrassing to the powers-that-be."<sup>263</sup> This historic purpose underscored the relevance of *Sullivan's* protection of "robust, uninhibited discussion" to the problem of government secrecy: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health."<sup>264</sup> Justice Black, in his concurring opinion, agreed that the historic aim of the first amendment was to protect the press "so that it could bare the secrets of government and inform the people."<sup>265</sup>

The glaring fact that the administration's reputation had been damaged may have clarified for at least some members of the Court the relation between the government's theory of the case and the doctrine of seditious libel. Justice White, for example, was convinced that the newspapers' previous disclosures had indeed damaged public interests but concurred nevertheless.<sup>266</sup> On a generous reading, if the Court acknowledged that public confidence in the government would be shattered by the disclosures, then the implication of the *Pentagon Papers* decision may well be that the first amendment invites such a shattering.

In summary, the Court's modern tradition of seditious libel consists of two distinct and fundamentally irreconcilable traditions. The dark tradition, in which government critics were throttled, began with the Holmes Red Menace trilogy and was carried forward in *Dennis*. The enlightened tradition is one of tolerance for those who defy the prevailing orthodoxies of the day. *Near*, *Sullivan*, and *The Pentagon Papers*<sup>267</sup>

---

<sup>262</sup> 403 U.S. 713, 720 (1971) (Douglas, J., concurring).

<sup>263</sup> *Id.* at 724.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 717 (Black, J., concurring).

<sup>266</sup> *Id.* at 730 (White, J., concurring).

<sup>267</sup> Kalven acclaimed *The Pentagon Papers* as the historic decision for the "unprecedented tradition of dissent" that he had prophesied in his earlier essay on *Sullivan*. Kalven, *Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 36 (1971). He believed that *The Pentagon Papers* carried *Near v. Minnesota*, 283 U.S. 697 (1931), and *Sullivan*, 376 U.S. 254 (1964), one step further down the road toward full protection of the right of dissent. That one step consisted of upholding a "vigorous, searching, and uncharitable . . . critique of our wars" while we are fighting them. Kalven, *supra*, at 35. If Kalven is right, then *The Pentagon Papers* stands in sharp contrast to Holmes's deprivileging of speech "[w]hen a nation is at war." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

But Kalven went even further in his celebration of this opinion. In forbidding the prior restraint, the Court in *The Pentagon Papers*, in Kalven's view, read into the first amendment "a

carry forward the bold tributes to freedom of expression and the right to criticize the government that Holmes and Brandeis had formulated as defiant dissenters on the Court. Although the *Sullivan* decision<sup>268</sup> had apparently finally ousted seditious libel from our system of government, the courts in *Agee*, *Snepp*, and *The Progressive* have restored life to that doctrine in the guise of protecting the national security. The question that remains, as darkness once again overtakes enlightenment, is the same troublesome question raised by the Sedition Act of 1798: How far may authority go to suppress the free and full expression of disapproval of the government?

### B. *Snepp*, *Agee*, and *The Progressive* in the Sunlight

The argument thus far has suggested that authority has two irreconcilable traditions of response to dissent. One is autocratic, strangles dissent as seditious libel, thrives on fear, speaks an official monologue, and justifies itself as tutelary god to a giddy, ungrounded people. The other is democratic, celebrates dissent, and trounces as its only heresy the doctrine of seditious libel. It thrives on hope, expresses unofficial polyphony, and justifies itself as fit for beings that strive to exercise the peculiarly human capacity for intelligence. Both grounded in history, the two are not equal in any sense except that they have contended and continue to struggle for control of our destinies. The dark tradition belongs to a repudiated past that nevertheless continues to cast its shadows. The tradition of light, against which the Court recently turned its back, beacons nevertheless. Even though the first amendment suns, like *Near*, *Sullivan*, and *The Pentagon Papers*, may be in temporary eclipse, it is possible to speculate here as to how their illuminating sunlight would affect the Court's recent decisions.

How might the Court have decided *Snepp* if it had approached the first amendment claim in the light of its repudiation of seditious libel in *Sullivan*?<sup>2</sup> The Court would have begun with the general observation that freedom of speech on public issues is secured by the first amendment. The issue then would be whether *Snepp* had forfeited that protec-

---

constitutional requirement that everything, or virtually everything, is entitled to be published at least once." Kalven, *supra*, at 34. Under Kalven's radical analysis, seditious libel cannot withstand the democratic principles embraced in *Sullivan* and government secrets cannot withstand the first amendment analysis advanced in *The Pentagon Papers*. Even though the first amendment may not confer immunity for disclosure of all secrets, it was clear to Kalven that the thrust of *The Pentagon Papers* was that dissenters get their message to the public. *Id.* For a more sober view of *The Pentagon Papers*, see Fiss, *Free Speech and the Prior Restraint Doctrine: The Pentagon Papers Case*, in *THE SUPREME COURT AND HUMAN RIGHTS* 49 (B. Marshall ed. 1983).

<sup>268</sup> Kalven was so certain that *Sullivan* had finally put seditious libel to rest that he endorsed Meiklejohn's proclamation that the case was "an occasion for dancing in the streets." Kalven, *supra* note 256, at 221 n.125.

tion by failing to obtain the CIA's official imprimatur on his book.<sup>269</sup> The Court might have resolved this issue in at least two different ways.

Under one analysis, the Court might have inquired whether the CIA had used its censorship powers as a weapon for silencing Snepp as a hostile critic, as Snepp had claimed.<sup>270</sup> Had the Court perceived the government's suit against Snepp as a covert seditious libel proceeding, then it might have dismissed the case on the basis of *Sullivan*.<sup>271</sup>

Under a second analysis, even assuming that the government's suit was not a pretext to silence a critic, the court might have amplified its *Sullivan* ruling to provide greater first amendment protection in the spe-

<sup>269</sup> As the Court stated in *Sullivan*:

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

376 U.S. at 270-71 (citations omitted). The Court's tacit premise in *Sullivan* was that utterances are initially presumed to be political speech and are then, and only then, scrutinized to determine whether they lose their first amendment privileged status on the ground that they constitute libel.

<sup>270</sup> See A. DERSHOWITZ, *THE BEST DEFENSE* 225-35 (1982). Dershowitz, who was one of Snepp's lawyers, wrote:

When [one of Snepp's attorneys] respectfully sought to introduce evidence showing that the CIA had not sued other CIA officials who had published *favorable* books about the agency disclosing classified material without prior clearance, Judge Lewis asked incredulously, "You're not serious?" and then ruled that "this is not a First Amendment case."

*Id.* at 228. The court of appeals ruled that Snepp's claim of selective enforcement had no merit insofar as he had failed to show that the CIA treated uncritical books differently than critical books. *United States v. Snepp*, 595 F.2d 926, 933 (4th Cir. 1979); see *supra* note 141 and accompanying text.

<sup>271</sup> In *Agee v. CIA*, 500 F. Supp. 506 (D.D.C. 1980), Judge Gesell refused to impose a constructive trust over the proceeds of Agee's books on the ground that the record indicated that the CIA might have used its censorship power to silence critics. *Id.* at 509. See *supra* note 141. The CIA has conceded in congressional hearings that it has selectively enforced its censorship power against authors of books unfavorable to the CIA. See *Prepublication Review Hearings*, *supra* note 140. See generally Medow, *supra* note 124, at 820 n.273; Snepp, *supra* note 137, at 10.

The *Sullivan* case has not figured into the arguments over discriminatory enforcement, perhaps because lawyers and scholars have failed to perceive the issue as one of seditious libel. Snepp's claim of selective enforcement, for example, was based in part upon cases that were decided on the ground that there is a right of access for expression of unpopular views although they might also have been characterized as seditious libel cases. See, e.g., *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) (held participants in unauthorized demonstration that was no more disruptive than authorized demonstrations could not be prosecuted under a regulation governing disturbances on government property); see Brief for Defendant-Appellant at 39-42, *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979). If *Sullivan* outlaws seditious libel in form and in substance, a prosecution designed to achieve the result of a seditious libel proceeding, although brought under a different theory, should be quashed.

cial case of whistle-blowing by former insiders. The Court might have taken this tack, reasoning that if the first amendment protects criticism of the government, its policies, and its officers, and if insiders alone have access to information regarding the misdeeds of public officers, then their whistle-blowing would be the sole source of information upon which public debate of those issues could proceed. If one can take literally the Court's pronouncement of a "profound national commitment" to uninhibited, robust, and wide-open public debate on the conduct of government and its officials, *Sullivan* justifies extending constitutional protection from the principle of public scrutiny to the privilege to inform.<sup>272</sup>

Under either analysis, the Court might have invoked *The Pentagon Papers* in response to the government's assertions of harm to the national security. Because Snapp's book included only unclassified information and past history, it should command a position at least as privileged as that of the classified documents published by the *New York Times* and *Washington Post*. After all, the publication of nonclassified information would seem to pose less of a threat to asserted national security concerns than the classified material published in *The Pentagon Papers*. If, in fact, the classified-unclassified distinction cuts in favor of the *Snapp* case, then the chief distinction remaining between *Snapp* and *The Pentagon Papers* presumably rests on the secrecy oath.

The secrecy oath, however, is not a talisman against which first amendment considerations disappear. Of course, if the oath could be construed as a valid contract,<sup>273</sup> the Court might have awarded the government nominal damages for breach.<sup>274</sup> But another route was open to

<sup>272</sup> The principle of public scrutiny is carefully considered in THE FEDERALIST NO. 84, at 582-83 (A. Hamilton) (J. Cooke ed. 1961). See *supra* note 35. Harry Kalven would go farther, speaking of the duty to inform. See Kalven, *supra* note 256, at 102 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964)); see also Lewis, *Keynote Address: The Right to Scrutinize the Government: Toward a First Amendment Theory of Accountability*, 34 U. MIAMI L. REV. 793 (1980); Emerson, *Legal Foundations*, *supra* note 233; cf. Kalven, *supra* note 267, at 35 (agreeing with Justice Stewart that informed and critical public opinion is essential to protect values of democratic government).

The modern classic defense of the principle of public scrutiny is that offered by Alexander Meiklejohn:

Public discussion of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unbridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

Meiklejohn, *The First Amendment is an Absolute*, in FREE SPEECH AND ASSOCIATION 1, 13 (P. Kurland ed. 1975). For a contrasting view, see Henkin, *The Right to Know and the Duty to Withhold: The Case of The Pentagon Papers*, 120 U. PA. L. REV. 271, 275 (1971) (noting that public scrutiny is reduced by government's right to withhold information in public interest).

<sup>273</sup> On the question of the validity of the contract, see sources cited *supra* note 134.

<sup>274</sup> As the earlier analysis of *Snapp* showed, the only injury the CIA suffered was the damage to its reputation—an injury cognizable only under the doctrine of seditious libel. See *supra* notes 133-60 and accompanying text. Although the Court in *Sullivan* would permit li-

the *Snepp* Court. It might have taken the bolder step and asserted that even though the need for secrecy in the CIA is self-evident, the first amendment precluded judicial enforcement of the secrecy agreement. This is not to say that the CIA could not fire an unruly employee; it would simply mean that the first amendment protects whistle-blowing by former insiders. Such a theory is buttressed by Justice Stewart's concurring opinion in *The Pentagon Papers*, in which he reasoned that the responsibility for maintaining secrecy must lie where the power is.<sup>275</sup> To paraphrase his position, if the Constitution gives the executive a large degree of unshared power to conduct foreign affairs and to maintain the national defense, then the executive must have the largely unshared duty to preserve confidentiality and secrecy.<sup>276</sup> The executive's claim that it would be left without a remedy against the likes of *Snepp* might have prompted the reply that whistle-blowing is one of the risks of a democracy. Thus, the executive would be left to its own devices—tightening its procedures, persuading Congress to enact legislation for oath violators such as *Snepp*, or instilling an attitude of awe in its subjects.<sup>277</sup>

Would *Agee* fare any differently as a seditious libel case? Putting to one side the question of the president's *authority* to revoke *Agee's* passport, would the *Sullivan-Pentagon Papers* rationale protect *Agee's* speech as it would protect *Snepp's*? The principal premise in *Sullivan* is that debate on public issues, even in the form of attacks on public officials, is privileged. A second key premise in *Sullivan* is that criticism of governmental officials "does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."<sup>278</sup>

These premises shed an entirely different light on the government's claims that *Agee's* speech imperiled its foreign operations and caused its CIA sources to dry up. Those claims demonstrate only that *Agee's* criticism was effective. Irrespective of truth, it is obvious why *Agee's* accusations—that the CIA is comparable to the Gestapo and the secret police, that it undertakes subversion and murder in the interest of multinational corporations—would inevitably impair public confidence in the government's enterprise. Like the implicit assault on the policeman's

---

belled public officials to recover damages for injury to their reputation upon a showing of "actual malice," see 376 U.S. at 280, the CIA, as an arm of the government, would seem to be categorically excluded from recovering any actual damages for the injury to its reputation occasioned by the libel.

<sup>275</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

<sup>276</sup> See *id.* at 728-29.

<sup>277</sup> In the words of King James, "Incroach not upon the Prerogative of the Crowne: If there fall out a question that concerns my Prerogative or mystery of State, deale not with it." *THE POLITICAL WORKS OF JAMES I* 332 (C. McIlwain ed. 1918), quoted in J. GOLDBERG, *JAMES I AND THE POLITICS OF LITERATURE* 56 (1983); see also *id.* at 55-112.

<sup>278</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

integrity in *Sullivan*, these accusations are probably "libelous per se."<sup>279</sup> Moreover, Agee's publications, like Near's scandal sheet, probably have created "resentment and the disposition to resort to violent means of redress."<sup>280</sup> Indeed, Agee's declared purpose in publishing these accounts was to bring the Agency into public contempt. But if, as the Court stated in *Sullivan*, "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct,"<sup>281</sup> and if, as the Court had previously noted in *Near*, danger of violent reaction has no bearing on the freedom to publish,<sup>282</sup> then on what basis could the government legitimately silence Agee?

The most prominent distinction between *Agee* and *Snepp* appears to lie in the harm that Agee was said to have caused. In the majority's view, Agee's disclosures could be suppressed under the *Near* exception because they inevitably, directly, and immediately would cause an event kindred to the imperiling of the safety of a transport at sea.<sup>283</sup> If the government could properly censor Agee's disclosures under the *Near* exception, it scarcely seems open to dispute that it could elect instead to pursue some less exceptional sanction, such as passport revocation, a constructive trust, or criminal sentence, to deter or punish him. Ultimately, the first amendment protection for criticism of the government would cease to exist whether the government censored such criticism or sought after-the-fact sanctions.

Nevertheless, the government failed in *Agee*, as it had in *Snepp*, to demonstrate that Agee had caused any damage other than the damage to the CIA's reputation. Agee's disclosures of the names of some of the CIA's agents and sources did create an international public scandal, but they were an inseparable part of his campaign to vilify the CIA and to expose those of the CIA's activities that he alleged were illegal or immoral. Even though Agee unquestionably disclosed this information with the intent to defame the government, the disclosures should fall within the protection *Sullivan* afforded to criticism of the government. Thus, attempts to punish Agee for those disclosures, even if made under the rubric of the *Near* exception, evidence a return to the doctrine of seditious libel.

To avoid the problem of seditious libel, then, a government set on punishing dissenters must make one of two assumptions. The first as-

<sup>279</sup> The Alabama statute that the Court invalidated in *Sullivan* had provided that a publication was "libelous per se" if the words "tend[ed] to injure a person . . . in his reputation," or bring him into "public contempt." *Id.* at 267.

<sup>280</sup> *Near v. Minnesota*, 283 U.S. 697, 722 (1931).

<sup>281</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).

<sup>282</sup> *Near*, 283 U.S. at 722 (1931).

<sup>283</sup> The Court in *Near* formulated an exception to the rule against prior restraints. *See id.* at 715-16. The Court's decision in *Near* and the context in which the exception arose are addressed *supra* notes 191-95 and accompanying text.

sumption, that the CIA may be excluded from the category of "public officials and policies" normally subject to first amendment protected criticisms, appears too blunt and heavy-handed a maneuver to achieve the goal of avoiding the problems of seditious libel. So, let us assume instead that the clandestine nature of the CIA categorically requires its withdrawal from the domain of public policy. This assumption would imply, as Paul Chevigny recently observed, that although public discussion is the norm, the government could seek to fence participants away from discussions of a vital aspect of national policy. The government would, in effect, be telling the public that the activities of the CIA are such that *no* understanding is to be permitted, that "stupidity on the part of potential participants is the desired end."<sup>284</sup> From our discussion of the history of seditious libel, however, such an assumption would entail the authoritarian practices and premises of the Tudors and Stuarts.<sup>285</sup> It would set up an executive as benign despot over assertedly puerile populace. An iron curtain would descend around the Central Intelligence Agency.

It does not require a treatise to explain why secrecy in government is fundamentally hostile to democracy and congenial to despotism. That the CIA cannot accomplish its national security functions without a guarded confidentiality is self-evident but irrelevant. Full and open discussion of matters relating to the conduct of the nation's paramilitary forces abroad and its role in stabilizing or subverting foreign governments is too important to be cloistered in the executive suite. If men were gods, as the Star Chamber declared its established magistrates to be,<sup>286</sup> then the law could declare whistle-blowers blasphemers. But men are not gods, and our tradition, at least the better tradition, does not permit the government to equate dissent with blasphemy any more than with treason.

History and common sense, then, teach us that we must reject the proposition that the CIA should or could be removed from the category of criticizable "public officials and policies." Nevertheless, the defenders of *Agee* might reply that even assuming that the CIA should, in theory, be subject to criticism and public accountability, the extraordinary conditions prevailing abroad at the present time warrant the enforcement of silence under the *Near* exception.<sup>287</sup> These times, the *Agee* apologists might assert, demand that we view the CIA undercover sources abroad

---

<sup>284</sup> Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 191 (1980).

<sup>285</sup> See *supra* notes 15-20 and accompanying text.

<sup>286</sup> "Let all men take heede how they complayne in wordes against any magistrate, for they are gods." Star Chamber saying, *quoted in* Riesman, *supra* note 62, at 735 n.35; *Defamation in Legal History*, 175 L.T. 30, 31 (1933).

<sup>287</sup> See Note, *Naming Names: Unauthorized Disclosure of Intelligence Agents' Identities*, 33 STAN. L. REV. 693, 707 (1981).

as war transports at sea, not in the context of any ordinary war, but in the context of a worldwide battle between the CIA and hostile terrorists armed with communist weapons and linked to the insidious KGB.<sup>288</sup>

Even assuming that we could entertain such an assertion, what proof would be required in a court of law to establish it as a fact? The government's bare assertion might, of course, elicit a judicial "observation" that the statement accurately describes world conditions. Indeed, the Court in *Agee* quoted similar language about "the explosive nature" of contemporary international relations.<sup>289</sup> If such a general "observation" is allowed to substitute for the requisite proof of the specific, direct, and immediate harm contemplated by the *Near* exception, then the courts will inevitably adjudicate in the manner of the Red Menace era. Dissent may be transformed by assertion alone, as in the Red Menace cases, into something akin to armed insurrection.<sup>290</sup>

Defenders of the *Agee* opinion might, nevertheless, contend that the courts should not require proof of specific harm to a CIA source on the ground that it would compromise the secrecy of CIA operations abroad. It is, however, difficult to differentiate this assertion from the absolute exemption of the CIA from the category of "public official and policies" that we have already rejected. In either case, evidence becomes superfluous and public scrutiny becomes impossible. Those who would proffer the alternative of an *in camera* judicial inspection of evidence must acknowledge that the judiciary, from the time of the Star Chamber through the Red Menace era, has too frequently supported autocratic exercises of power.<sup>291</sup> The recent *Progressive* case demonstrates how a crisis mentality breeds in the darkness of closed chambers.<sup>292</sup> Judicial operations without the normal safeguards of cross-examination enable the mere claim of national security to eclipse all concern for freedom.

Although *Snepp* and *Agee* apparently pose new and difficult problems for the first amendment, the proper solution lies easily within

---

<sup>288</sup> Addressing the connection between governmental critics like *Agee* and the KGB, John Maury, a former legislative counsel to the CIA, observed:

Such individuals, from whatever motives . . . are in a position to serve a primary purpose of the KGB by disclosing vital information which not only reveals secrets of our intelligence operations, but also has the effect of discrediting and demoralizing our intelligence teams. . . . I remember a very knowledgeable Soviet defector from the KGB . . . once said, "we were always taught that our highest priority was to put out the eyes of our adversaries by disrupting and discrediting and exposing his intelligence service."

*Unauthorized Disclosure of Undercover Agents' Identities Hearings, supra* note 179, at 134-35 (statement of John Maury, former legislative counsel to the CIA in espionage laws and leaks).

<sup>289</sup> *Haig v. Agee*, 453 U.S. 280, 292 (1981).

<sup>290</sup> See *supra* note 13 and accompanying text for a discussion of the old English doctrine of constructive treason.

<sup>291</sup> See *Riesman, supra* note 62, at 735.

<sup>292</sup> See discussion *supra* notes 204-23 and accompanying text; see also *Knoll, supra* note 211, at 167-68.



the reach of the enlightened first amendment doctrine. *The Progressive* is even more easily resolved. In *The Pentagon Papers*, the Court closed its ears to that mind-stopping siren song, entitled national security, and held firmly to its course for reasons both principled and practical. By the time the Court heard the case, the secrets were already out and the sole question was whether they would spread immediately to the entire populace.<sup>293</sup> Court action could only diminish harm to the government's reputation—unless, of course, the state secrets doctrine allowed officials to cut out the tongues of those who had already seen the documents. We like to believe that such terror tactics are foreign to our way of life.<sup>294</sup> Halting publication in *The Progressive* would likewise have been fruitless; so many people had read the article during the editorial process that the injunction would have come too late to ensure that "classified" data would remain classified. An injunction could therefore only serve as an *in terrorem* measure to intimidate the press and shore up the crumbling appearance of official control. Under the Court's enlightened precedents, however, such official measures are impermissible.

#### CONCLUSION: TOWARD A NEW AREOPAGITICA

The ideal that was grafted onto the Constitution in the first amendment did not originate with the framers. The Greeks recognized that freedom of speech is integral to democracy and equality. For the ancient Athenians, the greatest political freedom, that which was the very essence of the democratic form of government, was *isegoria*—the equal right of speech in public assembly. At the core of this great freedom lay dialectic, a method that presupposes the confrontation of opposing opinions freely expressed and thus, it has been argued, sharpens the mind for philosophy and critical thought.<sup>295</sup> With its emphasis on multivocality, on the confrontation of a multiplicity of equal voices with discordant ideas, dialectic parallels the democratic ideal that authority dwells in dialogue, that it resists a finalizing determinacy. Both the philosophical method of dialectic and the political right of dialogue ultimately rest upon the view that each individual participant has the capacity to form opinions and make judgments on matters of common concern.<sup>296</sup> In

<sup>293</sup> See Fiss, *supra* note 267, at 56.

<sup>294</sup> But see the hair-raising allegations in *Sigler v. LeVan*, 485 F. Supp. 185, 189 (D. Md. 1980).

<sup>295</sup> See Berti, *Ancient Greek Dialectic as Expression of Freedom of Thought and Speech*, J. HIST. OF IDEAS, July-Sept. 1978, at 347, 348, 350, 356-58. Nonetheless, the Greek philosophers were not all of the opinion that this was laudatory. Isocrates, in his *Areopagiticus*, for example, condemned this freedom and called for a return to censorship. See G. ANASTAPLO, *supra* note 90, at 703; 2 R. JEBB, *THE ATTIC ORATORS FROM ANTIPHON TO ISAEOS* 206-14 (1893).

<sup>296</sup> The principle of political dialogue may best be understood in contrast to its opposing principle, monologue. As a political doctrine, monologism is "a denial of the equal rights of consciousness vis-a-vis truth . . . . Monologue is finalized and deaf to the other's response . . . . Monologue pretends to be the *ultimate word*." M. Bakhtin, *Toward a Reworking of the*

Athens, because power was in the hands of the citizenry, it was expected that each citizen would be interested in the affairs of the state;<sup>297</sup> if he lacked such interest, he was considered useless. Euripides cogently conveyed this attitude in dramatic dialogue:

This is true Liberty when free born men  
 Having to advise the public may speak free,  
 Which he who can, and will, deserves high praise,  
 Who neither can nor will, may hold his peace;  
 What can be juster in a State than this?<sup>298</sup>

Centuries later, Milton, declaring his legacy, quoted Euripides's dramatic speech in the title page of his attack on the licensing of the press. In his defense of political pluralism in the *Areopagitica*, Milton carried forward the Athenian idea that truth is not revealed through divine inspiration but arises from the clash of opinions. Addressing the Long Parliament, Milton railed against the Parliamentary suppression of dissenting opinion. Censorship, he asserted, reduces humans to brutes and elevates censors to tyrants:

Ye cannot make us now less capable, less knowing, less eagerly pursuing of the truth, unless ye first make yourselves, that made us so, less the lovers, less the founders of our true liberty. We can grow ignorant again, brutish, formal and slavish . . . ; but you then must first become that which ye cannot be, oppressive, arbitrary and tyrannous, as they were from whom ye have freed us.<sup>299</sup>

More eloquent than Milton's frequently quoted paean to truth,<sup>300</sup> this passage illumines the organic connections between the suppression of dissent and despotism, and it suggests how the confinement of political discourse to official monologue stunts the body politic. To Milton, the multivocality of voices promoted—indeed, was essential to—truth.

*Dostoevsky Book*, in PROBLEMS OF DOSTOEVSKY'S POETICS —, — (C. Emerson trans. forthcoming in 1984).

<sup>297</sup> See 2 THUCYDIDES, THE PELOPONNESIAN WAR ch. 37 (R. Warner trans. 1967). In words that Justice Brandeis was to echo centuries later in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), see *supra* note 239 and accompanying text, Pericles urged the citizens of Athens to "make up your minds that happiness depends on being free, and freedom depends on being courageous." Reported in 2 THUCYDIDES, *supra*, at 121.

<sup>298</sup> EURIPIDES, THE SUPPLIANTS (11.438-441). For this reference and for much of the ensuing discussion of Milton, we acknowledge our indebtedness to Annabel Patterson, whose brilliant treatment of Milton can be found in her forthcoming volume, A. PATTERSON, CENSORSHIP AND INTERPRETATION (1984).

<sup>299</sup> J. MILTON, *supra* note 233, at 408.

<sup>300</sup> See *id.* at 409:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

And although those lively, vigorous things called books might, like the fabled dragon's teeth, chance to "spring up armed men," he insisted:

Since . . . the knowledge and survey of vice is in this world so necessary to the constituting of human virtue, and the scanning of error to the confirmation of truth, how can we more safely, and with less danger, scout into the regions of sin and falsity than by reading all manner of tractates, and hearing all manner of reason? And this is the benefit which may be had of books promiscuously read.<sup>301</sup>

The idea that the road to truth is through error, by going astray, was not original with Milton. Socrates had discovered the secret meaning of truth in the etymology of *aletheia*, the Greek word for truth: *aletheia*, a "divine wandering."<sup>302</sup> To both Milton and Socrates, "wandering" and "going astray" were positive terms; they signal the vitality of a mind that turns from the trodden path to the unknown. To speak, to think, and to read "promiscuously," means to deviate and to celebrate one's deviation, mixing all manner of thought and opinion while defying conventions and propriety. Through a process of intellectual promiscuity, the mind begets offspring and claims them as her own. The ravishing censors would, however, use her to bear only those ideas that reproduced their patriarchal authority.

We capture the spirit of Socrates, the polemic of Milton, and the prophecies of Brandeis and Kalven in a passage in Dostoevsky's *Crime and Punishment* where Razumikhin declares:

I like people to talk nonsense. It is man's unique privilege, among all other organisms. By pursuing falsehood you will arrive at the truth! The fact that I am in error shows that I am human. You will not attain to one single truth until you have produced at least fourteen false theories, and perhaps a hundred and fourteen . . . . It is almost better to tell your own lies than somebody else's truth; in the first case you are a man, in the second you are no better than a parrot!<sup>303</sup>

The one theme uniting the voices of Pericles, Milton, and Dostoevsky is dialogue, the idea of the polyphony of voices contending for truth. Political dialogue, disengaging the mind from orthodoxy, opposes the official monologue of power, which can triumph only by silencing other voices, as by censorship and seditious libel. The notion that human beings should be silenced rather than free to pursue their own consciences; licensed rather than free to write something that rattles the catechism of the day; bound up by paternalistic laws rather than free to investigate everything under the sun—such a notion reduces human beings to a

<sup>301</sup> *Id.* at 391.

<sup>302</sup> PLATO, CRATYLUS, reprinted in THE COLLECTED DIALOGUES OF PLATO 456 (1961). On Socrates's role as martyr to freedom of expression, see R. WARNER, THE CULT OF POWER 158-59 (1947).

<sup>303</sup> F. DOSTOEVSKY, CRIME AND PUNISHMENT 193 (Norton Critical ed. 1964).

brutish condition. It was just this "mutilation of the thinking process" that Alexander Meiklejohn, the leading first amendment theorist of our time, insisted that the Constitution outlawed.<sup>304</sup>

The theme that freedom of speech rests upon a dialogic dynamic in which many equal consciousnesses participate is implicit in the enlightened tradition against seditious libel. In repudiating the idea that government may punish persons for their discord with the official truth, the Court's enlightened tradition has captured this theme and claimed it for the forces of democracy. It has been our aim to suggest that this theme has recently been taken hostage in the camp of darkness and that official monologue has supplanted political dialogue. The task that remains is for the Court, exposed to its conflicting traditions of democracy and seditious libel, to choose which shall prevail.

---

<sup>304</sup> See A. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960).