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Learned Hand's Seven Other Ideas about the Freedom of Speech

Vincent A. Blasi

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I say "other" because, regarding the freedom of speech, Learned Hand has suffered the not uncommon fate of having his best ideas either drowned out or credited exclusively to others due to the excessive attention that has been bestowed on one of his lesser ideas. Sitting as a district judge in the case of *Masses Publishing Co. v. Patten*,[1] Hand wrote the earliest judicial opinion about the freedom of speech that has attained canonical status. He ruled that under the recently passed Espionage Act of 1917,[2] writings critical of government cannot be grounds for imposing criminal punishment or the denial of mailing privileges unless the authors tell their readers it is in their interest or is their duty to violate the law.[3] Hostile criticism very likely to cause harm or intended to do so is not punishable under that statute, he concluded, if it stops short of direct advocacy of law violation.[4] He derived this standard in the guise of statutory interpretation but very little in the text of the law or its history of passage suggested his reading. Rather, to support his preferred test Hand drew upon what he took to be the basic presuppositions of democratic governance, assumed to underlie the enactment of the statute. In subsequent private correspondence, he repeatedly invoked his test as not only implicit in the Espionage Act but also the best interpretation of the First Amendment.[5]

Hand's focus on the exact meaning conveyed by the speaker's words rather than their likely or intended effect represents a different approach from that of his peers, most notably his friend and hero Justice Oliver Wendell Holmes, Jr., whose clear-and-present-danger test, introduced two years later, turns on predicted consequences and speaker intentions.[6] It has become a

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1. 244 F. 535 (S.D.N.Y. 1917).
2. Espionage Act of 1917, ch. 30, § 1, 40 Stat. 217.
3. *Masses Publ'g Co.*, 244 F. at 540.
4. *Id.*
5. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 758, 763, 765–66, 768, 770 (1975).
6. *See* Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); Schenck v. United States, 249 U.S. 47, 52 (1919).

staple of First Amendment study to examine the limits of the principle of freedom of speech by comparing the contrasting tests of Holmes and Hand.[7] In these comparisons, Hand typically holds his own and the subject is illuminated, even if this focus on the operational test or standard tends to divert attention from much else that Hand's *Masses* opinion has to offer.

To simplify, Hand's test has the advantage of making the legally relevant inquiry a determination of the specific meaning of a discrete communication, a commission we might think both trial and appellate judges are well suited to undertake. Speculative judgments about predicted consequences and speaker intentions are rendered unnecessary, a happy outcome for disputes in which political passions and prejudices are likely to be in play. Moreover, Hand's approach has a categorical quality that serves the objective of giving unpopular speakers a "safe harbor" of legal immunity: they pretty much know in advance what they can and cannot say.[8] Holmes's test, in contrast, seems better to track the legitimate reasons a liberal government might have for wanting to regulate speech: principally, the prevention of material harm. Under Hand's test, a speaker can deliberately cause serious harm and yet escape legal liability by influencing audiences with carefully worded albeit incendiary observations that fall short of specific, operational appeals to interest or duty.

Thus, Holmes's test comes across as less vulnerable to abuse by speakers bent on mischief, while Hand's test seems to be less vulnerable to abuse by judges and juries bent on scapegoating controversial or strident but probably inconsequential speakers. The Holmes and Hand approaches to justifying and demarcating the freedom of speech can be compared—and usually are—with dominant attention to such practical matters as risks of abuse, problems of proof, judicial capability, fair notice of legal vulnerability, common understanding, and fit with standard regulatory motivations.[9] But that is to conduct the comparison on Holmes's terms. It is to miss much of what Hand has to say.

What is most notable about the *Masses* opinion is the way it proceeds from the premise that a certain kind of speech, what Hand terms "hostile criticism," is not just something the country can endure, but rather something the country must have if political authority is to derive from the consent of the governed, a requisite of the constitutional regime's explicit ("We the People")

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7. *See, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 133–34 (Jamie Kalven ed., 1988).

8. *See* Gunther, *supra* note 5, at 726.

9. *See, e.g.*, Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209.

commitment to popular sovereignty.[10] The various elaborations, qualifications, and implications which Hand develops from that premise constitute potentially his most important contribution regarding the freedom of speech. It is a contribution that has been marginalized by Hand's misfortune to be cast by subsequent generations as Holmes's foil, made to debate on Holmes's turf, where experience is exalted and both logic and political theory devalued. My aim here is to enumerate some of Hand's neglected ideas—ideas of broader and deeper significance than the question of which judge identified the more workable or intuitively appealing test for delimiting the freedom of speech.

FIRST

Hand treats the freedom of speech not as a personal right against the majority but rather as a procedure essential to constituting a legitimate majority.

Like Holmes, Hand was a rights skeptic. His constitutional philosophy, much influenced by his Harvard Law School teacher James Bradley Thayer,[11] was centered on the quest to liberate majority rule from special interests and demagogic influence. As a young New York practicing lawyer, Hand published an article in the Harvard Law Review savaging the majority opinion in *Lochner v. New York*[12] for its ungrounded, expansive, anti-democratic invention of an employer's constitutional right to be free from legislative limits on working hours and conditions.[13] His extravagant admiration for Holmes was partly a product of the latter's now legendary dissent in that case.

Because of their general skepticism regarding the place of rights in a regime of popular sovereignty, both Hand and Holmes faced a dilemma during and shortly after World War I when confronted with claims by dissident speakers that prosecutions under the Espionage Acts of 1917 and 1918 violated the First Amendment. Both judges were appalled by the zealous persecution of dissenters that wartime passions unleashed, but they

10. Masses Publ'g Co. v. Patten, 244 F. 535, 539–40 (S.D.N.Y. 1917).

11. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 50–52 (1994).

12. 198 U.S. 45 (1905).

13. *See* Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 502–04 (1908).

were committed to a view of rights and the judicial role that constrained their capacity as judges to confront the injustice.[14]

Hand's solution to this dilemma was nothing short of brilliant. He decided that the foundational principle of majority rule could be served—not violated—by protecting speakers because freedom of speech is not really a right against the ruling majority so much as a component of the very process that defines and enables majority rule. It is a majoritarian procedure, not an anti-majoritarian individual right. Only consent to government actions and policies that is generated in the face of hostile criticism is genuinely authoritative in a regime of popular sovereignty, he concluded. As such, the principle of freedom of speech operates not only as a constitutional basis for striking down a speech-restricting statute such as the Espionage Act of 1917 but also as a starting point for interpreting such a statute. So a reading of the statute should be undertaken with an eye to preserving "that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority."[15]

This felt need to protect essential, authority-conferring free speech led Hand to embrace, as a matter of creative statutory interpretation in the spirit of constitutional avoidance, a distinction that he considered to be fundamental as a matter of basic democratic theory. "[T]he normal assumption of democratic government," he asserts in his *Masses* opinion, is that "the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper."[16] Government evaluations, whether legislative, executive, or judicial, of the substance or temper of speech cannot determine which utterances are legally permissible.[17] However, that does not mean that all speech is beyond the reach of legitimate regulation. "[T]here has always been a recognized limit to" "the free utterance of abuse and criticism of the existing law," Hand notes, "incident indeed to the existence of any compulsive power of the state itself."[18] This "recognized limit" formed the basis for the operative standard he read into the Espionage Act of 1917:

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14. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 624–30 (1919) (Holmes, J., dissenting); *Masses Publ'g Co.*, 244 F. at 537–43; *see also* David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 141–42 (1982) (explaining that "a fundamental tenet of Holmes's creed was that the judge should not impose his personal values on society").

15. *Masses Publ'g Co.*, 244 F. at 539.

16. *Id.* at 540.

17. *Id.*

18. *Id.*

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.[19]

Notice that Hand derives this limit not by means of balancing benefits and costs within the categories of speech he is considering, nor by invoking the practical advantages of the line he draws. Rather, he tries to determine which categories of speech serve an essential function in generating meaningful consent to the creation of governmental authority.

With characteristic intellectual candor, Hand admitted in subsequent private correspondence with the noted First Amendment scholar Zechariah Chafee, Jr., that his preference for a test based on the meaning of the speaker's statement rather than the predicted consequences of the utterance or the objectives of the speaker does not follow ineluctably from his insistence that the way to understand the freedom of speech is to ask what speech is essential to creating majoritarian government authority.[20] Were it not for predictable abuses in administration, he told Chafee, "[t]he chance that the State would lose any valuable opinion by suppressing those whose purpose was to produce a violation of law, while they kept on the safe side of counselling it, seems to me much too thin for practical estimate."[21] So the practicalities of administration and proof did matter to Hand, but only because they have a bearing on identifying which speech serves the function of facilitating majority rule.

One could disagree with Hand's judgment regarding which categories of speech serve the function of constituting democratic authority and still believe he was asking the correct question. For example, Dr. Martin Luther King's call in his historic *Letter From Birmingham Jail* for the violation of demonstrably unjust racial segregation ordinances, to be undertaken openly in the spirit of peaceful protest and with no effort to evade punishment, would seem to qualify as the counseling of violation of law but also as hostile criticism that constitutes a legitimate test for a regime that claims to be based on popular sovereignty.[22] Perhaps under his own theoretical rationale Judge Hand needed to subdivide and treat differently various calls for the violation

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19. *Id.*

20. *See* Gunther, *supra* note 5, at 765.

21. *Id.* at 766.

22. Martin Luther King, Jr., *Letter From Birmingham Jail* (1963), *reprinted in* 26 U.C. DAVIS L. REV. 835, 837–41 (1993).

of law, something he failed to do in the *Masses* opinion. Even were that so, his underlying theory would not be discredited.

There is reason to believe that Hand's focus on how democratic authority is constituted derived from his reading of a book, *The Promise of American Life*, written by his good friend and New Hampshire summer neighbor, Herbert Croly.[23] That book, published in 1909, created a buzz among intellectually-inclined Progressives.[24] Hand loved it, spent many hours and letters discussing it with Croly, and did all he could to get others, including Theodore Roosevelt, to read it.[25] Roosevelt's third-party Bull Moose presidential campaign in 1912 drew upon several of Croly's ideas.[26]

One thing a twenty-first century reader of the book is bound to find striking is the degree to which Croly integrates his understanding of the rights and duties of individual citizens into the quest for a collective democratic spirit. Much of the book is devoted to unpacking the idea of popular sovereignty.[27] Croly maintains that a certain kind of collective will is integral to the concept: "The People are not Sovereign as individuals. They are not Sovereign in reason and morals even when united into a majority. They become Sovereign only in so far as they succeed in reaching and expressing a collective purpose."[28]

He also recognizes that forging and sustaining such a collective purpose is an ongoing challenge: "Undesirable and inadequate forms of democracy always seek to dispense in one way or another with this tedious process of achieving a morally authoritative Sovereign will."[29] Croly is not as clear as he needs to be about how a large, diverse population spread out over a continent can have a collective purpose, but he appears to accord major roles to trust, fair procedure, national identity, and moral aspiration. He invokes a duty "of dealing towards one's fellow-countrymen in good faith, so that

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23. Marc Winerman & William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295, 312–13 (2013).

24. *See* David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 978–79 (1996) ("[The Promise of American Life] was widely praised by . . . progressive intellectuals . . . ."); *see also* CHARLES FORCEY, THE CROSSROADS OF LIBERALISM CROLY, WEYL, LIPPMANN, AND THE PROGRESSIVE ERA 1900–1925, at 121 (1961) ("[The Promise of American Life was] a significant part of the progressive movement.").

25. *See* GUNTHER, *supra* note 11, at 195–97.

26. *Id.* at 190–202.

27. *See* HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 84–86, 176–78, 223–24, 265–66, 269–70, 279–81 (1965).

28. *Id.* at 280.

29. *Id.* at 281.

differences of interest, of conviction, and of moral purpose can be made the agency of a better understanding and a firmer loyalty."[30]

More than biographical details about their friendship suggests that Hand was influenced by Croly. In an article he published in the *Harvard Law Review* the year before he wrote the *Masses* opinion (and seven years after he read and touted *The Promise of American Life*), Hand discussed with unmistakably Crolyesque resonance how law relates to collective will:

> The law must have an authority supreme over the will of the individual, and such an authority can arise only from a background of social acquiescence, which gives it the voice of indefinitely greater numbers than those of its expositors. Thus, the law surpasses the deliverances of even the most exalted of its prophets; the momentum of its composite will alone makes it effective to coerce the individual and reconciles him to his subserviency.[31]

Because law is at bottom a manifestation of the collective will, "it must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation."[32]

Nevertheless,

> It is not as the priests of a completed revelation that the living successors of past lawmakers can most truly show their reverence or continue the traditions which they affect to regard. . . . Only as an articulate organ of the half-understood aspirations of living men, constantly recasting and adapting existing forms, bringing to the high light of expression the dumb impulses of the present, can they continue in the course of the ancestors whom they revere.[33]

Legal interpretation must be dynamic as well as disciplined and deferential because

> no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. Men cannot know their own meaning till the variety of its manifestations is disclosed in its final impacts, and the full content of no design is grasped till it has got beyond its

30. *Id.* at 286. See DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 232–42 (1997), for a lucid account of how Croly's understanding of popular sovereignty bears on the freedom of speech.

31. Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 618 (1916).

32. *Id.*

33. *Id.* at 618–19.

> general formulation and become differentiated in its last incidence.[34]

Hand might as well have entitled his article "The Promise of American Law."

Perhaps Judge Hand's most revealing explanation for why he valued the freedom of speech mainly for its contribution to the enrichment of collective opinion appears in brief remarks he made in 1944, two weeks prior to D-Day, upon administering the oath of citizenship to 150,000 newly-naturalized immigrants gathered in Central Park.[35] With over a million of their fellow citizens in attendance,[36] Hand told the new Americans:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[37]

Because liberty, like law, lies in public sentiment rather than formal enactments, claimants and defenders of liberty must attend more than anything else to how public opinion is formed.

SECOND

He derives his understanding of the relationship between free speech and the creation of legitimate government authority from the common assumptions of regimes that are founded on the principle of popular sovereignty.

In *Masses* Hand invokes authority in defense of his theory but it is not the authority of judicial precedent, or a particular law-creating action, or the intentions of specific lawgivers, or what may have been the common understanding of his own political community at a particular moment in time. Rather, he invokes the authority of what is "normally" guaranteed in "countries dependent upon the free expression of opinion as the ultimate source of authority."[38] Or again, he rests his case on the authority of "the normal assumption of democratic government" and what "in normal times is a safeguard of free government."[39] In effect, his argument is that the

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34. *Id.* at 620.
35. GUNTHER, *supra* note 11, at 548.
36. *See id.*
37. LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dilliard ed., 2d ed. 1953).
38. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).
39. *Id.* at 540.

Espionage Act of 1917 and, as his subsequent correspondence makes clear even the First Amendment itself, should be interpreted with reference to what are the requisites of the general form of government to which the nation is committed.[40] In the case of the United States, that is an electoral republic of limited powers based on the principle of popular sovereignty. This understanding of the kind of authority that matters most enables Hand and those who would follow him to debate controversial questions of interpretation with a focus on vital functions, objectives, structures, and relationships, that is, features relating to the ongoing distribution of power and trust that go to the heart of whether a government should be considered a republic, with all that term implies about political responsiveness, energy, adaptation, and resilience. Notably missing from Hand's *Masses* opinion are appeals to free-standing textual language or precedent.

It is interesting that with the help of a skillful lawyer in the *Masses* case, Gilbert Roe, Hand may have derived his understanding of the proper sources of authority from James Madison, the principal author of the First Amendment. Roe was the attorney who initiated the *Masses* litigation on behalf of the magazine, seeking to enjoin the New York Postmaster's denial of mailing privileges for the August 1917 issue.[41] Earlier that year Roe had testified before Congress in opposition to passage of the Espionage Act.[42] In his testimony, he analogized the proposed law to the infamous Sedition Act of 1798.[43] He called attention to James Madison's detailed contention in his *Virginia Report* of 1800 that the Sedition Act violated the First Amendment.[44] Available records do not tell us what arguments Roe made to Judge Hand in the District Court, but in defending Hand's ruling in *Masses* before the Second Circuit, Roe's brief placed heavy emphasis on Madison's argument

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40. *See* Gunther, *supra* note 5, at 725–26, 765–66 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 8, 1920)).

41. *Masses Publ'g Co.*, 244 F. at 537.

42. *Espionage and Inference with Neutrality: Hearings on H.R. 291 Before H. Comm. on the Judiciary*, 65th Cong. 36–42, 62–63 (1917) [hereinafter *Hearings*] (statement of Gilbert E. Roe, Esq., Representative, The Free Speech League).

43. *Id.* For an account of Roe's testimony by his biographer, see ERIC B. EASTON, DEFENDING THE MASSES: A PROGRESSIVE LAWYER'S BATTLES FOR FREE SPEECH 128 (2017). Regarding Roe's testimony analogizing the Espionage Act to the Sedition Act of 1798, which provoked Madison's *Virginia Report*, see Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 351 (2003).

44. *Compare Hearings*, *supra* note 42, at 36–42, *with* JAMES MADISON, REPORT ON THE ALIEN AND SEDITION ACTS (1800), *reprinted in* WRITINGS 608 (Jack N. Rakove ed., 1999).

in the *Virginia Report*.[45] Two years later, when the Espionage Act of 1917 was under review before the United States Supreme Court in the case of *Debs v. United States*, Roe submitted an *amicus* brief which invoked Madison in similar fashion to challenge the constitutionality of the Act.[46]

If Roe did indeed construct his argument before Judge Hand the same way he tried to persuade Congress, the Second Circuit, and the Supreme Court that punishing explicit, strongly worded war criticism violates a proper understanding of the freedom of speech, it is not surprising that in his *Masses* opinion Hand would make his main source of interpretative authority the national constitutional commitment to the republican form of government founded on the principle of popular sovereignty. For that is exactly what Madison did in his *Virginia Report*, so heavily emphasized in all of Roe's various challenges to the Espionage Act.[47]

Madison famously, if not always consistently, maintained that interpretation of the Constitution should be based on the understanding of its provisions that prevailed at the state ratification conventions whose assent made the Constitution positive law, or the state legislatures whose ratifications of subsequent amendments gave those provisions constitutional status.[48] In that regard, the intentions of drafters of constitutional clauses or amendments (such as Madison himself) were legally relevant, he thought, only insofar as they informed the understandings of the ratifiers.[49] Staying true to the ratifiers is not a simple interpretative undertaking, however, given the paucity of records regarding the deliberations of the ratifying bodies, not to mention the difficulty as a general matter of determining such a thing as the collective understanding of a multi-member body, particularly about contentious questions considered by all the actors to be historically consequential. Madison appreciated the limits of textual content as a window into enactor will better than most; his *Federalist No. 37* is a succinct disquisition on the subject.[50] So it is instructive to track how he went about in the *Virginia Report* to argue that the Sedition Act of 1798 violated the First

45. *See generally* Brief of Complainant-Appellee, Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917) (No. 123).

46. *See generally* Brief of Gilbert E. Roe as Amicus Curiae, Debs v. United States, 249 U.S. 211 (1919) (No. 714).

47. *See* MADISON, *supra* note 44, at 644–58.

48. For a careful account of how in different constitutional controversies Madison treated this question of whose understanding is authoritative, see JEREMY D. BAILEY, JAMES MADISON AND CONSTITUTIONAL IMPERFECTION 150–59 (2015).

49. *See id.* at 151.

50. THE FEDERALIST NO. 37 (James Madison).

Amendment, and how much his interpretative method has in common with Judge Hand's in the *Masses* case.[51]

Madison begins his argument by asserting that the "freedom of the press" specified in the First Amendment cannot have been understood by the ratifiers to be coextensive with the English common law concept of press freedom.[52] This is because, unlike in Britain, in the United States "[t]he people, not the government, possess the absolute sovereignty."[53] A free press serves an entirely different function in the American republic from what it does in Britain, where both the crown and one branch of the legislature are hereditary rather than elective and "the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate."[54] Indeed, in Britain "[t]he representatives of the people in the legislature, are not only exempt themselves, from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive."[55] In the United States, by contrast, "the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both, being elective, are both responsible."[56] These fundamental differences between the two regimes (one of which did not qualify as a republic by his measure) in sovereignty, trust, and accountability led Madison to ask, rhetorically: "Is it not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated?"[57]

Then, after sketching the political pressures and deliberations that led to the decision to amend the Constitution by adding a Bill of Rights including the First Amendment, Madison makes the following intriguing observation about the proper sources of authority:

> But the question does not turn either on the wisdom of the Constitution or on the policy which gave rise to its particular organization. It turns on the actual meaning of the instrument; by which it has appeared, that a power over the press is clearly excluded, from the number of powers delegated to the federal government.[58]

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51. MADISON, *supra* note 44, at 608–662.
52. MADISON, *supra* note 44, at 644.
53. *Id.* at 645.
54. *Id.* at 645–46.
55. *Id.* at 645.
56. *Id.* at 646.
57. *Id.*
58. *Id.* at 651.

Some interpreters might think that the history, both outdoors and indoors, of adoption might be a key to discerning "actual meaning," but Madison quickly makes clear that for him actual meaning is to be found in the structure of accountability manifested in the document.

We know this in part by the way he describes the rights and—importantly—the duties that are "secured"[59] (not created) by the First Amendment. He accords equal status in his analysis to "the freedom of the press,"[60] "th[e] right of freely examining public characters and measures, and of . . . communication . . . thereon,"[61] and "the right of electing the members of the government,"[62] despite the fact that only the first right appears in the text of the Amendment. He never discusses the meaning of "the freedom of speech." Furthermore, his framing the interpretative inquiry in terms of delegated and reserved powers signals Madison's premise that for him the First Amendment is principally about popular sovereignty and limited, accountable government, not free-standing rights as such. It is about the functioning of republican government. Consequently, it is to be interpreted, he strongly implies, by determining which understandings of rights and duties are most consonant with the premises, procedures, and objectives of republican government. His search for "actual meaning" centers on the effort to understand the structures, relationships, responsibilities, and purposes enacted by the constitutional text.

Madison next sets out in the *Virginia Report* how the Constitution itself, including as amended in 1791, assumes that the officers of government "may not discharge their trusts," that when that happens "they should be brought into contempt or disrepute," that such an accountability generates "the duty as well as the right of intelligent and faithful citizens" to control miscreant officials "by the censorship of the public opinion," so as to "promote a remedy according to the rules of the Constitution," to which end free elections serve as chief among "the great remedial rights of the people."[63] He elaborates:

> [T]he right of electing the members of the government, constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right, depends on the knowledge of the . . . merits and demerits of the candidates for public trust; and

59. *Id.* at 657–58.
60. *Id.* at 658.
61. *Id.* at 651–52, 654.
62. *Id.* at 655.
63. *Id.* at 652–53.

> on the equal freedom, consequently, of examining and discussing these merits and demerits . . . respectively.[64]

Madison believed in natural rights and based his constitutional understanding upon their existence,[65] in that respect differing mightily from Hand.[66] In matters of legal interpretation, Madison may also have accorded more significance to formal enactment in preference to organic development than did Hand, the quintessential common law judge.[67] Nevertheless, it is striking how much Hand's analysis in *Masses* replicates Madison's method of reasoning from the commitment to popular sovereignty in its republican form to establish the centrality of public opinion in the constitutional scheme. Like Madison, Hand does that specifically to determine what opportunities citizens must have to scrutinize and criticize their governors. Whether or not he was influenced by actually having read the *Virginia Report*, Hand's employment of an interpretative method not unlike Madison's is a noteworthy feature of the *Masses* opinion.

THIRD

He concludes from republican theory that the most problematic kind of regulation of speech is that which turns on the viewpoint expressed by the speaker.

In the *Masses* opinion, Hand does not elaborate upon the popular sovereignty theory he invokes. But in a fascinating letter he wrote to Professor Zechariah Chafee, Jr. twenty-nine months later, he supplemented his analysis in a way that anticipated the eventual course of modern First Amendment doctrine, particularly the singling out of "viewpoint discrimination" as the quintessential regulatory wrong:

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64. *Id.* at 655.

65. *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC 92–93 (1998); COLLEEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 83 (2009); Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245 (1990).

66. In a letter to Zechariah Chafee, Hand colorfully expressed his deflationary view of rights as serving procedural efficiency rather than fundamental entitlement. *See* Gunther, *supra* note 5, at 769–71 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 2, 1921)) ("On the whole I believe that while the justification for freedom of speech is public enlightenment, historically the 'right,'—though I join you in hating the word,—is vested in the speaker constitutionally, and our legislatures can engage ad lib. in obscurantism, provided they don't infringe on an individual who can cry out.").

67. Admittedly, it is inevitably a stretch to compare the jurisprudential commitments of a person operating in an incipient legal regime with another operating in a mature one.

> [A]ny state which professes to be controlled by public opinion, cannot take sides against any opinion except that which must express itself in the violation of law. On the contrary, it must regard all other expressions of opinion as tolerable, if not good. As soon as it does not, it inevitably assumes that one opinion may control in spite of what might become an opposite opinion. It becomes a State based upon some opinion, as against any opinion which may get itself accepted. . . .
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> If so, nothing short of counsel to violate law should be itself illegal.[68]

Although Hand has never received credit for introducing possibly both the earliest and the best defense of the now-dominant principle against viewpoint discrimination, no doubt in large part because his defense surfaced only in private correspondence, his justification is notable for its powerful theoretical grounding. The great weight that current doctrine accords to whether the applicability of a regulation of speech or its justification turns on the viewpoint advanced by the speaker usually is explained in terms of possible distortion of public debate or possible revelation of an illicit regulatory purpose. Many years ago Geoffrey Stone developed these rationales and they have figured prominently in academic inquiry ever since.[69] Recently, James Weinstein has suggested that government discrimination on the basis of viewpoint fails to accord individual speakers the equal dignity and respect to which they are entitled, either as persons or more narrowly as citizens.[70]

Hand's rationale for the principle against viewpoint discrimination has certain advantages over those proffered by Stone and his many followers or Weinstein. Their explanations depend to a considerable extent on claims regarding either what amounts to a "distortion" of public debate, or how illicit purpose can be inferred from the form a regulation takes, or what it means to treat persons equally. All of these are worthy inquiries in evaluating the exercise of state power, but they are questions that are likely to engender a wide range of answers. Hand's rationale depends on a claim that will seem to many less disputable. His premise is that popular sovereignty embodied in the republican form of government requires, above all else, that the exercise

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68. *See* Gunther, *supra* note 5, at 765 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 8, 1920)).

69. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198, 227 (1983); *see also* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 248 (2012).

70. James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 580 (2017).

of government authority be responsive to public opinion, if not reflexively and rapidly in response to shocks and fevers, at least in due course and continually.[71] Viewpoint discrimination is problematic, according to Hand, because it contravenes the republican commitment that law and policy, like human understanding, be open-ended, capable of adapting to changing conditions.[72]

Arguably the most consequential issue of First Amendment interpretation currently is whether the principle against viewpoint discrimination should be extended to create a strong presumption against forms of regulation that take into account the subject matter of the speech (*e.g.*, for whom to vote, what to buy, where to go to attend an event), the legal status of the speaker (*e.g.*, foreign national, economic entity, civil servant, prisoner, non-adult), or the function served by the speech (*e.g.*, persuasion, transmission of information, intimidation, signaling solidarity, teaching a skill). The omnibus term "content regulation" typically is employed to encompass this set of disparate variables. Taking into account subject matter, speaker identity, or speech function surely can be a means of practicing viewpoint discrimination surreptitiously. But often those variables are treated as relevant for legitimate reasons that have little to do with viewpoint discrimination. Consider labeling requirements, libel law, and punishment for fraud. Hand's distinctive justification for the principle against viewpoint discrimination has implications for whether viewpoint regulation should be conflated with content regulation in the formulation of First Amendment doctrine as a general matter, or only upon proof or good reason to suspect that in the particular instance considering content was a cover for punishing viewpoint.[73]

Compared with the other rationales for treating viewpoint discrimination to be the quintessential violation of the First Amendment, Hand's justification based on the conceptual impossibility of a republic being "a State based upon some opinion" provides less reason to lump viewpoint and content regulation together. In terms of conceptual coherence, it is not the case that a republic the laws of which make relevant the subject matter or

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71. *See* Gunther, *supra* note 5, at 765. In recent years, Dean Post has emphasized this type of responsiveness as a defining dimension of popular sovereignty, tracing the idea to Madison. *See, e.g.*, ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 10–11 (2014); *see also* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).

72. *See* Gunther, *supra* note 5, at 765.

73. This precise question is debated in an exchange between Justice Thomas, for the majority, and Justice Kagan, concurring, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). For a comprehensive analysis of that debate and its doctrinal implications see Genevieve Lakier, Reed v. Town of Gilbert, Arizona*, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233.

function of a communication or the status of the speaker thereby becomes founded upon "some opinion." True, if in a particular instance those non-viewpoint considerations are used to select for viewpoint under the table, the conceptual difficulty invoked by Hand kicks in. The State then is indeed basing its exercise of authority "upon some opinion, as against any opinion which may get itself accepted." But if the principal function of the freedom of speech is to legitimate and facilitate majority rule, as Hand maintained, it would raise a different kind of conceptual problem to leverage this occasional phenomenon of surreptitious viewpoint discrimination into a wholesale prohibition against regulators employing coverage criteria relating to subject matter, speaker identity, or speech function. Such criteria routinely have been utilized by republican regimes to make their laws closely track their policy justifications and operate no more broadly or intrusively than necessary. Both dimensions of fit, we might think, are defining features of limited, accountable government. In this respect, Hand's distinctive understanding of the freedom of speech as conceptually integrated with the project of republican governance has implications for how large the footprint of the First Amendment can be without contradicting its own *raison d'etre*.

Of course, the test that Hand derived from his republican premise has an honored place for one kind of viewpoint discrimination, punishment of a speaker for telling his audience that it is in their interest or is their duty to violate the law.[74] Why this exception to what is asserted to be a fundamental general principle? Did Hand simply find it necessary to identify *some* category of speech which is punishable so as not to appear "absolutist" in a doctrinaire sort of way? That explanation is implausible not only because Hand had the courage of his convictions, but also because even if he had felt some need to find limits to speaker freedom nothing in his analysis forced him to employ viewpoint in preference to other possible sources of limitation.

I believe that Hand derived his exception from the same foundational commitment from which he derived his general disallowance of viewpoint discrimination: popular sovereignty. Just as popular sovereignty embodies the authority of emergent, nascent, and potential majorities, it embodies the authority of currently prevailing majorities. This last type of majority must not entrench itself but must be allowed to rule, and that allowance entails a minimum respect for the authority of law on the part of all those who aspire to rule in the future by altering public opinion and gaining political control. Stirring up fierce discontent with existing rulers, policies, and practices is consistent with such respect for the authority of law, but telling persons it is in their interest or is their duty to violate the law as it currently stands is not.

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74. *See* Gunther, *supra* note 5, at 721.

Or so an adherent to Hand's understanding of dynamic popular sovereignty in a republic might believe.

In fact, Hand's exception to his general disallowance of viewpoint discrimination echoes a distinction Herbert Croly drew in *The Promise of American Life*.[75] A nation's sovereign will, according to Croly, "increases with the increasing power of its citizens to deal fairly and to feel loyally towards their fellow-countrymen."[76] Although the "responsibility and loyalty which the citizens of a democratic nation must feel towards one another is comprehensive and unmitigable," particular laws "will be welcome to some citizens and obnoxious to others."[77] Those in the latter category "have every right and should be permitted every opportunity to protest in the most vigorous and persistent manner."[78] This is how the bond essential to having a collective sovereign will is preserved in the face of conflicting interests and opinions. But the bond, according to Croly, is a two-way street: "The nation may, however, on its part demand that these protests, in order to be heeded and respected, must conform to certain conditions. They must not be carried to the point of refusing obedience to the law."[79]

Croly does not say in so many words that protests must not be carried to the point of advocating as well as practicing disobedience to law, but his argument from reciprocity would support such an extension. And Judge Hand may well have found this part of a book he knew well to be of interest, especially because its author was so focused on trying to understand and unpack the concept of popular sovereignty.

FOURTH

He does not require that speech meet a standard of decorum or reasonableness in order to be protected.

Croly found that the commitment to popular sovereignty entails a right of dissenters to "protest in the most vigorous and persistent manner" consistent with the correlative duty to obey the laws in place until they are altered by democratic means.[80] Hand outdid Croly in validating aggressive dissent. The *Masses* opinion explicitly extends its protection to "immoderate and indecent

75. *See* CROLY, *supra* note 27, at 280–88.
76. *Id.* at 285.
77. *Id.*
78. *Id.* at 285–86.
79. *Id.* at 286.
80. *Id.*

invective,"[81] arguments "trivial in substance, and violent and perverse in manner,"[82] "intemperate and inflammatory public discussion,"[83] "hostile criticism" which falls outside "the range of temperate argument,"[84] "free utterance of abuse and criticism,"[85] the arousal of "passions" by means of "[p]olitical agitation,"[86] and the writings of a magazine "which attacks with the utmost violence the draft and the war."[87]

Were Hand elaborating a free-standing individual right grounded in a conception of inviolable personhood, the freedom to express hostility in an intemperate, indecent, abusive manner might seem to be implied. But why should the freedom of speech understood as a procedure for facilitating popular sovereignty in a collective and constructive sense extend to the kind of hostile, inflammatory agitation that Hand goes out of his way almost to celebrate in *Masses*?

James Madison confronted this very question when he developed in the *Virginia Report* the argument that the commitment to popular sovereignty entails the protection of speech critical of public characters and measures. In response to the argument of defenders of the Sedition Act of 1798 that it only punished malicious writings published with the intent to defame officials, bring them into contempt or disrepute, or excite hatred against them, Madison said:

> Should it happen, as the [C]onstitution supposes it may happen, that either of these branches of the government, may not have duly discharged its trust; it is natural and proper, that according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.[88]

As discussed above, Hand may or may not have been urged by counsel in *Masses* to consult the *Virginia Report*, but whatever the truth of the matter is on that point, it is noteworthy that even a thinker so concerned about the quality of public debate as Madison should have seen a constructive role for angry, disrespectful speech in the forging of a sovereign public opinion.

John Stuart Mill also addressed the question of how decorum figures in the freedom of speech. In *On Liberty*, published in 1859, Mill expressed the

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81. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).
82. *Id.*
83. *Id.*
84. *Id.* at 539–40.
85. *Id.* at 540.
86. *Id.*
87. *Id.* at 541.
88. *See* MADISON, *supra* note 44, at 652.

view that in principle the maintenance of high standards of fairness and rationality in public debate would advance the search for progress in wide-ranging understanding.[89] (Such progress was his priority; Mill was not exploring the sources of political authority.) But then he explained how demands for discursive decency play out in practice:

> With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion . . . .[90]

When those who defend prevailing opinions resort to "unmeasured vituperation" against their opponents, they are greeted not with sanctions or criticism but rather "the praise of honest zeal and righteous indignation."[91]

This pattern of selective insistence on temperate argument led Mill to conclude that "law and authority have no business" enforcing a decorum of public disputation.[92] Mill's point about imbalance and prejudice in administration would seem to have even more purchase in Hand's political process justification for the freedom of speech than it does in Mill's justification based on general enlightenment and societal progress.

In the *Masses* opinion, Hand's pattern throughout is to mention the impropriety of any kind of decorum requirement virtually every time he describes the freedom at issue. That indicates how strongly he was committed to the proposition. However, he never explains in the least detail the basis for this view. He does say explicitly in *Masses* that the legal standard cannot properly embody a demand for a "general tenor and animus" or a "general ethos" because "[t]he tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law."[93] It is hard to imagine a decorum standard that could meet this requirement. If this concern best explains Hand's rejection of decorum as a limiting principle in free speech disputes, the *Masses* opinion anticipates Justice John Marshall Harlan's memorable dictum in *Cohen v. California*, affirming the right to use four-letter words in public: "it is largely because governmental officials cannot

89. *See* JOHN STUART MILL, ON LIBERTY 118 (David Bromwich & George Kateb eds., 2003) (1859).

90. *Id.* at 119.

91. *Id.*

92. *Id.*

93. Masses Publ'g Co. v. Patten, 244 F. 535, 542–43 (S.D.N.Y. 1917).

make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[94]

FIFTH

He assumes that sedition is never a legitimate ground for regulating speech.

Hand says in *Masses* that a finding that a magazine's writing is "subversive to authority and seditious in effect" does not constitute a sufficient basis for denying it mailing privileges.[95] Earlier in the opinion he maintains that his creative reading of the Espionage Act of 1917 is necessary to prevent the statute from providing that "every political agitation which can be shown to . . . create a seditious temper is illegal."[96] In a different paragraph he specifies that statements which "arouse a seditious disposition" without directly advocating law violation "would not be enough" to justify punishment.[97] In these three different passages rejecting sedition as a regulatory rationale, Hand can be read to anticipate the Supreme Court's landmark opinion in *New York Times Co. v. Sullivan* declaring "the central meaning of the First Amendment" to be the rejection of the very concept of seditious libel.[98]

The *Sullivan* case held that under the First Amendment speakers cannot be held liable for defaming public figures unless their factual errors are in effect deliberate.[99] That ruling transformed libel law, but as Professor Harry Kalven, Jr. explained in an article that has become a classic, the Court's reasoning was even more dramatic than its holding:

> The Court did not simply, in the face of an awkward history, definitively put to rest the status of the Sedition Act. More important, it found in the controversy over seditious libel the clue to "the central meaning of the First Amendment." The choice of language was unusually apt. The Amendment has a "central meaning"—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, "the censorial power" would be in the Government over the people and not "in the people over the Government." This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected

94. Cohen v. California, 403 U.S. 15, 25 (1971).
95. *Masses Publ'g Co.*, 244 F. at 543.
96. *Id.* at 540.
97. *Id.* at 542.
98. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).
99. *Id.* at 279–80.

> and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time.[100]

Justice William Brennan's majority opinion in *Sullivan* quoted heavily from Madison's *Virginia Report*, as did Professor Herbert Wechsler's brief on behalf of the New York Times.[101] Today, for a court to invoke Madison in a First Amendment case is hardly noteworthy.[102] But at the time of the *Masses* decision, Madison was pretty much forgotten as an authority about the freedoms of speech and press. Throughout the nineteenth century, the *Virginia Report* was utilized in debates over state sovereignty and nullification, but its discussion of the First Amendment was all but ignored. Then came Gilbert Roe.

I had occasion to ask Professor Wechsler, who for several years was my colleague on the Columbia Law faculty, whether in preparing his historic brief in the *Sullivan* case he was aware of the way Gilbert Roe had resurrected Madison's *Virginia Report* in arguing against the Espionage Act of 1917 in the *Masses* and *Debs* cases. He was.

By no means does Judge Hand deserve the credit that Gilbert Roe, Herbert Wechsler, and Justice William Brennan (or for that matter, Harry Kalven) do in the saga that led to the fundamental rejection of seditious libel as an American legal concept. In the *Masses* opinion, Hand's treatment of the modern status of seditious libel occurs only in passing and only in the form of an unexplained assumption. But Hand is part of the story in that he was the first judge to do even that much, and he proved to be on the right side of history.

SIXTH

He formulates a governing test with emphasis on how well it will function during periods of unusual public anxiety when toleration is at a low ebb and dissenters are most vulnerable to being made scapegoats.

In the same letter to Zechariah Chafee in which Hand maintained that viewpoint regulation is problematic because it is a premise of republican government that a state cannot be "based upon some opinion, as against any opinion which may get itself accepted," he observed that it is mainly in "times of excitement" when fear and prejudice are at their peak that "the freedom of

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100. Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment*,*"* 1964 SUP. CT. REV. 191, 208.

101. Brief for the Petitioner at 45, 47, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1994) (No. 39), 1963 WL 66441.

102. *E.g.*, Gravel v. United States, 408 U.S. 606, 641 (1972).

speech becomes important as an institution."[103] He told Chafee that his preference for a qualitative test extending absolute protection to all advocacy that stops short of asserting a duty or interest to violate the law was driven by his skepticism about how a more flexible test requiring judgment, prediction, or inference would be administered in periods of unusual public anxiety.[104] In a subsequent letter to Chafee he elaborated:

> I own I should prefer a qualitative formula, hard, conventional, difficult to evade. If it could become sacred by the incrustations of time and precedent it might be made to serve just a little to withhold the torrents of passion to which I suspect democracies will be found more subject than for example the whig autocracy of the 18th century.[105]

In Hand's earlier correspondence with Holmes, this theme surfaced as well. Hand spoke of the need to "moderate the storms of popular feeling"[106] and "get over the existing hysteria."[107] He lamented to Holmes that "the merry sport of Red-baiting goes on, and the pack gives tongue more and more shrilly."[108] He owned "to a sense of dismay at the increase in all the symptoms of apparent panic."[109]

Hand's priority he made clear. It is in these unusual periods—periods I have elsewhere labeled "pathological"[110]—that the freedom of speech matters most. But what exactly does that imply about how the First Amendment and other pertinent laws should be interpreted? In *Masses* and in his correspondence and academic writing during the World War I period, Hand suggested a few answers to this question.

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103. *See* Gunther, *supra* note 5, at 765–66 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 8, 1920)).

104. *Id.* at 766.

105. *Id.* at 770 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Zechariah Chafee, Jr., Professor, Harvard Law Sch. (Jan. 2, 1921)).

106. *Id.* at 759 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Apr. 1, 1919)).

107. *Id.* at 760 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Nov. 25, 1919)).

108. *Id.* at 761 (quoting Letter from Learned Hand, Judge, U.S. Dist. Court for the S. Dist. of N.Y., to Oliver Wendell Holmes, Jr., Assoc. Justice, Supreme Court of the U.S. (Nov. 25, 1919)).

109. *Id.*

110. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) (stating that "pathological period" refers to "equip[ping] the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically").

One way for law to push against dangerous, fear-driven, hopefully passing passions is for doctrinal formulations to reduce as much as is practically possible the role of discretion, judgment, and prediction in the application of laws to particular parties. That is exactly what Hand tried to do with his *Masses* test. In free speech disputes since then, courts for the most part seem to have taken his point by opting to employ somewhat crude, formalistic, all-encompassing doctrinal concepts such as content discrimination and prior restraint, partly it would appear in order to make adjudication relatively mechanical.

Reducing judicial discretion by means of doctrinal formalism might prove to be efficacious to a degree, but recall that Hand believed firmly that "liberty lies in the hearts of men and women" rather than in legal prescription or doctrine.[111] This might suggest that the educative role of the First Amendment ought to be emphasized. When Madison managed to overcome his skepticism about the efficacy of bills of rights, which he termed "parchment barriers,"[112] one of his rationales was that a listing of rights could have a salutary effect by influencing public opinion or providing a standard around which ordinary citizens could rally in moments of official transgression.[113]

How can the freedom of speech be made more educational? One way is by having articulate, inspiring expositors on the order of Holmes,[114] Louis Brandeis,[115] and Justice Robert Jackson.[116] Another is by construing it so as to keep doctrinal formulations resonant with the most noble purposes and instructive object lessons that over the years gave rise to its pre-eminence among the various claims of liberty. In this respect, functional rather than formalistic criteria for determining the scope and meaning of the freedom of speech would seem to be indicated. The ways that both Hand and Madison read the First Amendment to be integral to the project of realizing and sustaining republican government is an example.

However, functional analysis requires sophisticated understanding and wise judgment. In the wrong hands, sophisticated understanding can produce complicated doctrinal formulations—creative extensions of coverage, multi-factor tests, differential levels of scrutiny—that mask partisan motivations, enable discriminatory application, and prove counter-productive educationally. It is the challenge for wise judgment to distill an appreciation

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111. HAND, *supra* note 37, at 190.

112. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* WRITINGS, *supra* note 44, at 420.

113. *See id.* at 421–23.

114. *See, e.g.*, United States v. Schwimmer, 279 U.S. 644, 653–55 (1929) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

115. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring).

116. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 625–42 (1943).

of functional complexity into operational principles and standards that are intelligible, intuitively just, and also relatively prescriptive so as to cabin discretion in application. Equipping the freedom of speech to do service in the worst of times is a worthy but also challenging undertaking, as Judge Hand appreciated as well as anyone. His *Masses* opinion, both the test and the rationale, was a start, but only that.

SEVENTH

He acknowledges that serious harms might follow from the speech he nevertheless rules cannot be prohibited.

Possibly influenced by John Stuart Mill's famous thesis in *On Liberty* that only harm can justify restricting individual freedom, reinforced by the ascendency in First Amendment law of Holmes's clear and present danger test, the common tendency has been to justify the protection of free speech by minimizing the harm that it causes or contending that the harm can be mitigated or undone by "more speech."[117] This is the sticks-and-stones theory of the First Amendment.[118]

Describing the strident writings and satirical cartoons at issue in the case, Hand in *Masses* goes out of his way to eschew this rationale:

> [P]ublications of this kind enervate public feeling at home which is their chief purpose, and encourage the success of the enemies of the United States abroad, to which they are generally indifferent. Dissension within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects of such agitation upon the success of the national project . . . .
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> . . . .
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> The defendant's position is that to arouse discontent and disaffection among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must suffer and die, will be more prone to

117. *See Whitney*, 274 U.S. at 377.

118. Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 206 (1994).

> insubordination than those who have faith in the cause and acquiesce in the means.[119]

His ruling was that even though the speech at issue was likely to prove very harmful to the war effort in a variety of ways, it could not be made the basis for criminal prosecution or the denial of access to the mails because it belongs to a category of speech, the freedom of which is integral to creating the very governmental authority that was being invoked to regulate it.[120]

Actually, Hand's treatment of harm in *Masses* is not really antithetical to Mill's analysis in *On Liberty*. Mill never maintained as a matter of principle that proof of harm is always sufficient to justify the restriction of individual liberty. He states his famous Harm Principle to be:

> [T]hat the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else.[121]

Proof of harm is *necessary* in Mill's scheme to justify the restriction of individual liberty but not always *sufficient* to do so. And lest there be any doubt about the importance to Mill of this distinction between the necessary and the sufficient, in Chapter Two of *On Liberty*, entitled "Of the Liberty of Thought and Discussion," he never once addresses the question of when and how speech can cause harm and what that means for his analysis.[122] That is because, as Mill specifies immediately preceding that chapter, he is arguing for "absolute freedom of opinion and sentiment on all subjects" including the "liberty of expressing and publishing opinions."[123] He contends that individuals must be permitted to circulate even concededly harmful

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119. Masses Publ'g Co. v. Patten, 244 F. 535, 539 (S.D.N.Y. 1917).
120. *Id.*
121. MILL, *supra* note 89, at 80.
122. *Id.* at 86–120.
123. *Id.* at 82.

opinions.[124] Regarding thought and discussion, proving harm is not sufficient to warrant restriction.

In Chapter Three of *On Liberty*, entitled "Of Individuality, as One of the Elements of Well-Being," Mill does indeed discuss harm with his well-known example of a speaker telling "an excited mob assembled before the house of a corn-dealer" that "corn-dealers are starvers of the poor."[125] That speaker, says Mill, "may justly incur punishment," even though the same statement "ought to be unmolested when simply circulated through the press."[126] We might be tempted to interpret this passage to be making a distinction that turns on the likelihood that harm will follow from the speech, with speaker physical presence, crowd agitation, and victim proximity all factors that increase the odds. If that were Mill's point, then he would be saying that a sufficient probability of sufficiently serious harm justifies the punishment of speech that would otherwise be protected by his liberty theory. Were that true, Mill would differ from Hand regarding the relevance of harm to the regulation of speech.

I do not believe that to be the proper interpretation of Mill's corn-dealer example, however. First, the example appears in Chapter Three, where the subject is individuality as an element of well-being, not Chapter Two, where the subject is the liberty of thought and discussion.[127] This suggests that with the corn-dealer example Mill is exploring the relation of harm to the regulation of a broader range of conduct than thought and discussion; he is exploring the relation of harm to individuality more generally. And there can be no doubt that with regard to liberty generally, excluding only the liberty of thought and discussion, Mill does indeed maintain that proof of the requisite harm will often justify limiting the liberty.[128]

Interpreting the excited mob version of the corn-dealer example to be not about thought and discussion, but rather about another form of liberty, one that can be restricted on the basis of harm, is supported by the way Mill introduces the example: "No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act."[129]

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124. *Id.* at 118–20.
125. *Id.* at 121.
126. *Id.*
127. *Id.* at 121–38, 86–120.
128. *Id.* at 80.
129. *Id.* at 121.

From this passage we know that Mill believes actions are to be treated differently from opinions, and that opinions which constitute positive instigations are to be treated differently from other opinions. Whether we label positive instigations "opinions" or "actions" is beside the point. In either event, they "lose their immunity" from the "absolute protection" accorded by Mill to "the liberty of thought and discussion," the subject of Chapter Two, where he never discusses harm because it is irrelevant.[130] For all activities other than thought and discussion—actions, positive instigations, trade, competition to secure scarce positions—harm is indeed relevant. It is a necessary and sometimes sufficient basis for restricting liberty, depending on the balance of considerations that bear on collective and individual well-being.

The distinction Mill perceives between thought and discussion and all other liberties is why he calls for different outcomes for his two corn-dealer examples, treating stirring up an excited mob in person as a fundamentally different activity from circulating the same message through the press.[131] It is also why Mill is at such pains in Chapter Two, the longest chapter of *On Liberty*, to demonstrate the supreme importance of thought and discussion for human flourishing and progress in understanding.[132] That supreme importance he does not claim for the full range of activities we commonly call "speech," "expression," or "communication," as his mob-inciting example and treatment of positive instigation makes clear.[133]

Frederick Schauer, who has written perceptively about speech and harm on numerous occasions and from different perspectives,[134] confirms this reading of Mill and explains why it matters to First Amendment doctrine:

> If speech is understood as protected because it does not create harm in the relevant sense, such an understanding may . . . foster the view that only harmless speech is protected. And if speech is protected only because and when it is harmless . . . it may be too easy to think of harmlessness as a necessary condition for protection, and thus of harmfulness as a sufficient condition for regulation. But if instead we recognize, as I believe Mill did, that the liberty of thought and discussion protects communications that may well be harmful in

130. *Id.* at 121, 86–120.

131. *See id.* at 121.

132. *See id.* at 90–91.

133. For an in-depth discussion of Mill's corn-dealer example see C.L. TEN, MILL ON LIBERTY 133–36 (1980).

134. *See, e.g.*, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 81–111; Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 635–53 (1993).

> any plausible sense of that term, and that it does so for reasons extrinsic to the harm and anti-paternalism principles, what emerges may be the robust free speech principle to which Mill plainly subscribed, and in the service of which Mill and *On Liberty* remain so important today.[135]

Just like Mill, Hand in *Masses* identifies a subset of human activity, speech he calls "hostile criticism," which plays such an indispensable role in constituting political authority in a republic that it must be protected without regard to what harm it might cause.[136] In *Areopagitica*, his classic essay against the licensing of printing, the seventeenth-century poet John Milton makes a similar move regarding the speech he considers indispensable not only to republican governance—Milton was a fierce critic of monarchy and a devoted republican—but also to the discharge of duties owed to God.[137] Madison maintains in the *Virginia Report* that the federal government has no authority whatsoever to regulate seditious speech no matter the harm.[138] The Supreme Court in *New York Times Co. v. Sullivan* held that defamed public officials can recover damages against their critics only by proving that the harmful statements were published with knowledge of their falsity or reckless disregard for the truth,[139] which means that good faith criticism of government is absolutely protected no matter how false and harmful it is.[140] It should be noted that in none of these instances of ruling out the relevance of harm is the exclusion comprehensive. Rather, harm is considered insufficient to warrant regulation as an exceptional matter due to the supervening importance or fundamentality of the subset of speech at issue.

Thus, Hand's holding in *Masses* that certain speech cannot be prohibited even when it is likely to cause specific, material harm does not mark him as

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135. Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's* On Liberty, 39 CAP. U. L. REV. 571, 592 (2011).

136. Masses Publ'g Co. v. Patten, 244 F. 535, 539–40 (S.D.N.Y. 1917).

137. *See* Vincent Blasi, *A Reader's Guide to John Milton's* Areopagitica, *The Foundational Essay of the First Amendment Tradition*, 2017 SUP. CT. REV. 273, 296–98.

138. *See* MADISON, *supra* note 44, at 650.

139. 376 U.S. 254, 279–80 (1964).

140. Whether Holmes can be added to this list depends upon whether he understood his danger test to provide that proof of the specified imminent type of harm is without exception sufficient to justify the regulation of speech. His formulation of the danger test in seemingly unqualified and comprehensive terms would appear to suggest that. On the other hand, when in his *Abrams* dissent he opines that seditious libel cannot be a basis for regulating speech, that "Congress certainly cannot forbid all effort to change the mind of the country," and that a patriot cannot be made to answer for criticizing war production priorities, Holmes might be implying that even when those forms of speech threaten to cause imminent harm they are nevertheless protected under the First Amendment. *See* Abrams v. United States, 250 U.S. 616, 627–28, 630 (1919) (Holmes, J., dissenting); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 44. As always, definitive interpretations of Holmes are elusive.

an isolated outlier; he has good company on this point. Nevertheless, it is noteworthy that in determining the bounds of regulatory authority over speech, so careful, balanced, and thoughtful a judge would deny the relevance of a type of harm thought by millions, including himself, to be a true threat to the nation, all in the name of honoring the commitment to republican government.

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These seven ideas demonstrate, I submit, how much more the Learned Hand of the *Masses* opinion has to offer than his "interest or duty" test, whatever its merits.