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Freedom of the Press

C. A. Peairs Jr.
Northeastern University

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FREEDOM OF THE PRESS

By C. A. PEAIRS, JR.*

"Give me the liberty to know, to utter,
and to argue freely according to con-
science, above all liberties."

"It's ugly; but is it Art?"

"Who steals my purse steals trash."

The subject of freedom of the press may be treated from any one of four angles: it may be considered as a problem in moral philosophy and political ethics; it may be dealt with as an interesting chapter in social and political history; it may be discussed as a part of the broader subject, constitutional law; or it may be argued as a vital issue in present-day statesmanship. It is purposed here to treat it primarily from the aspect of the constitutional guarantees supporting it, with a brief historical sketch of the growth of the doctrine, to indicate how it came to be written thus firmly into all our constitutions, and with an even briefer application of what is developed in the main body of the paper as to present-day conditions. It will be seen that if the open gates in the constitutional doctrine, and the straws blowing in the wind of current comment, are true omens, the history of the subject has not yet revealed its most interesting chapters. The past history of the subject we view with a single eye; but we are not sure as to where we should stand in the future, because of the doubt as to the relative ethical positions of the potential suppressed and their suppressors. This wavering position is reflected only partially in past litigation, under different circum-

* A. B., M. A., LL. B., West Virginia University; LL. M., Harvard University; associated with Joseph S. Farland and Albert M. Morgan, Morgantown, W. Va.; now instructor in law, Northeastern University, Boston, Mass. This article was awarded the James F. Brown Prize for 1939 by West Virginia University in substantially its present form.

stances and legal backgrounds, but the quarrels of today contain the fights of yesterday.

The history of the struggle for freedom of the press may be dated from the invention of the printing press in the mid-fifteenth century. At that time, the extent of its freedom was less than zero; it was a negative quantity, because the press started life fettered by the civil authorities and by the dignitaries of the Church. The early presses, from the time of Gutenberg on, were licensed, and their continuous operation depended on the pleasure of the ruling classes. That, however, indicated no peculiar status of this right, because all of the so-called civil liberties, as we know them today, were similarly situated at that time.¹

William Caxton, having obtained special royal encouragement and the grant of privileges from Edward IV, established a press in Westminster, in 1476.² Since the existence rested on royal favor, there was no question but that the privilege to disseminate knowledge through it could be allowed or withheld by the ruler for reasons of state, or for no reason. Caxton and his followers, however, raised no question of right, but refrained from publishing anything that might be displeasing either to the Crown or to the Church. From that time on, for almost three centuries, licensing of the press continued in one form or another, in England as well as on the Continent.

During the sixteenth century, sentiment seemed to tend toward greater restrictions on the press, and in France it was even suggested that to save religion the art of printing ought to be abolished. In England, Henry VIII issued particularly severe regulations,³ and after the inception of the new Established Church absolute control was given to the King, to protect the new Church.⁴ Under Queen Elizabeth, the emphasis seemed to turn toward the licensing of individual publications, rather than of printers. It is a pity, in some ways, that the rule was not strictly enforced, and that manuscript copies of all early publica-

¹ For historical treatments of the subject see, Duniway, *Freedom of the Press in Massachusetts*, Cambridge (1906); Paterson, *Liberty of the Press, Speech, and Public Worship*, London (1880).

² Blades, *William Caxton*, ch. VI, cited in Paterson and Duniway. See also Wittenberg, *Literary Property* (N. Y. 1937).

³ Strype, *Memorials* (Oxford, 1812) 685, cited in Paterson.

⁴ 34 and 35 Henry VIII, c. 1.

tions were not collected by some such agency. The library thus gathered would today be priceless beyond all estimate.

The next step, in the seventeenth century, was the Star Chamber, which took precautions to prevent the publication of anything seditious as to the State or the Church.⁵ There seems to have been no doubt as to the legality of such restrictions, and when the Star Chamber fell in 1641, Parliament took over this function of government, and continued to exercise it through the Commonwealth, and even after the Revolution of 1688. The Bill of Rights of 1691 did not affect this practice. The Licensing Act of 1662 endured until 1695, when it was abolished pursuant to an act of 1693, when William and Mary's government decided to quit it, because of public indignation at the practices of the incumbent licenser.⁶ Thus, in 1695, died the last previous restraint on freedom of the press, and the law of the eighteenth century of Blackstone was that liberty of the press was guaranteed, as to previous restraints, although no objection seems to have been made to subsequent prosecution. This state of the law continued until 1792, when Fox's Libel Act was passed, giving the right to have a jury to determine the meaning and intention of the alleged libel.⁷

We see, then, that freedom of the press grows by various stages. It starts from absolute prohibition, as seen in the ecclesiastical law of the fifteenth century, and the proposed French law under Francis I. The next step is licensed printing, with official *indices librorum prohibitorum*, as compiled by Pope Paul IV in 1557. Other previous restraints have been taxes, as practiced in England from Anne to Victoria. The next step is freedom from previous restraints. The final step, won in England after Thomas Erskine's Case,⁸ and consisting of the right to speak free from subsequent prosecution, with greater or less qualification, is that existing even in America today.

When the colonies were settled, licensing was a recognized restraint, and previous restraints, and severe prosecutions, took

⁵ Prothero, *Statutes*, 168. See Wittenberg, *op. cit. supra*, n. 2. The Star Chamber was abolished a few years later by Parliament (17 Charles I, cc. 10, 11).

⁶ The Licensing Act of 1662 was enacted in 13 and 14 Charles II, c. 33. It was abolished under 4 W and M, c. 24.

⁷ 32 George III, c. 60. Blackstone's statement of the law, outlawing "previous restraints", is in vol. 4 Commentaries, p. 151.

⁸ See an account of Erskine's trial in 20 State Trials, p. 839 ff.

place during the seventeenth century, in the cases of Anne Hutchinson, Roger Williams, and their like. One of the early presses in this country was the Glover press, imported by him in 1638. The control passed soon afterwards from Glover to Henry Dunster, President of Harvard University. The Dunster press experienced difficulties with the authorities, and after Henry Dunster was forced to resign for his heretical printings, President Chauncey took over the supervision of the press until a censorship board was established in 1662.⁹ The censorship board died with the Andros government in 1689, and the censorship went into the hands of the legislatures, which treated unlicensed printing summarily. Censorship continued in the colonies somewhat later than in England, but it vanished during the first half of the eighteenth century, dying about the time of the unsuccessful prosecution of James Franklin. In Virginia some trouble was had after Governor Berkeley left, but the press was kept down even more completely than he had, until 1765, there being no printing in Virginia from 1684 to 1729, at all.¹⁰

The immediate cause of the strong feeling in the colonies for freedom of the press was possibly the prosecution in 1735 of Zenger, in New York, for libel. He was defended by Andrew Hamilton, a famous lawyer of the day, who persuaded the jury to acquit him contrary to the law of that day.¹¹ Thereafter, freedom of the press was jealously defended in the colonies, and this feeling contributed to the popular indignation at the Stamp Act. The press seems to have remained free in this country from 1735 until the Alien and Sedition Acts of 1798, and the failure of those acts, and the acquittal of Crosswell in 1804,¹² seem to have been the final guarantee of the right. The doctrine does not appear in the original constitution; it seems that no one thought it really necessary. It was added, however, in the First Amendment, and the Federal Constitutional provision thus added, and the provisions of the Hamiltonian state constitutions became the nucleus of the law as it exists today. It is well, therefore, to examine in detail the constitutional guaranties of freedom of the press, in order to determine as nearly as may be their

⁹ Duniway, *op. cit. supra*, n. 1, pp. 41-62.

¹⁰ See Callahan, *Semi-Centennial History of W. Va.* for a discussion of this point.

¹¹ Chafee, *Freedom of Speech*, N. Y., 1920, ch. 1.

¹² 3 Johns Cas. 337.

extent today, and the exceptions and limitations which must be recognized under them.

There are three constitutional guaranties that must be dealt with in any consideration of the restrictions which might be placed on freedom of the press. The first is the First Amendment to the Federal Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ." This is a limitation on the acts of Congress, and is substantially the only one.¹³ The Fourteenth Amendment is a Federal restriction on state laws, in its requirement of due process in state acts, although it does not specifically mention any of the guaranties of the first ten amendments.¹⁴

The third guaranty, the state constitution, varies, of course, from state to state. But as a matter of fact almost all states have the same provision. That of Illinois is typical: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty."¹⁵ There are a few exceptions, such as Vermont, which pattern their provisions after that of the Federal Constitution. The only substantial variation in wording occurs in the West Virginia provision:

"No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may, by suitable penalties, restrain the publication of obscene books, papers, or pictures, and provide for the punishment of libel or defamation."¹⁶

It is apparent, of course, that the difference in wording in the West Virginia provision is one which has been read into those of other states, and that the law of this provision is the same as under other state constitutions, or even, as will be seen, under the Federal Constitution.

¹³ U. S. Constitution, Amendment I. For cases discussing its general effect, see *Horner v. U. S.*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. 407 (1892), 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. 522 (1892); *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. 326 (1897); *Lewis Pub. Co. v. Moyan*, 229 U. S. 288, 57 L. ed. 1190, 33 Sup. Ct. 867 (1913); *Assoc. Press v. N. L. R. B.*, 301 U. S. 103, 81 L. ed. 953, 57 Sup. Ct. 650 (1937).

¹⁴ See for cases dealing with the general application of the Amendment to state infringements on freedom of the press, *Fox v. Washington*, 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. 333 (1915); *Gilbert v. Minnesota*, 254 U. S. 325, 65 L. ed. 287, 41 Sup. Ct. 125 (1920); *N. Y. ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 73 L. ed. 184, 49 Sup. Ct. 61 (1928). See also *Palko v. Conn.*, a case involving the inclusion of the Sixth Amendment in the Fourteenth, and *Stromberg v. Calif.*, 283 U. S. 359, 75 L. ed. 1117, 51 Sup. Ct. 532 (1931).

¹⁵ Const. Illinois, Art. II, sec. 4.

¹⁶ W. Va. Const. (1872) Art. III, sec. 7.

Much has been written in an effort to explain what ought to be self-evident: That the constitutional guaranty of freedom of the press is qualified, and does not forbid reasonable restrictions of a police nature in criminal law, or preclude civil liability for outrageous publication, if it amounts to a libel. These qualifications are articulated in the West Virginia Constitution, but are none the less true in other cases, as is evident from the cases interpreting them. It is probably not necessary to go further here to establish the fact of such qualifications, which has been dealt with, more than adequately, elsewhere.¹⁷ It may be proper, then, to proceed to an examination of the extent of such qualifications, under the Constitutional cases.

Sedition, obscenity, blasphemy, and defamation: These are the cornerstones of the legal structure which we are about to examine. Contempt of court is a *quintum quid* which, in a careful analysis of the cases, neither fits in any of the categories above, nor stands beside them as a separate basis of limitation of the constitutional liberty. Contempt cases must be discussed together with the others, bearing in mind a slightly different approach which will be noted in such cases. Cases involving sedition will be found to be chiefly federal cases, and may be found under special circumstances which induce decisions formulating new doctrines, which in turn are later extended to apply to cases not arising under such special circumstances.

It may be well in dealing with the cases involving sedition to build the discussion around one or two important "leading cases" on the subject. There have been in the history of this country two important legislative enactments on this subject. The first was the unpopular Sedition Act of 1798, and the second, the popular Espionage Act of 1917. The cases arising under the latter act are interesting because they indicate the extent to which this constitutional guaranty will be upheld where there is no element whatever of personal sympathy for the defendant

¹⁷ Corwin, Freedom of Speech and Press Under the First Amendment, 30 Yale L. J. 410 (1919); Chafee, Freedom of Speech, *supra*, n. 11; Wettach, Restrictions on a Free Press, 4 N. C. L. Rev. 24 (1925); Michael, Freedom of the Press Under our Courts, 33 W. Va. L. Q. 29 (1926); Pinsky, Freedom of Speech Under Our Constitutions, 31 W. Va. L. Q. 273 (1924). Many similar generalizations, distinguishing between "liberty and license", are found in the cases. See for an early discussion the opinion in *Rex v. Burdett*, 4 B. & Ald. 95 (1820). See for a non-technical discussion Eliel, Freedom of Speech, 18 Am. Pol. Sci. Rev. 712 (1924).

involved in the particular case. In the Espionage Act cases the publications in question were almost universally condemned so far as the purely moral aspect of their publication was concerned; their only defenders were *eorundem generis*, the ultra-liberal press. However, opinion as to the constitutionality of a statute making such publications criminal was almost evenly divided, indicating a special position over and above desirability guaranteed by the provision in question.

The law of sedition is probably more important than that relating to obscene, blasphemous, or libelous publications. In times of peace little is heard about restrictions on sedition and political libels; the general practice is to let the malcontents rave, and not to prosecute. But "war does make a difference."¹⁸ Today, in 1939, the problem becomes more acute than it was two or three years ago. The majority public opinion of the nation is becoming fairly well aligned on one side of a great world issue. There is a small minority in disagreement with it. Popular feeling runs ever higher, and even the most dignified and conservative publications begin, at least by implication, to encourage thoughts of suppression of such "ism" publications, and the legislature appropriates money to investigate the small groups out of step with the majority. Out of such an investigation may come legislation. And with its constitutionality we must deal, as nearly as may be, by an analysis of similar previous restraints and their fates.

As will be seen, the political issue runs in cycles, and is comparatively infrequently before the courts; but it is none the less the most important single issue in the field. Democracy is not threatened by censorship of obscene matter; it may be vaguely, by the misuse of such a censorship, or by an overgrown and greatly misused curb on blasphemy or libel, which will in realty amount to something else; but so long as the terms are kept within their bounds, it will be seen that none of them except sedition presents a direct challenge to free political communication.

There seemed to be little doubt that during the first few years of the existence of the United States government, when

¹⁸ *Schenck v. U. S.*, *infra*, n. 43. See also O'Donnell, *Military Censorship and the Freedom of the Press*, 5 Va. L. Rev. 178 (1918), and Note (1922) 9 Va. L. Rev. 516 on the military restrictions imposed during the Civil War.

European countries still regarded them as colonial territory, title to which was temporarily unsettled, there was a great deal of interference of foreign powers in our domestic affairs. French propaganda and other attempts to transfer American loyalties led to severe punishments for libel, in common-law prosecutions in the last years of the eighteenth century.¹⁹ The demands for legislation on the subject grew out of doubts as to the exact status of libel under the common law, and the severe penalties meted out under it. The Sedition Act was passed, therefore, as a clarifying measure rather than as a means of creating new offenses. It provided for the punishment of combinations and conspiracies to oppose measures of the United States Government, "or to impede the operation of any law" thereof, or to intimidate government officials, and incitation to riot or insurrection. This part of the law was so clearly reasonable that it met with no specific protest; objections to the law were directed at the other provisions of the Act. Section II provided for the punishment of false, scandalous, and malicious defamations of the Government, the Congress, or the President, and of publications calculated to bring them into contempt or disrepute, and of publications calculated to aid or indicate sedition or treason.²⁰ The Democratic opponents of the Act attacked it on three grounds, denying the constitutionality of such a measure.

The first objection to the Act was a negative one. It had been urged that the Act was necessarily constitutional as declaratory of the common law. It was answered that the common law was not in force as a part of the law of the United States, and a common-law Act was not necessarily constitutional. Congress seems to have considered the common law to be in operation; contemporary debates contained the argument that the common law was still in force because not abrogated by the Constitution. James Madison, as leader of the objectors, claimed that the common law was not a part of the law of the United States prior to the adoption of the Constitution, and therefore historically not part of the law of the United States unless made so by the Constitution.²¹ The Constitution contains no direct answer, although it speaks of "law and equity" cases as part of the judi-

¹⁹ See *U. S. v. Worrall*, 2 Dallas 384, 1 L. ed. 426 (U. S. 1798).

²⁰ 1 U. S. Statutes 596.

²¹ Madison's Writings (Ed. by Hunt), vol. VI, 373.

cial power. Opponents of the Act said that "law and equity" meant civil cases only, and such seems to have been the attitude later taken by the Supreme Court.²² However, even if this objection was tenable, it merely brought the argument up to zero; it proved that the Act was not necessarily constitutional, but it did not prove it unconstitutional.

The second point raised by Madison and others who took the same position was that no mention of control over the press was made in the enumeration of powers delegated to Congress in Article I of the Constitution; the Democrats contended that there was never any intent that Congress should control the press.²³ This position seems to have been well taken, and was conceded fairly generally to be accurate. The proponents of the measure, however, supported it on the grounds that the right to self-preservation is inherent in every government, and that such a measure was within the scope of the "necessary and proper" clause of the Constitution. These arguments seem to rest on a part of the Constitution not anywhere expressed, but which "so entirely pervades it, is so intermixed with the materials which compose it . . . as to be incapable of being separated from it."²⁴ It has been recognized in many cases that any government must perforce be permitted certain functions essential to its own organization and existence, even though they arise neither from any specifically granted power, nor from the necessity of continuing government.²⁵ This general principle is clearly recognized by all who support the varied governmental activities of today, and the 1939 answer to the second objection raised would undoubtedly be in favor of the Act.

Not so clear, however, is the answer to the third point—that a different status was given to the press by the First Amendment. No matter how broad a discretion is allowed Congress, in the scope of its activities, it has no power to enact legislation specifically prohibited by some clause in the Constitution. Here again,

²² *U. S. v. Hudson*, 7 Cranch 32, 3 L. ed. 259 (U. S. 1812).

²³ See T. F. Carroll, *Freedom of Speech and of the Press in the Federalist Period*, 18 Mich. L. Rev. 615 (1920) for a discussion of the arguments referred to here.

²⁴ Marshall, ch. J., in *McCulloch v. Md.*, 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819), discussing the principle of the immunity of Federal instrumentalities from state taxation.

²⁵ *Fong Yue Ting v. U. S.*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. 1016 (1892) (The power to exclude aliens.).

Madison, arguing historically, attempted to demonstrate that the First Amendment was intended to cover just this sort of thing.²⁶ The interpretation of the terms "abridge" and "freedom of the press", however, proved more difficult to determine. Madison attempted to demonstrate that the phrase "shall not abridge" was equivalent to "shall make no law respecting", because of the difference in the terminology of the Amendment respecting speech, press, and religion, which should, he said, clearly be accorded the same degree of freedom under it.²⁷ However, his argument seems to fall, because the first section of the Act was admittedly proper, and its existence seems to have been inconsistent with this argument.

Granting, then, that some control may be exercised over the press by Congress, the definition of "freedom of the press" becomes important, as limiting the control which may be exercised. The logical definition to be applied at the time of the Sedition Act was that of Blackstone, which was good law in England, and had been accepted by many colonial judges; indeed, few lawyers, probably, thought of "liberty of the press" in any other sense, except those who had heard political arguments now advanced for a freer interpretation. The two characteristics laid down by Blackstone of freedom of the press were freedom from previous restraints (licensing provisions), and freedom from punishment, on fair trial, for "non-pernicious" publications. Such a right was clearly not infringed by an act such as the one in question, providing for a fair jury trial.

The Democrats contended, on the other hand, that the Blackstonian theory was not law in the United States, and that the nature of the United States government required a greater freedom of the press than was allowed in England.²⁸ The first argument was based on the practice of the press in the States; *non constat*, however, that there was any claim of right in such publications. The second argument has later received support in the growth of the thought that the press must, in a democratic nation, be freed from subsequent as well as from previous

²⁶ 6 Madison's Writings, 390-2.

²⁷ 6 Madison's Writings, 400-1.

²⁸ See Schofield, *Freedom of the Press*, *infra*, n. 137; Schroeder, *op. cit. infra*, ch. VIII. American judges seem to have adopted the Blackstone theory, however. *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304 (1825). See also Vance, *Freedom of Speech and of the Press*, 2 Minn. L. Rev. 239 (1918).

restraints, and in the increasing limitations on the restraints which may be exercised. However, in Madison's time he was about the only one who took such a position, and the Sedition Act would probably have been held constitutional, if the question had been taken to the Supreme Court at that time.

Further discussion of the constitutionality of the Sedition Act should perhaps be postponed to a general discussion of the scope of the First Amendment. It may be well, however, to note briefly the enforcement of the Act. It appears that in the earlier prosecutions considerable moderation was exercised, but as offenses continued, and as political feeling ran high during the election of 1800, those enforcing the law clamped down until its effect was little, if any, less severe than that of the Blackstonian common law. However, there were relatively few prosecutions under it during the three years it remained in effect, and after it expired it was never re-enacted. Out of a total of about thirty arrests and sixteen indictments, there were only ten or eleven trials, all resulting in convictions. Punishment grew more severe toward the end of the period; even in the case of an individual judge, such as Chase, a great deal of difference was noted between his treatment of Cooper and that of Callender, two years later, where the issue was complicated by the participation of the Democratic Richmond bar.²⁹

The judges trying cases under the Act declined to hold it unconstitutional, inviting the defendants to take the question of constitutionality to the Supreme Court. The defendants, realizing that their constitutional objections were weak, under a court consisting of Federalist appointees, at least, and that their political position was strong, declined to appeal, and the question was saved for a later act. The significance of the Sedition Act and the controversy which raged over it is rather slight as a legal matter, and its story is chiefly notable as a matter of political history. Almost every move of either side in connection with it may be traced to contemporary politics, while few of them influenced the development of any constitutional doctrine.

²⁹ See for accounts of the trials of Callender, Cooper, Haswell, and Lyon, under the Sedition Act, Wharton, *State Trials*, pp. 333, 659, 684, 688. The historical background is indicated in these sketches. See also Lyon's Case, 15 Fed. Cas. No. 8646 (C. C. Vt. 1798); *U. S. v. Butterfield*, 25 Fed. Cas. No. 14,704 (D. C. S. D. N. Y. 1875); *U. S. v. Cooper*, 125 Fed. Cas. No. 14,865 (C. C. Pa. 1800); *U. S. v. Mundell*, 27 Fed. Cas. No. 15,334 (C. C. Va. 1795).

It would seem, on examination of the 1798 Act, together with the First Amendment, that it was in violation at least of the spirit of the Constitutional provision. Liberty of the press as declared in the First Amendment and the English common-law crime of sedition cannot co-exist, logically, whether the prescribed test of sedition is in form the tendency of the publication or the intent of the author or publisher. Tendency and intent have been prescribed as separate tests, but in practical application they come around to the same thing, the tendency, under the rule of *United States v. Press Publishing Co.*³⁰ being used as evidence of the intent. It was settled in *United States v. Hudson*,³¹ that sedition is not a part of the common criminal law of the United States, and the Act of 1798 rested on no better footing, although the sympathetic court might well have upheld it, because as has been shown above, the constitutional objections are not easily articulated as a matter of logic, but are more a matter of interpretation of the spirit of the rule. That spirit was recognized and not violated for more than a century. Whether the statutes of the World War period or their application violated it must be decided from an examination of the decisions under them, and of their historical and legislative background.

The World War and the Imperial German Government's openly avowed willingness to encourage disloyalty among its enemy's citizens brought the subject into bold relief. It was felt that the considerations in favor of legislation on the subject of espionage and foreign propoganda were sufficiently weighty to overcome the fundamental policy of the country, born in the Declaration of Independence, and arising from English law which led to the Revolution, against such laws. The first legislation, passed in February, 1917, was clearly within the power of Congress, since it affected only the mails.³² That act, however, did not meet the more difficult problem of meeting German attempts to arouse disloyalty, so in June, 1917, the Espionage Act was passed, establishing three new offenses: (1) False statements or reports interfering with military or naval operations or promoting the success of our enemies; (2) causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in

³⁰ 219 U. S. 1, 55 L. ed. 65, 31 Sup. Ct. 212 (1910).

³¹ 7 Cranch 32, 3 L. ed. 259 (U. S. 1812), cited, *supra*, n. 22.

³² 39 Stat. 230 U. S. Comp. Stat. (1918), Sec. 10381. Construed in *Magon v. U. S.*, 248 Fed. 201 (N. D. N. Y. 1918).

the military and naval forces; (3) obstructions of enlistment and recruiting.³³

The Espionage Act was given a fairly strict interpretation by the courts, and the Attorney General, at least, felt that it was missing complete effectiveness in failing to reach "impulsive or casual," disloyal utterances. To cover the gaps in the Espionage Act, the so-called Sedition Act of May, 1918, was passed, enlarging the roster of offenses to include (1) attempting by word or act to obstruct the sale of United States bonds, (2) uttering or publishing disloyal language, or language intended to bring the United States form of government, or the flag, or the Constitution, or the military uniform, into disrepute, or language intended to incite resistance to the United States or to promote the cause of the enemies, and (3) advocating curtailment of production of war materials, or advocating or teaching or defending the disloyal acts mentioned.³⁴

Legislation similar to that outlined here was passed in several of the states. The sum total of the new laws affected a large portion of the fly-by-night publications at least occasionally, and indirectly affecting a large proportion of the people of the country, readers of such publications. The result was (a) a tremendous howl of protest, which precipitated a discussion as to the constitutionality and the desirability of such legislation which lasted for almost ten years with considerable furor, and (b) a considerable volume of litigation over prosecutions under the statutes mentioned. The law of these cases forms a small but not unimportant item in our constitutional law today. It may be well in dealing with this phase of sedition law to present the cases first, in order to be able to discuss the various arguments which have been made in the light of an analysis of the law as under the cases it seems to be.

One of the most important of the early prosecutions was involved in *Masses Pub. Co. v. Patten*.³⁵ In that case, Postmaster Patten, of New York, excluded an issue of *The Masses* from the mails, on the vague general ground that the whole tone of the publication was in violation of the Espionage Act, without

³³ 40 Stat. 217 U. S. Comp. Stat., 1918, Sec. 10212(c). See *U. S. v. Pierce*, 245 Fed. 878 (1917), construing this Act.

³⁴ 41 Stat. 425-6. See 4 A. B. A. J. 306 (1918) for the complaints of the Attorney General as to the ineffectiveness of the 1917 Act.

³⁵ 246 Fed. 24 (C. C. A. 2d Cir. 1917).

relying on any specific ground of objection to the periodical, or on any specific statutory provision. An injunction was obtained from Judge Learned Hand in the District Court. The injunction was stayed, however, and the Circuit Court of Appeals (2d) affirmed the stay. It is interesting to note that although the Postmaster-General's staff, the Attorney-General's staff, and many members of Congress were either working on the case or actively discussing the controversy while it went on, the whole court battle was fought in New York City.

Judge Hand, though he admitted in his opinion³⁰ that some of the material specifically objected to, in the number of *The Masses* before the court, was "designed to arouse animosity to the war", felt that because the written matter did not "counsel resistance to law" it did not violate the Espionage Act. Another ground for his refusal to enjoin was the absence of a specific provision of the Act making the material non-mailable rather than criminal, as a method of enforcement. Judge A. N. Hand sustained the exclusion of the September issue of the magazine, saying that it was not a magazine or other publication regularly issued under the postal laws, because of the proper exclusion of certain issues from the mails. This decision joins sharp issue with the opinion in the earlier case, since it justifies both exclusions.

The *Masses* case involved three constitutional questions, in addition to one of statutory interpretation of the Espionage Act. The constitutional issues were the applicability of the First Amendment to circulation in the mails, the reviewability of decisions of the Postmaster-General's department by the courts, and whether the due process clause is violated by such exclusion.

The question of statutory interpretation for the court to decide was whether, under the Espionage Act, guilt was to be limited to those cases where there was a direct appeal to persons to violate the law, or was to include as well the use of language reasonably tending to promote illegality. The courts have not agreed on this point, whether the remote or the immediate tendency of the publication to produce the evils aimed at was to be the test. The cases of *Schenck v. U. S.*, *Debs v. U. S.*, *Abrams v. U. S.*, *Frohwerk v. U. S.*, *Gillow v. U. S.* and *Pierce v. U. S.*,^{30A}

³⁰ 244 Fed. 535 (S. D. N. Y. 1917).

^{30A} Secs. 43, 44, 45, 46, 52, *infra*, and 33, *supra*.

to be discussed below, all contribute to the confusion on the point. In the *Masses* case, a difference of opinion was shown when Judge Learned Hand said:

"If one stops short of urging upon others that it is their duty or to their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to produce a seditious temper is illegal. I am confident that . . . Congress had no such revolutionary purpose in view . . . to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance which in normal times is a safeguard of free government."^{36b}

Judge Rogers, of the Circuit Court of Appeals stated in the same case:

"If the natural and reasonable effect of what is said is to encourage resistance to the law and the words are used in the endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned. . . ."^{36c}

The first constitutional point raised under the *Masses* case, that the denial of postal facilities is tantamount to a denial of the right of publication, has had many supporters. The cases, however, do not bear out the contention. The postal department has been permitted to exclude lottery tickets, and publications containing lottery tickets, from the mails, not alone on the ground that the discrimination on the ground of the nature of advertising matter contained was not a denial of freedom of publication, since under the regulation publications of any sort could be carried so long as the advertisements were unobjectionable, but, also, on the ground of the discretion of the Government to refuse to be a party to the circulation of matter which it regards as injurious to the people.³⁷ Under the latter ground it would be quite proper for the Government to ban from the mails any material tending to contravene the governmental public policy within commonly understood due process limitations on the theoretically non-existent, but actually much-exercised, Federal police power. Some cases have gone even further, and would grant the government absolute discretion in the control

^{36b} 244 Fed. 535, 540 (S. D. N. Y. 1917).

^{36c} 246 Fed. 24, 38 (C.C.A. 2d Cir. 1917).

³⁷ See T. F. Carroll, *Freedom of Speech and of the Press in War Time*, 17 Mich. L. Rev. 621 (1919), for a detailed treatment of these arguments.

of its own agencies and the extent of their use³⁸—a valid argument it seems, if and only if the government permits private postal agencies to function in competition with itself. But if the government has a monopoly, enforced, on mail carriage, then an internal regulation of its postal system has the effect of a general law.

The second point, administrative finality of decisions of the Postmaster-General as to what may be mailed, was clearly settled by early cases in favor of finality.³⁹ Thus in *Bates & Guild Co. v. Payne*,⁴⁰ the rule was stated:

“ . . . where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of the opinion that his action was clearly wrong.”

The “unless” clause, of course, contains room for a reversal of actual practice, and a full judicial review might well be granted under the last clause. It is doubtful whether the post-war Court would have adhered so strictly to the rule of finality, but the tendency today seems to be for the pendulum to swing back in that direction from an extension of the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough* and *Crowell v. Benson*.⁴¹ The recent cases affecting the Department of Agriculture⁴² should not, it is submitted, affect the issue in the Post Office Department, because of the different nature of the administrative work affected.

The third question, that of due process, seems also to have been easily answered, to judge from Judge Rogers' opinion in the Circuit Court of Appeals. As a matter of fact, the argument was as of that time rather weak, resting on the contention that due process meant judicial process. Under long standing prac-

³⁸ *Pub. Clearing House v. Coyne*, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. 789 (1904). See also the Jackson and Rapier cases, *infra*.

³⁹ See U. S. *ex rel. Dunlap v. Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. 12 (1888).

⁴⁰ 194 U. S. 106, 108, 48 L. ed. 894, 29 Sup. Ct. 595 (1909).

⁴¹ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 64 L. ed. 908, 40 Sup. Ct. 527 (1920); *Crowell v. Benson*, 285 U. S. 22, 76 L. ed. 598, 52 Sup. Ct. 285 (1932), (on due process requirements of judicial review of administrative findings in general).

⁴² *Morgan v. U. S.*, 8 F. Supp. 766 (1934), 298 U. S. 468 (1936), 23 F. Supp. 380 (1937), 304 U. S. 1, 82 L. ed. 1129, 82 Sup. Ct. 773 (1938), 24 F. Supp. 214 (1937), 304 U. S. 590, 58 Sup. Ct. 999 (1938), (reviewing of decisions of the Secretary of Agriculture under the Packers and Stockyards Act).

tice, and the law of almost all the states, that is not the case, although the tendency of the Supreme Court during the Twenties seemed to be to examine all cases possible, under the due process clause, at least as to state proceedings, and to require an examination of cases by state judicial tribunals.

In the *Schenck* case,⁴³ the defendant was indicted for distributing circulars to prospective objects of the military draft, urging them to resist the draft. The conviction was upheld by a unanimous Supreme Court. Mr. Justice Holmes wrote the opinion, saying:

“Of course 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.”

In the opinion, however, Mr. Justice Holmes laid down the following test on the constitutional point, much-quoted later by students of the subject as well as by dissenting justices in subsequent appeals. He said:

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

The conclusion reached was, of course, that the words used in this case did create such a “clear and present danger.” The interesting problem arises upon application of the test in subsequent cases.

In *Frohwerk v. United States*,⁴⁴ Mr. Justice Holmes again delivered the opinion for a unanimous court. The facts did not differ greatly from those of the *Schenck* case, the chief difference being that here the publications were in a newspaper, the *Missouri Staats Zeitung*. There seemed to be little difficulty in holding the *Schenck* rule applicable, and the First Amendment not; Justice Holmes says:

“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.”

In *Debs v. United States*,⁴⁵ decided the same day as the *Frohwerk* case, the question was really one of freedom of speech rather

⁴³ 249 U. S. 47, 63 L. ed. 470, 39 Sup. Ct. 247 (1919).

⁴⁴ 249 U. S. 204, 63 L. ed. 561, 40 Sup. Ct. 18 (1919).

⁴⁵ 249 U. S. 211, 63 L. ed. 566, 39 Sup. Ct. 252 (1919).

than of the press; however, the same statute and the same constitutional tests were involved, so it may be safely treated with the other cases in the group. The speech made by Debs in the case had undoubtedly a tendency to bring about resistance to the draft, and the jury convicted him under the trial courts "natural tendency and reasonably probable effect" test. The conviction was affirmed, Mr. Justice Holmes again writing the opinion, which was couched in the phrases of an ordinary test of indirect causation and constructive intent, instead of forcing on the trial court and jury the "clear and immediate" test elsewhere indicated as required by the Constitutional First Amendment.

The *Abrams* case⁴⁶ involved slightly different facts from any of the others, and is notable chiefly for the dissent of Mr. Justice Holmes, who wrote the opinions in the other three cases. The dissenting opinion in this case makes the doctrinal issue on this point of constitutional law, which might never have been noted had not this, the least important in many of its political aspects of the sedition cases, arisen. The publications in the case were pamphlets, one in English and one in Yiddish, containing Communistic propaganda, together with specific exhortations for a general strike. These pamphlets appear from the evidence to have been issued not to hinder the progress of the war with Germany, but rather to stop intervention in Russia, and to aid the cause of the revolution in that country. In the trial, conducted by Judge Clayton,⁴⁷ many things took place which have been cited by critics of the Act and of those administering it, and of the government, to show bias or prejudice. Clear it is, that the things advocated by the defendant, if not anathema to their times, at least had a considerable tendency to arouse hostility. The "indirect causation" tests were applied in a militant fashion which may have had something to do with the opinion of Justices Homes and Brandeis that the conviction should be reversed.

In the Supreme Court the main issue, in addition to the minor one of specific intent, was whether the Espionage Act could constitutionally be interpreted to apply to this case. The *Schenck* case is not overruled by Mr. Justice Clarke, writing for the majority, so for the purpose of doctrine the "clear and present

⁴⁶ 250 U. S. 616, 63 L. ed. 1173, 40 Sup. Ct. 17 (1919).

⁴⁷ See Chafee *A Contemporary State Trial*, 33 Harvard L. Rev. 747 (1920).

danger" test may be considered to be law still. There is no question, as between the majority or the minority, of the constitutionality of the statute in question, properly construed. The difference arises in the application of that statute to this case, under the authority of cases decided under the 1917 act, before the 1918 amendments, which were used also to support the construction here given the Act. Holmes, dissenting, seems to wish a far more rigid constitutional safeguard, fettering the Act to confine its scope to cases of immediate threats to interests which Congress may protect:

"... only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command 'Congress shall make no law abridging the freedom of speech.'"⁴⁸

The nicety of the argument on the specific intent point reduced it almost to a constitutional issue, whether Congress could punish acts which were directly intended to paralyze industry in this country, and which would necessarily affect the progress of the war, or whether it was restricted to punishment of acts intended specifically to impede our participation in the war. The real issue was whether the Act passed did make the deeds involved here criminal; but the language used in the opinion, and by commentators, is constitutional language, and the authorities cited are constitutional authorities, bearing on the other point.

The *Abrams* case has been widely criticized, and the controversy between "present danger" and "remote tendency" as the test of a publication's effect for the purpose of determining its punishability under the Constitution has grown into what may be called for want of a better term a living constitutional issue. In spite of the decision in the *Abrams* case, where the issue was joined, the law today is probably the clear and present danger test; the question is one of "proximity and degree,"⁴⁹ but not of proximate cause. State prosecutions, brought under the Fourteenth Amendment, have defined this test more clearly. Mr. Justice Brandeis, in *Whitney v. California*,⁵⁰ presents it as follows:

"In order to support finding of clear and present danger it must be shown either that immediate serious violence was to be expected

⁴⁸ 250 U. S. 616, 631, 40 Sup. Ct. 17, 22 (1919).

⁴⁹ Holmes, J. in *Schenck v. U. S.*, *supra*, n. 43.

⁵⁰ 274 U. S. 357, 71 L. ed. 1095, 47 Sup. Ct. 641 (1927).

or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."^{50A}

The test had been announced by Brandeis in *Schaefer v. United States*,⁵¹ in 1920, in a dissent, and the majority accepted the test, under the *Schenck* case, without committing itself to the strict interpretation placed on the test by the *Abrams* and *Schaefer* dissents. In *Gitlow v. New York*, the state anarchy statute punished "not mere historical or philosophical essays, . . . but advocating, advising or teaching the overthrow of organized government by unlawful means."⁵² The court held the statute constitutional under the "direct effect" test, and refused to consider its constitutionality as applied to a specific case:

"It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition. The question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration."

Justices Holmes and Brandeis thought otherwise:

"If . . . the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views . . . Eloquence may set fire to reason. But . . . the redundant discourse before us had no chance of starting a present conflagration."

It seems that there is an inconsistency to be found between the very strict application of the present danger test urged by Holmes and Brandeis in these later cases, and the opinions in the *Schenck* and *Frohwerk* cases. It is submitted that in none of these cases could it be said "that a very small spark would not set off a conflagration, under the circumstances under which the publication was circulated, and that those circumstances were not taken into account by the defendant," to paraphrase the language of those cases. The doctrinal difference between the present danger test and that of remote tendency is of no practical importance in a case, because either may be applied to reach the result intended by the proponents of the other. That this is so seems amply demonstrated by the refusal of the court to

^{50A} 274 U. S. 357, 576 (1927).

⁵¹ 251 U. S. 466, 64 L. ed. 360, 40 Sup. Ct. 259 (1920).

⁵² 268 U. S. 652, 69 L. ed. 1138, 45 Sup. Ct. 625 (1925); *Fox v. Washington*, 236 U. S. 273, 59 L. ed. 573, 35 Sup. Ct. 383 (1915). See also *State v. Holm*, 139 Minn. 267, 166 N. W. 181 (1918), and *State v. Fox*, 71 Wash. 185, 127 Pac. 1111 (1912).

reexamine the facts in the *Schenck* case, and the desire of Mr. Justice Holmes to do so in such a case as the *Gillow* case. In spite of this conceptual inconsistency, however, it is quite clear that there are two possible results in any appellate case except the clearest one, and it is believed that the strict application of the constitutional provisions, advocated by Holmes and Brandeis, will be, actually, the law in future cases. The present court is composed largely of men who feel that "freedom of the press means freedom of those whose ideas we dislike," and as to sedition cases, at least, we may expect to see the First and Fourteenth Amendments given a great deal of weight.

Before leaving the subject of sedition,⁵³ however, it may be well to consider some of the collateral phases of the last great national attempt to curb it, as well as some of the earlier authority dealing with the subject.

One of the liveliest legal discussions inspired by the group of cases just discussed arose from the *Masses* case; it was widely contended that exclusion from the mails was a previous restraint on freedom of the press, and hence bad under even the Blackstonian theory. The decisions settling the contrary rule, such as *Ex parte Jackson*, and *In re Rapier*,⁵⁴ were criticised, as allowing a practical destruction of a periodical's circulation, and actually exercising a greater restraint on liberty of the press than a subsequent penalty. It was contended by the Attorney-General that under the same theory Congress could exclude undesirable matter from interstate commerce, but the Court negatived that argument by dictum in the *Jackson* and *Rapier* cases, evidently feeling that closing those channels would be more directly a governmental interference than the mere refusal to carry as mail.⁵⁵

A far more important issue than that of the constitutionality of the enactments of the wartime period was that of the

⁵³ Periodical comment seems to be fairly uniform in its condemnation of the interpretations of the Acts of 1917 and 1918. Chafee is an outstanding example, but other commentators, such as Carroll and Willis, concur wholeheartedly with his general views, if not with his sensational approach.

⁵⁴ 96 U. S. 727, 24 L. ed. 877 (1877); 143 U. S. 110, 36 L. ed. 98, 12 Sup. Ct. 304 (1892). See also *Champion v. Ames*, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. 321 (1903).

⁵⁵ See for a discussion of this argument, and of the collateral points of conspiracy, treason, and presidential censorship, T. F. Carroll, *Freedom of Speech in War Time—The Espionage Act*, 17 Mich. L. Rev. 621 (1919).

policy behind them. It was widely felt that a dangerous political precedent had been set, and that a step had been taken backward from the principles fought for in the Revolution, regardless of the constitutional interpretation of the acts. On the other hand, it was pointed out, sterner measures had been adopted during the Civil War against those who were dangerous or disaffected, by the Executive, without Congressional sanction. Only about five per cent as many were prosecuted under the Espionage Act, as were held in military prisons without trial and without charges, during the Civil War, with popular acquiescence. War-time measures are necessary harsh, because of national emergency and whatever be the legal rules involved, they will, whether or not they ought to, give way before a paramount need. One of those needs is for a population pulling in one harness; and since liberty of speech and of the press, freely exercised, may cause disloyal actions, that liberty must be restricted in war time. Of course, it was recognized, there was no actual curb on the press as such during the Civil War, due to Lincoln's feeling against such action. But the lesson is none the less plain because it lacks a symmetrical structure, and the previous relaxation of the constitutional provision was not complete. The lesson to be drawn from history is threefold: First, freedom of the press means freedom of the press, other things being equal; second, "war does make a difference," and in wartime disloyal acts must be curbed; and third, "words are not only the keys of persuasion, but the trigger of action," and words may properly be suppressed under proper circumstances. The rest—the lesson of the Espionage Acts and the cases under it and similar acts—is a matter of application, and of determining what are proper circumstances.⁵⁶

It may be noted in conclusion that procedural matters, and the form in which cases are decided, as well as the time of their decision, affect these decisions, and by weight of numbers affect the law as much as individual rules. In *United States v. Stokes*,^{56A} the defendant was committed under the Espionage Act for this statement in a newspaper "I am for the people and the Government is for the profiteers." The case was never appealed. It is

⁵⁶ See for a partisan discussion of the sedition legislation, Chafee, *Freedom of Speech*, (N. Y. 1920).

^{56A} Bull. Dept. of Justice (1918).

extremely doubtful whether the conviction would have been sustained by the "clear and present danger" Court or even by the "remote tendency" Court. Who can say what the effect on the law would have been of an appeal of the *Masses* case? A purely fortuitous circumstance—the coincidence of the publication in question and the assassination of McKinley—caused the prosecution and the conviction in *People v. Most*.⁵⁷ What would have been the result of an appeal to the Supreme Court? No discussion of this phase of the problem has been found, and it is not purposed to do more here than to indicate it, without idle speculation on a matter not on the direct point at issue, which has been settled so far as actual decisions in the books are concerned.

Contempt of court has been an angle, from which slight limitations on the doctrine of freedom of the press have been made; the general classification of the offenses so punished is sedition or "political libel", it seems, but a separate word may be said in connection with this particular phase of the matter. The First Amendment, of course, affords no protection against this type of restraint; neither does the Fourteenth. Yet as often as the judicial power of summary punishment for "constructive" contempt arises, objections of liberal-minded men are voiced, leading, in many cases, to legislation on the subject, which, however, seems to be no permanent cure. The practice has been rather common in state courts, and many cases support the right to do so,⁵⁸ in spite of Mr. Justice Holmes' slighting remarks about a judge who would let the conduct of his court be affected by a newspaper publication. The chief criticism seems to be that such action revives old Star Chamber practices, and violates the right of trial by jury.

The doctrines of constructive contempt seems to have been distinctively American, going back to the early Federalist judges, such as McKean of Pennsylvania.⁵⁹ Among early examples

⁵⁷ 171 N. Y. 423, 64 N. E. 175 (1902). See also *Coleman v. McLennan*, 78 Kan. 711, 98 Pac. 281 (1908). The Stokes case is reported and discussed in *Bull. Dept. Justice* (1918); 106, no official report was found. See for an earlier application of state laws, *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N. E. 55 (1901).

⁵⁸ See *McDougall v. Sheridan*, 23 Idaho 191, which collects authorities for the action taken.

⁵⁹ See *Hummel v. Bishoff*, 9 Watts 425 (Pa. 1841), showing a similar tendency, in spite of the trouble McKean and others had after Oswald's case, *infra*, n. 60.

may be cited *Oswald's* case, and *Passmore's* case.⁶⁰ The most notorious case, however, was the severe punishment of Lawless, by Judge Peck, in frontier Missouri, in 1826. Among the political repercussions of this case were a Federal statute, declaratory of the inherent limits of summary power under the Constitution, and the impeachment of Judge Peck. He failed of conviction, probably for personal reasons, but it is worthy of note that of the few judges ever impeached in Congress, such a large proportion were those who had transgressed the right of freedom of speech. Paterson and Chase are, of course, outstanding examples, under the Sedition Act, but Judge Peck's case is no less significant, especially in connection with the prompt passage of the statute delimiting punishment possible for the offenses involved in the *Lawless* case.⁶¹

The Buchanan Act of 1831 checked the practice of judicial punishment of contempt by publication, even in the state courts, until its revival in 1855, by Judge English, in Arkansas, in the case of *State v. Morrill*.⁶² Judge English even intimates, in this opinion, that a publication scandalizing a court may not be pardoned by the executive, raising a nice point of separation of powers.

The leading case in the Supreme Court on this point is *Patterson v. Colorado*.⁶³ In that case Senator Patterson was committed under a summary criminal process, for an article published in a Denver newspaper. The court refused to let him show the truth of his publication. The Supreme Court refused, over the vigorous protest of Brewer and Harlan, to reverse under the Fourteenth Amendment. An interesting angle of the opinion is that it construes the First Amendment to apply only to previous censorship, under the Blackstonian theory. This construction is clearly wrong, under the decisions of the Court, but it is not so clear that the First Amendment should have been the turning point of the case. The facts raise a serious question of due process, it seems, which the Court dodged entirely, as is pointed out in the dissenting opinions. It is probable that a

⁶⁰ *Respublica v. Oswald*, 1 Dallas 319 (U. S. 1788); *Respublica v. Passmore*, 3 Yeates 441 (Pa. 1809).

⁶¹ See *Nelles & King Contempt by Publication in the United States* for an account of this very interesting episode in American History.

⁶² 16 Ark. 384 (1855).

⁶³ 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. 556 (1907).

right of Federal review on that point would be recognized now.

A later case was *United States v. Toledo Newspaper Co.*⁶⁴ which raised several new issues, and seems to have brought the law to its present state. The publication involved was one of the Toledo News-Bee intimating bias on the part of the judge in favor of traction interests, in a suit against the city. The Judge overruled the early construction of the Federal Contempt statute, although it was contemporary, and had stood for over eight years. That construction, in *Ex parte Poulson*,⁶⁵ while deploring the effect of the statute, held that the meaning was clear that a publication out of court could not be punished under the "so near" clause of the statute. This construction was approved forty years later, by the Supreme Court, in *Ex parte Robinson*,⁶⁶ where it was held that the summary power of a lower Federal court could be exercised only . . . "to insure order and decorum in their presence." Judge Killis, in the *Toledo* case, said that the construction in the *Poulson* case read into the statute an exception (to the summary power) which was contrary to public policy, and that the *Robinson* case, with its "topographical propinquity" test, had been overruled by a failure to review in a later case.⁶⁷

The Supreme Court affirmed the Judge in the *Toledo* case; the decision has since been strongly criticized by many writers,⁶⁸ and Mr. Justice Holmes delivered a dissent that has been more quoted, probably, than the rule of the case, saying:

"But a judge of the United States is expected to be a man of ordinary firmness of character. . . ."^{68a}
 (There was nothing) in the case that would have affected a mind of reasonable fortitude, [or] that obstructed the administration of justice in any sense that I possibly can give to these words.^{68b}

The case is still law, however, and may remain so. Its best chance of reversal, in *United States v. Craig*,⁶⁹ failed, perhaps

⁶⁴ 247 U. S. 402, 62 L. ed. 1186, 38 Sup. Ct. 560 (1918).

⁶⁵ 19 Fed. Cas., No. 11, 350 (C. C. E. D. Pa. 1835). *Ex Parte Poulson*.

⁶⁶ 22 Wallace 505 (U. S. 1873). See also *U. S. v. Shipp*, 203 U. S. 506, 51 L. ed. 292, 27 Sup. Ct. 161 (1906).

⁶⁷ 220 Fed. 458 (D. C. N. D. Ohio 1915).

⁶⁸ Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924), 37 Harv. L. Rev. 1010.

^{68a} 247 U. S. 402, 424 (1917).

^{68b} *Id.* at 425.

⁶⁹ 266 Fed. 230 (S. D. N. Y. 1920), 279 Fed. 900 (S. D. N. Y. 1921), 263 U. S. 255, 68 L. ed. 293, 44 Sup. Ct. 103 (1923).

because of accidental factors which prevented its being very severely contested.⁷⁰ Subsequent Federal cases have applied the doctrine to the limit of the *Toledo* rule, and state courts seem to have swung into the practice.

An example of a state commitment for contempt under a Constitution even more liberal than the standard Hamiltonian type⁷¹ is *State v. Frew*,⁷² decided by the West Virginia Court in 1884. The court followed the Arkansas rule, and did not attempt to fit the facts of the publication into any "so near" test such as was prescribed for Federal Courts. Other state decisions show similar cases, although they were relatively rare after the Federal Statute, until the *Toledo* decision, when almost all the states fell into line within a few years. There is a definite policy against "trial by newspapers", which may give weight to the rule of punishment by summary process for contempt by such publications, and the rule may be here to stay.⁷³ However, many liberals, who appear to be in the driver's seat at present, have committed themselves to a view of freedom of the press which is irreconcilable with such a power, and the probabilities are that if such a case is carried to the Supreme Court soon, or if the matter is again brought to the attention of Congress, steps will be taken to curtail, if not to destroy, the rule of contempt by publication⁷⁴ expressed in the *Toledo* case.

Two of the prominent exceptions to the general doctrine of freedom of the press, blasphemy and libel, involve other considerations than that of the personal liberty to such an extent as to make a detailed study of them here, unprofitable and out of place. It may be well, however, to consider them briefly, in order to indicate the nature of the problems involved.

The topic of blasphemous publications is a difficult one to deal with accurately. It is complicated by the guarantee of religious freedom as well as by that of freedom of the press. There

⁷⁰ Craig relied on *habeas corpus* when he should have appealed; an intervening presidential pardon took the wind out of the *habeas corpus* proceeding.

⁷¹ W. Va. Const. (1872), Act. III, sec. 7.

⁷² 24 W. Va. 416 (1884).

⁷³ See for comments on "Trial by Newspaper", Brown, *Some Points on the Law of the Press*, 95 Central L. J. 59 (1922); Taft, *The Press and the Courts*, 58 Am. L. Rev. 595 (1924).

⁷⁴ See Nelles & King, *op. cit. supra*, n. 61. But see Mattison, *Restraints on Freedom of the Press*, 13 Marquette L. Rev. 1 (1928) on Trial by Newspapers.

is always in such cases strong political pressure in favor of overriding the guarantees, as well as that in the opposite direction; and the authorities are almost all English cases, not worth quite their face value in this country due to the different constitutional background, and the different religious set-up there where there is an official church as contrasted with the many approximately equivalent sects here. The best treatment that can be made of the subject is an analysis of the English cases, plus an estimate of their probable application here, in the light of our constitutional provisions.

The central question in the law of blasphemy seems to be whether a requirement of Christianity, or of respect for Christianity, or for any specific Church, or of respect for and abstinence from criticism of religion and church in general, is a part of the law. The avowal of the constitutional guarantee of the American, and of the constitutional liberty of the Englishman, would seem to be that it is not, today, if it ever was, under the more rigid regime of two centuries ago. The exception to this guarantee, with respect to blasphemy, moves the line between required, or unpunishable conduct, and forbidden, punishable conduct, just part of the way back up the scale.

Because of the nature of the judicial system in England, the statements of the Justices in the cases may be considered of more actual importance than the results thereof. A case under the Federal Constitution would decide that a specific offense was or was not punishable, and the statements in the opinion might be considered of greater or less importance depending upon the writer, and of surrounding circumstances. The English cases which we have to consider involved selections from the following questions to be submitted to the jury: (1) Did the defendant make any statements at variance with the creed of the Anglican Church? (2) Did the defendant make obscene statements concerning religion or the Church?, and intermediate charges, or taking the case from the jury. Their statements are valuable, then, as amounting to charges of the state of the Law of England.

In *Shore v. Wilson*⁷⁵ Erskine, J. stated the law thus:

"It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule the doctrine of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement

⁷⁵ 9 Clark & F. 355 (1839).

for any such purpose; yet any man may, without subjecting himself to penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it."

The question was one of the law of trusts, involving a charitable gift for the purpose of scientific inquiries into the truth of Christian dogma. The trust was upheld. This decision did not, of course, bear on the question of criminal prosecution directly, but it threw into some doubt the decisions in *Rex v. Woolston*,⁷⁶ and allied cases, refusing to permit any argument that Christianity might be wrong. That view of the law of blasphemy, stated by Lord Hale, who said that "Christianity is parcel of the laws of England", persisted, until definitely killed by *Bowman v. The Secular Society, Ltd.*,⁷⁷ in 1917.

The leading case in favor of a more moderate view of the law was *Regina v. Ramsey and Foote*,⁷⁸ decided by a trial court in 1883. The prosecution was dismissed after the charge rendered, so of course, no appeal was taken, and the case did not become an authority binding on all English courts, until affirmed in the *Bowman* case, which made it Constitutional law. Coleridge, L. C. J., laid down the rule in that case as follows:

"If the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers, who have attacked the foundations of Christianity . . . I think it a good law persons should be obliged to respect the feelings and opinions of those among whom they live . . . in a Catholic country we have no right to insult Catholic opinion, nor in a Mohammedan country, have we any right to insult Mohammedan opinion. I differ from both, but I am bound as a good citizen to treat with respect opinions with which I do not agree."^{78A}

The authoritative statement of the House of Lords was made in *Bowman v. The Secular Society*, in 1917. The Justices were agreed that the law still was, or ought to be (there were no prior, binding precedents of the House) what it was in the Seventeenth and Eighteenth Centuries, when apostasy was a crime, and an irreverent reference to preaching blasphemy. The historical background, however, gave the house some difficulty. They did not wish to admit that they were changing the law, or to point out where the change took place, but there was no blinking the fact that a change in the law had taken place. It has been sug-

⁷⁶ 1 Barn. K. B. 162 (1729).

⁷⁷ (1917) A. C. 406.

⁷⁸ 15 Cox Crim. Cas. 231 (1883).

^{78A} (1917) A. C. 406, —.

gested⁷⁹ that the decision would have been more easily arrived at, had there been no precedents at all on the problem. At any rate, the case settled that "scurrility or indecency is an essential element of the crime of blasphemy at common law", and "to constitute blasphemy at common law, there must be such an element of vilification, ridicule or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace." Another statement,⁸⁰ also embodying the rather new "breach of the peace" notion, was that "the offense is associated with violent, offensive, or indecent words, . . . the common law of England does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated," an even stricter test, it seems, than Lord Coleridge's "wilful misrepresentation or artful sophistry, calculated to mislead the ignorant and unwary."

The law in America is probably that the Constitution will protect the individual against any statute of the Federal government more severe than the English present-day common-law rule. The test has not been directly applied to the First Amendment, but authorities under the religious freedom clause indicate a similar attitude.⁸¹ State constitutions on the point vary, but the general rule is not far from that stated above. West Virginia has a specific constitutional provision protecting the right to profess and to argue religious opinions.⁸² There is, also, in West Virginia an obscene publications law, and a constitutional provision making insulting language punishable,⁸³ which, it seems, could lead to no other dividing line in blasphemous publications than that announced in the *Bowman case*, which is the common-sense rule of today,⁸⁴ and in accord with the rules of the state blasphemy cases on the books.⁸⁵

⁷⁹ Lee *The Law of Blasphemy*, 16 Mich. L. Rev. 149, 153 (1918).

⁸⁰ Reg. v. Ramsay & Foote, *supra*, n. 73.

⁸¹ See for discussions of the distinctions *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637, 10 Sup. Ct. 299 (1890); *Mormon Church v. U. S.*, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. 792 (1890).

⁸² W. Va. Const. (1872), Art. III, sec. 15.

⁸³ W. Va. Const. (1872), Art. III, sec. 7. W. Va. Rev. Code (1931), c. 55, Art. 7, sec. 2.

⁸⁴ See for a discussion of the *Bowman case* Lee, *The Law of Blasphemy*, 16 Mich. L. Rev. 149 (1918).

⁸⁵ *Conn. v. Updegraph*, 11 Serg. & R. (Pa. 1824) 394, *State v. Chandler*, 2 Harr (Del. 1837) 553, *Conn. v. Kneeland*, 20 Pick. (Mass.

The exception to the right of freedom of speech, in cases of defamatory libel, cannot well be dealt with from a general point of view, with any applicability to West Virginia law. The English common law divided "libels" into four classes, embracing, generally, all the exceptions noted to liberty of the press, *i. e.*, defamatory, seditious, blasphemous, and obscene libels. The only one now included in the category is defamatory libel, for which a civil remedy was permitted at common law, while resort must be had to the criminal law to reach the others. Various tests as to the existence of a libel were applied at common law, the chief one being the tendency of the publication to create and diffuse a bad opinion of the personal or professional reputation of the person referred to. Erskine, J. thought the test ought to be "criminal intent", as a question for the jury. That test was rejected by the court in the *Dean of St. Asaph's Case*,⁸⁶ in 1784, the question being held one of law. Fox's Libel Act followed soon afterward, in 1792,⁸⁷ and provided that for a verdict both judge and jury must be convinced of the libelous character of the publication.

In America, Hamilton in his model state constitution set up a test similar to that advocated by Erskine: The "good motives, for justifiable ends" excuse for publishing true matter, found in most state constitutions today. Jefferson, who was President when Hamilton argued *Croswell's Case*, agreed with him, and professed to find that test in the common law, but that seems to be at best doubtful.

Today, in America, the libel problem is chiefly one of varying state law. There could be no Federal statute on the subject of defamatory libel, it seems, except as to exclusion from the mails, and similar restraints of a purely Federal character, and it seems at least arguable that the power to impose such restraints is arbitrary. The First Amendment, of course, does not affect state laws, and the Fourteenth Amendment, it seems would not affect a state libel law as such, unless it violated some specific canon of due process.

1838) 206, *State v. Ruggles*, 8 Johns Rep. (N. Y.) 290 (1811), are the leading cases on the subject.

⁸⁶ *Rex v. Shipley*, 4 Douglas 73 (1784).

⁸⁷ The judge still decides as to matters arising from the face of the publication, however; *Hunt v. Star Newspaper Co.* (1908), 2 K. B. 309; *Dakyl v. Lalunchere* (1908), 2 K. B. 325, settle that point, as to modern English law.

State constitutional provisions vary considerably, although most of them apply the Hamiltonian test of "truth, with good motives for justifiable ends", to all publications, private as well as public. A few states still have a copy of the Federal provision in their constitutions. The West Virginia provision is not like that of any of the others, if the "insulting words" provision be considered.

The true meaning and application of the provision for the defense of truth, with good motives, for justifiable ends, seems not to have been decided. Some judicial semi-constructions, however, have been rendered. The Kansas court, under a Hamiltonian constitution, announced a doctrine which would permit defamatory falsehood if published in the belief that it was true.⁸⁸ This same rule exists elsewhere, although qualified by limiting it to publications that circulate only within the state or election district, if it is a libel on a candidate for public office.

The Pennsylvania constitution provides that no conviction shall be had for libel relating to men in public capacity, if such publication was not "voluntarily or negligently made." The court held this to apply only to criminal actions.⁸⁹ Later, however, a broader rule, approximating that of Kansas, was laid down.⁹⁰ Other cases talk of "balancing conflicting interests", and "drawing a line between the needs and good of society and the right of an individual to enjoy a good reputation." It seems that just where the line should be drawn should remain a question of the law, and not of constitutional construction.

The West Virginia Constitution provides specifically for the punishment of libel, for civil liability.⁹¹ The truth, "published with good motives, and for justifiable ends" is made a defence.⁹² A further statutory provision is that evidence of the truth, or of an apology, may be offered in mitigation of damages.⁹³ Insulting

⁸⁸ *Coleman v. McLennan*, 78 Kan. 711, 98 Pac. 281 (1908), *supra*, n. 57.

⁸⁹ *Barr v. Moore*, 87 Pa. St. 385 (1878).

⁹⁰ *Briggs v. Garrett*, 111 Pa. St. 404 (1886).

⁹¹ W. Va. Const. 1872), Art. III, sec. 7. *Sweeney v. Baker*, 13 W. Va. 158 (1878), and *State v. Frew*, 24 W. Va. 416 (1884), contain discussions of the limitation on the doctrine of freedom of the press, in the case of libelous matter.

⁹² W. Va. Const. (1872), Art. III, sec. 8. See *Michaelson v. Turk*, 79 W. Va. 31, 90 S. E. 395 (1916).

⁹³ W. Va. Rev. Code (1931), c. 57, Art. 2, sec. 4.

words are made actionable as a "breach of the peace."⁹⁴ These provisions make the law, while not clearer as to interpretation than in other jurisdictions, much more nearly delimited by statute than in other common law states.

In addition to the defence of truth, that of conditional privilege is often invoked in newspaper libel cases. Reports of public proceedings, such as sessions of the legislature, courtroom trials, are privileged if fair and true, because of the public interest in having such proceedings open, which is considered to be of greater importance than the individual's interest in not being defamed. The widespread complaint against "trial by newspapers" is directed to libelous statements made by such publications concerning parties to public proceedings, as well as to partisan accounts tending to obstruct the administration of justice by the courts. However, the abuse of this privilege by so-called "yellow" journals, so long as it does not violate the canons against contempt or obscenity, is not likely to be visited with serious consequences, nor to lead to any restrictions on such accounts generally. The general sentiment seems to be in favor of such publicity, in this country, although similar practices are not always found elsewhere.⁹⁵

Abuses of the privilege of true publications concerning public figures grew to such a point that a new doctrine was urged upon the courts—that of the "right of privacy." It seems perfectly reasonable to suppose that a man should be able to appeal to a court to protect his interest in not having his private affairs or his picture published for all the world to see, but the courts have been slow to adopt this view, although it is a growing one.⁹⁶

Another outgrowth of the increasing complications of the law of libel has been the granting of injunctive relief in equity where it appears that a property interest (other than the plaintiff's "good name" alone) will be injured by the anticipated publication. This has been attacked on the ground

⁹⁴ W. Va. Const. (1872), Art. III, sec. 8, *supra*, n. 83.

⁹⁵ Criminal and other judicial proceedings appear not to be nearly as fully reported in England and on the Continent as in this country. See Beman, *Censorship of Speech and the Press* (N. Y. 1930), for some valuable non-technical material on the problem.

⁹⁶ *Pavesich v. N. Eng. L. Ins. Co.*, 122 Va. 190, 50 S. E. 68 (1905), is the leading case for recovery.

that an injunction is a "previous restraint" on freedom of the press,⁹⁷ and that granting relief in equity violates the policy in favor of trial by jury in libel cases.⁹⁸ It seems clear under the authorities today that if no clearly defined property right is involved, equity will not intervene merely to protect an interest of personality, standing alone, against injury by apprehended scurrilous publications.⁹⁹ It is evident from these examples that the application of the constitutional guarantee of liberty of the press to the law of libel has become a much more complicated legal problem than it was in the time of Hamilton, even if the common law of libel is not much different from what it was at the time of *Croswell's Case*.¹⁰⁰

A side-light on the legal problems connected with liberty of the press has been its application to labor disputes. Individuals being picketed have claimed, without great success, that the signs carried by picketers were libels; labor leaders, on the other hand, while denying that their signs contained statements of fact which might be, if untrue, libelous, argued that injunctions against strikes, when extended to signs and publications such as "Unfair", abridged their constitutional right of liberty of the press. That argument failed in *Gompers v. Buck's Stove and Range Co.*,¹⁰¹ but it is submitted that in view of the state of flux in which labor law is at present, the issue is not yet clear, and if anti-injunction legislation is repealed, courts may extend the protection of the First Amendment to the signs of picketing strikers. It is clear, of course, that where the First Amendment goes, the law of libel should go, and the constitutional protection should carry with it a corresponding legal liability.

In concluding these references to the law of libel and its connection with our subject, it may be pointed out that the

⁹⁷ See Chafee, *op. cit.*, *supra*, n. 11. See Lovell v. City of Griffin, 303 U. S. 444 (1938), on the prior restraint problem.

⁹⁸ Pound, *Equitable Relief Against Defamation*, *infra*, n. 99.

⁹⁹ Folsom v. Marsh, 9 Fed. Cas. 342, No. 4901 (C. C. D. Mass. 1841), and Dixon v. Holden, 7 Eq. Cas. 488 (1889), indicate the possibility of injunctive relief, in spite of the doctrine of freedom of the press. See Pound, *Equitable Relief Against Defamation*, 29 Harvard L. Rev. 640 (1915).

¹⁰⁰ *People v. Croswell*, 3 Johns Cas. 337, involving an alleged libel on Jefferson.

¹⁰¹ 221 U. S. 418, 55 L. ed. 797, 31 Sup. Ct. 492 (1911). See also on the general problem *Marx & Haas Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391 (1902). It does not seem to have been dealt with in law review comment.

conclusion drawn from libel cases should not be applied to the other exceptions to the freedom of the press rule, because the libel law stands alone in dealing with publications affecting private persons, and not to those affecting society generally. It is difficult to distinguish the utterances in many libel cases from those involving obscenity, blasphemy, or even sedition unless this division, expressed in the celebrated *Chicago Tribune* case,¹⁰² where the city of Chicago tried to sue a newspaper for libel, is kept in mind.¹⁰³

The censorship of obscene and immoral writing forms an important part of this subject today, although there was a time not too long ago when it did not. There is some question as to whether the publication of obscene writings was punishable at common law, but most cases indicate that it was.¹⁰⁴ There are today Federal statutes making it a crime to send obscene and indecent matter through the mails, and granting the Postmaster-General authority to exercise a previous restraint by excluding such matter from the mails without trial.¹⁰⁵ This latter power has been extended even to newspapers which contained obscene matter only incidentally.¹⁰⁶ There are also obscenity statutes in almost all states making such publications criminal. West Virginia has such a statute, under express Constitutional authority.¹⁰⁷

The problem has become of greater importance in recent decades, because of the construction of such statutes to forbid publications on such matters as social disease and birth control, as to which certain groups of intellectual liberals wished to educate the public. The fight on these subjects between the

¹⁰² Never appealed; see Brown, *Law of the Press*, 95 Central L. J. 59 (1922).

¹⁰³ Limiting libel cases to suits by individuals. But see *State v. Pioneer Press*, 100 Minn. 193, 110 N. W. 869 (1907), and similar language elsewhere.

¹⁰⁴ *Rex v. Curl*, 2 Strange 788 (1795); *Rex v. Wilkes*, 4 Burr. 2527 (1770), Schroeder, *Obscene Literature and Constitutional Law* (1911), takes the opposite position. See ch. 3, *op. cit.*

¹⁰⁵ 35 Statutes 1149; 36 Stat. 1139 U. S. Code, Title 18, sec. 334. See also Title 19, sec. 135, as to the importation of obscene matter.

¹⁰⁶ *U. S. v. Burnell*, 75 Fed. 824 (S. D. Ia. 1896); *Anderson v. Patten*, 247 Fed. 382 (S. D. N. Y. 1917); *Burleson v. U. S. ex rel. Workman's Coop. Pub. Co.*, 260 U. S. 757, 67 L. ed. 499, 43 Sup. Ct. 246 (1921), affirming 287 Fed. 418.

¹⁰⁷ W. Va. Const. (1872), Art. III, sec. 8; Rev. Code (1931), c. 61, Art. 8, sec. 11.

medical groups and the Sangerites, who wished to disseminate the propaganda of their social doctrines over the country, and the conservative groups who wished to prevent such education, was carried for several rounds into the courts, as to the initial validity of existing obscenity statutes under the Constitution, as to their application to these publications, and as to the validity of new statutes constructed for the specific purpose of limiting such publications. The ethical issues involved were subjected to considerable further complications by the remarkable "mushroom growth", after the World War, of immoral and obscene magazines and sensational and super-sensational newspapers. Many of these problems did not reach the courts, but the problems of the legislator and of the citizen must be remembered, even if they cannot be answered in this study.¹⁰⁸

The difficulty of deciding whether any particular publication falls within the definition of the words "obscene" and "indecent" has caused various tests to be adopted by the courts. Perhaps the most widely used device is a division of all published matter into three classes—that which is not obscene as a matter of law, that which is questionable matter for the jury to decide, and that which is obscene as a matter of law. Then in litigation involving any questioned publication, the court decides into which class it falls, and instructs a verdict if it is in the first or last group. If it is doubtful, the jury decides whether or not it is punishable.¹⁰⁹ This method of determination, of course, applies only to criminal prosecutions, and not to such restraints as exclusion from the mails, where the postmaster-general makes a final, though reviewable, decision.¹¹⁰

No standard test, either for the court or the jury, as to obscenity, has been worked out; however, in instructions to juries, and in disputed classifications, language has been used which indicates fairly clearly what the test will be. One statement, much quoted, was that the test of obscenity is "whether the tendency of the publication is to deprave and corrupt those whose minds are open to such immoral influences

¹⁰⁸ See an outline of the problem in E. W. Mandeville, "Gutter Literature", *New Republic*, XLV, 350, Feb. 17, 1926; Whibley, "The Yellow Newspaper", *Blackwoods* CLXXXI, 531, April, 1907.

¹⁰⁹ *U. S. v. Harmon*, 45 Fed. 414 (D. Nev. 1891), 50 Fed. 921 (C. C. D. Kan. 1892); *U. S. v. Journal Co.* 197 Fed. 415 (E. D. Va. 1912); *Depart v. U. S.*, 4 F. (2d) 765 (C. C. A. 5th Cir. 925).

¹¹⁰ *Anderson v. Patten*, 247 Fed. 382 (S. D. N. Y. 1917), *supra*, n. 106.

and into whose hands a publication of this sort may fall."¹¹¹ Many courts, especially in recent years, have attempted to limit the meaning of the term to include that which is lubricious and suggestive, but not that which is merely vulgar, improper, or even scatological.¹¹² It has been suggested, in the light of such cases, which strain the dictionary definition of obscenity, that the statutes making it an offense should be redefined, to punish pornography, rather than mere obscenity.

A celebrated example of the application of the test mentioned was *United States v. One Book Called "Ulysees"*.¹¹³ There Joyce's book got a good review in the opinion of the court, as well as a great deal of publicity which undoubtedly tended to increase its circulation. Judge Woolsey, who had previously approved sexual expositions in *United States v. One Book called "Married Love"*,¹¹⁴ and *United States v. One Book Called "Contraception"*,¹¹⁵ found in the *Ulysses* case also that the book was not written with pornographic intent, saying: "In spite of its unusual frankness, I do not detect anywhere the leer of the sensualist."¹¹⁶ The attacks on new books written in a modern ultra-frank manner began to dwindle after a succession of such cases, because those investigating them saw that if they failed, as they seemed likely to, under such loose enforcement of the statutes, the book would be in a much stronger position than if it had been completely ignored. So the later tendency seems to be to ignore completely the cheap products of some modern novelists, rather than to try to suppress them.

An odd sidelight on the fight against obscenity has been the attempts to bar many books of long standing, or those by authors widely known and respected. Prosecutions of such so-

¹¹¹ *Regina v. Hicklin*, L. R., 3 Q. B. 360 (1868), a similar test is laid down in *Dysart v. U. S.*, 4 F. (2d) 765 (C. C. A. 5th Cir. 925), *supra*, n. 109.

¹¹² *U. S. v. Klaunder*, 240 Fed. 501 (N. D. N. Y. 1917); *Swearingen v. U. S.*, 161 U. S. 446, 40 L. ed. 765, 16 Sup. Ct. 562. See for other distinctions *People v. Eastman*, 188 N. Y. 478, 81 N. E. 459 (1907), *Knowles v. U. S.*, 170 Fed. 409 (C. C. A. 8th 1909), *Coomer v. U. S.*, 213 Fed. 1 (1914).

¹¹³ 5 F. Supp. 182 (S. D. N. Y. 1933). The case is noted in 2 *Geo. Wash. L. Rev.* 516 (1934).

¹¹⁴ 48 Fed. (2d) 821 (S. D. N. Y. 1931).

¹¹⁵ 51 Fed. (2d) 525 (S. D. N. Y. 1931). See also *Dunlop v. U. S.*, 165 U. S. 446, 41 L. ed. 799, 17 Sup. Ct. 375 (1897).

¹¹⁶ See *U. S. v. Dennett*, 39 F. (2d) 564 (C. C. A. 2d Cir. 1930), where a book called the "Sex Side of Life" was held not obscene, because of its "dignified and conscientious" tone.

called "classics" have been most frequent under the comparatively strict New York statute, affecting the comparatively active New York book market. The most striking effect has been to bring a large and representative, if not complete, list of such books to the attention of the reading public.¹¹⁷ Other localities have banned large numbers of the classics, quietly and in general without court proceedings, but such practices cannot be studied in detail here, nor can the effect of unofficial enforcement agencies, such as the Legion of Decency and the resulting Hays Censorship in Hollywood under the motion picture code. Such unofficial agencies may be restrained if they become too obvious in their restraints on theoretically free publications. Such a case was the Watch and Ward Society in Boston, which met its nemesis when it caused the American Mercury to be barred by dealers.¹¹⁸

Publication by newspapers of full and accurate accounts of public proceedings, under a conditional privilege as to libel, may not include obscene matter. However, accurate reports of court proceedings are generally held not punishable, no matter how obscene they may be.¹¹⁹ It is submitted that this is an unfortunate result. The general realization of that fact has led to the enactment of many statutes specifically prohibiting the publication of newspapers devoted to the publication of criminal news, police reports, or pictures and stories of such things. Such statutes have generally been held constitutional. An outstanding exception was the famous case of *Near v. Minnesota*,¹²⁰ decided in 1931, in which Mr. Chief Justice Hughes wrote an exhaustive treatise on the whole topic of freedom of the press as applied to libel and obscenity cases, in condemning a Minnesota statute providing for the enjoining of obscene or

¹¹⁷ *Anderson v. Patten*, 247 Fed. 382 (S. D. N. Y. 1917), *supra*, n. 106; *Halsey v. N. Y. Society*, 234 N. Y. 1 (1922); *People v. Seltzer*, 203 N. Y. S. 809 (Sup. Ct. 1924); *People v. Pesky*, 243 N. Y. 193, 153 N. E. 45 (1930). See Grant & Angoff, *Massachusetts Censorship*, 10 Boston Univ. L. Rev. 147 (1930).

¹¹⁸ *American Mercury v. Chase*, 13 F. (2d) 224 (D. Mass. 1926).

¹¹⁹ *Commonwealth v. Herald Pub. Co.*, 128 Ky. 424, 108 S. W. 892 (1908); *U. S. v. Journal Co.*, 197 Fed. 415 (1912), *supra*, n. 109.

¹²⁰ 283 U. S. 697, 75 L. ed. 1357, 51 Sup. Ct. 625 (1931). The statute involved was 1 Minn. Stat. (1927) 10123-(1)-(3). Cases involving similar statutes are *State v. McKee*, 73 Conn. 13 (1900); *In re Banks*, 36 Kan. 242, 42 Pac. 693 (1895), and *State v. Warren*, 113 N. C. 633, holding the statutes constitutional.

scandalous and defamatory newspapers as nuisances. The case was argued, decided, and fought back and forth through the periodicals for many months before the Supreme Court rendered its decision, five to four. The statute, unpopular with those who at the time needed some ground on which to wave the flag in their editorial columns, was generally known as the Minnesota Gag Law; however, it seems clear as a historical matter that the statute was passed not to curb the decent press, but to combat a social evil, and that there was little ground for the fear that the law would be applied improperly. Of course, if the law made abuses possible, it is no argument to say that the incumbent officials would not take advantage of such possibilities; but the statute in the *Near* case seems not to have been directed to any but the very yellow and very degraded sheets. As Mr. Justice Butler points out in his dissent, the act did not provide for a previous restraint in the proper sense of the word; previous restraint in the Blackstonian sense, and in that used by most current writers, connotes an administrative control in advance, such as that formerly exercised by licensers and censors, and does not include a possibility of an advance restraint in equity.

It has been suggested that the rule of the *Near* case may apply to such Federal restraints as the Radio Act, but such a result is highly improbable.¹²¹ The *Near* case, while not criticized, is not likely to be extended on the type of legislation there involved, clearly for a proper police purpose. The rule is much more likely to be extended in other directions, to more subtle laws such as the Louisiana newspaper tax, which hit all powerful newspapers, and thus created a government club over the press.¹²²

In concluding the discussion of obscenity, it may be pointed out that in recent years two elements have grown considerably: The tendency toward greater control over the scandalous publications has advanced, and has been checked by a partial conflict in practical application with the movement for greater liberality

¹²¹ See Note, Previous Restraints on Freedom of Speech, 31 Columbia L. Rev. 1148 (1931), for a discussion of *Near v. Minnesota*, and similar "previous restraints."

¹²² See Deutsch & Kerrigan & Burke, Memorandum on Newspaper Advertising Bill, New Orleans, 1934; a parallel problem in *Lovell v. Griffin*, 305 U. S. 444 (1938), *supra*, n. 97.

with respect to such matters as birth control literature. The result of the conflict seems to have been a gradual victory for the forces of "Frankness, be it harmful or helpful". The issue has become much more argued as an everyday matter even than that of sedition, and political comment, although the latter would seem to be more nearly a matter of fundamental necessity.

Ardent advocates of complete freedom, such as Schroeder, who contends that any limitation on obscenity is unconstitutional,¹²³ and Chafee, who contends that almost any limitation on communication of any sort is unconstitutional,¹²⁴ have been much more vociferous than the forces ranged against them who cry "To the pure . . ." and try to keep their society in a state of relative purity, rather than to risk general contamination by general education. It is of course dangerous to predict the final outcome of the struggle, but in 1939 it looks as if, so far as obscenity is concerned, liberty of the press is in the ascendant.

In concluding this study many things might be said. The tendency is for discussions of the doctrine of liberty of the press, and of the limitations thereon, to point out that there are such limitations, couching the conclusions so reached in such glittering and poetical general terms that it seemed that they had been drawn from the very heart of the law, instead of being merely an elementary statement of the nature of the subject under discussion. Other works tend to close with a flag-waving oration in favor of the Constitution and all that it stands for, as indicated by the cases discussed, or as not indicated, but shamefully neglected, by those cases, as to this study, after a prolonged examination of the trees composing this forest. The author's view of the general panorama has become so obscured that it seems difficult to paint it in a few words. To be sure, others say that the right of freedom of the press exists; they say that it is limited, however, by the fine distinction between liberty

¹²³ *Obscene Literature and Constitutional Law*, (N. Y. 1911). The book purports to be "a forensic defense of freedom of the press," and certainly is nothing more, so far as legal analysis is concerned. The book comes much closer to being a history of obscenity than of the constitutional law of the subject.

¹²⁴ *Freedom of Speech*, *supra*, n. 56, and various articles in the *Harvard L. Rev.* See, for general discussions of the law of Obscenity: Balter, *Some Observations Concerning the Federal Obscenity Statutes*, 8 *So. Calif. L. Rev.* 267 (1935), and *The Enforcement of the Laws against Obscenity in New York*, 28 *Columbia L. Rev.* 950 (1928).

and license. It is difficult to fit all cases into this dichotomy. The line does not appear clear, on one side of which a publication is protected by the doctrine, Constitutional or otherwise, of liberty of the press, and on the other side of which it is punishable, nay preventable. Let it be said here merely that there appear to be many authorities on limitations on the doctrine we are studying, and that there is no clarity in the cases as to just the extent of those limitations.¹²⁵

A further respect in which the examination of the trees in this forest has obscured the vision of the student, is that it is now found impossible to divide the trees into two classes, and to say that those facing in one direction are bulwarks of our society, while those facing in the opposite direction are a menace to that society, and of questionable ethical background. I challenge anyone to say either that freedom of the press ought to be made absolute, or that it ought to be limited to the very words of the Constitutional guarantee, strictly construed, for cases which will arise ten years hence.

A study of a few saplings may help to clarify this point. In Time for March 18, 1939, appeared the following item:

"*W PAYOFF* . . . to each of its 10,000 members the American Federation of Actors said preemptorily last week: Thou shalt not crack wise about the WPA, on pain of fine or suspension. Aware that (1) many of its members were working on WPA; (2) many WPA workers had walked out on gags at their expense, the Federation termed all such wisecracking 'degrading and injurious', compared it to making jokes at a funeral."

The restriction referred to sprang from the element of society whose journalistic representatives would be the first to howl at any thought of restriction on political criticism in general, and more particularly at restrictions on attacks in the press on the wealthier element. For fifteen years after the World War, these elements were on the outside looking in, and were very zealous to protect their rights. Now they are, comparatively, on the inside track, and may tend to consolidate that position by discouraging criticism of it.

¹²⁵ See, for discussion of the general rules: Hale and Benson, *Law of the Press*, (St. Paul, 1933), pp. 349-369; Paterson, *op. cit., supra*; Fisher, H. M., *Freedom of the Press*; Brown, *Some Points on the Law of the Press*, 95 *Central L. J.* 59 (1922). A brief discussion from the *quo vadis* angle is Willis, *Freedom of Speech and of the Press*, 4 *Indiana L. J.* 445 (1929).

Among other recent items of interest to be considered in this connection are the articles, reviews, and editorials pointing out the growth of certain organized groups of a professedly patriotic nature, and their leaders, as a menace to the civilization of this country, and more than suggesting that their growth be severely curbed by confiscating their rights of freedom of speech and of the press. And on the other side of the struggle we see editorials today in such magazines as *Colliers* citing examples of restriction in communications in certain respects, and contending that the Constitutional guarantee is being defied by those restrictions. Among well-known writers, William Allen White takes a similar stand. After many years of building the Constitutional law on this subject, and in spite of the cases and expositions now existing, the quarrel still goes on, wherever people say things that other people do not like, and wherever people find that they may not publish just what they please.

From these present-day omens, read in the light of the history of the doctrine, and the legal development of the topic, it is purposed to draw two conclusions. First, it seems that there is no immutable, everlasting division of the forces taking part in the struggle for freedom of the press. With the exception of a few notable liberals, who believe that "liberty of the press means liberty for those with whom we disagree",¹²⁶ the sides taken in questions of this sort depend on whose ox is being gored. Even in the past, few followed Voltaire's famous dictum. Even Milton, who with his *Areopagitica*, struck a great blow for the cause, would except from its benefits Papists. John Stuart Mill, Bertrand Russell, even Walter Lipmann, when they say absolute freedom of the press means absolute freedom for all except wrong-thinkers, and so it seems to be with the leaders of the cause today—the American people. Where moral and political issues grow too serious, then the factions will cease to believe in freedom of the press for each other. This second conclusion, that the strongest advocates of freedom of the press cease to advocate it, when their substantive political or moral views become sufficiently pronounced, as to those at variance with them, is a lesson to be learned from the recent realignment

¹²⁶ Felix Frankfurter, 37 *Har. L. Rev.* 1029, following the Holmes approach.

of the factions in this country. It is this lesson that leads us to appreciate the existence of a Constitutional guarantee, hard to evade, beyond a certain variable point, against all effects of such a realignment. The First Amendment, and allied provisions, may be mere nebulae in times of comparative natural harmony, but when the mind of a nation becomes aroused against a small minority, they do their greatest work.