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An Accelerated History of Expressive Freedom

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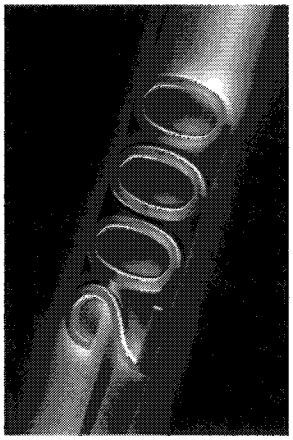

My purpose in writing this article is to examine the growth of Anglo-American speech rights over the past millennium. Since the best measure of expressive freedom is the freedom to criticize one's government, I will focus on the regulation of *seditious* speech in an accelerated tour of history, from the printing press to the present day.

In England, statutes criminalizing utterances critical of the government date from the 13th century. The invention of printing in the 15th century magnified the danger of such opinions, and led to harsher and more pervasive controls on seditious speech. In 1579, the right hand of an author was chopped off as punishment for his written attack on the proposed marriage between Queen Elizabeth and the Duke of Anjou. In 1603, at the end of Elizabeth's reign, a printer was hanged, drawn and quartered for publishing a book that opposed the ascension of James I to the throne. In 1683, Algernon Sidney was beheaded for suggesting – in an unpublished treatise discovered in his study – that the king was accountable to the people.

Such punishment was justified on two complementary grounds: affairs of state were no business of the people, and self-preservation required the government to suppress any voice of dissent. In 1620, for example, James I issued a proclamation, asserting that political issues "are no Theames, or subjects fit for vulgar persons, or common meetings."[1]

Presiding over a seditious libel trial in 1704, Chief Justice Holt instructed the jury: "If [speakers] should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it," *The Queen v. Tutchin*, 14 Howell's State Trials 1095, 1128 (Q.B. 1704). In suppressing dissent, the English crown and Parliament employed three principal devices: the doctrine of constructive treason, the licensing of the press and the law of seditious libel.

Constructive Treason

The Statute of Treasons, enacted in 1350, made it a crime to "compass or imagine" the king's death. Conviction under this statute required some overt act as a step toward toppling the king. Expressing a dissident opinion did not violate the statute. However, starting with the reign of Henry VIII and continuing late into the 17th century, the definition of treason came to embrace mere *utterances* critical of the government. This dramatic departure from the medieval definition, authorizing conviction and death for a purely verbal crime, became known as "constructive" treason.

A notorious example of constructive treason is the prosecution of John Twyn, tried in 1663 for publishing a book that postulated a right of revolution on the grounds that the king was accountable to the people. Twyn was sentenced to be hanged, cut down while still alive, and then emasculated, disemboweled, quartered and beheaded – the standard punishment for treason.

After executing a teenager in 1720 for printing a dissident pamphlet, the crown finally abandoned the use of constructive treason. By then, Parliament had imposed procedural obstacles to such prosecutions, and juries, viewing the death penalty as too drastic a punishment, had grown reluctant to convict.

Licensing of the Press

In addition to constructive treason, the English government employed a second method in controlling the spread of dangerous ideas: the licensing of the press. Spurred by the invention of printing in the late 15th century, the English crown asserted the power to impose editorial control over all printed matter. Established initially as a right of royal prerogative, this licensing system criminalized the publication of any work that had not received advance approval by agents of the crown.

From the middle of the 16th century through the end of the 17th century, the licensing system served as a powerful clamp on dissent: It afforded the crown prepublication censorship and easy prosecution of offenders. The penalties for unlicensed printing included confiscation of all goods and chattels, imposition of fines and imprisonment at the will of the crown, and the posting of bonds to be forfeited upon further misbehavior. These penalties were designed in part to exert so much pressure upon printers that they could be tempted to assist the crown and disclose the whereabouts of dissident authors. Licensing finally ceased in 1694, but not from any nascent commitment to free speech. Instead, as the number of printers and presses grew, the system became unwieldy, ineffective and conducive to bribery.

The Doctrine of Seditious Libel

By 1769, with licensing a thing of the past, Sir William Blackstone observed, "The liberty of the press is indeed essential to the nature of a free state [–] but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."[2] Freedom from prior restraint was cold comfort for authors and printers, because post-publication punishment (even with the demise of constructive treason) could be so easily effected through yet another device: the doctrine of seditious libel.

Closely akin to constructive treason, and featuring penalties nearly as severe, the doctrine of seditious libel was broad enough to criminalize any comment critical of the government. Born in the Star Chamber in 1606, the doctrine did not die when that tribunal was abolished in 1641. Through the intervention of Charles II, seditious libel was declared a common law offense in 1680, and thus within the jurisdiction of the King's Bench, *The King v. Harris*, 7 Cobbett's State Trials 925, 929-30 (K.B. 1680) (Scroggs, L.C.J.). After 1689, concomitant prosecutions were carried out by Parliament itself, as both the Lords and the Commons vigorously pursued any publication critical of their actions.

As a creature of the Star Chamber, seditious libel was not initially subject to the procedural restrictions that prevailed in the common law courts: indictment and trial by jury. When the Star Chamber was abolished and seditious libel actions moved to the common law courts, the crown pushed for procedural innovations that would limit the power of juries to acquit. One such method was to bypass the grand jury, authorizing the attorney general to proceed on information, rather than indictment. Another method, even more significant, was to limit the range of issues that juries were permitted to decide.

In 1680, at the crown's behest, Chief Justice Scroggs established that juries in seditious libel prosecutions were permitted to decide only one issue: whether the defendant had actually published the remark. The judges reserved for themselves, as a question of law, whether the remark constituted seditious libel. Truth was no defense, and malicious intent to cause sedition did not need to be proven. In this way, the King's Bench perpetuated the crown's prerogative power over seditious libel, much in the tradition of the infamous Star Chamber.

In contrast to the hundreds of seditious libel trials conducted in England during the 17th and 18th centuries, the number in prerevolutionary America was insignificant, probably not more than half a dozen. Among these, the most famous was the trial of John Peter Zenger in 1735.

Zenger, a printer, was prosecuted for publishing a series of attacks on the British colonial governor of New York. Andrew Hamilton, Zenger's lawyer, pressed for procedural changes that would give juries greater power to acquit. The chief justice repudiated Hamilton's arguments as inconsistent with prevailing law, but the jury found them compelling and, after

deliberating for only a few minutes, returned a general verdict of not guilty – prompting shouts of celebration in the crowded courtroom. The *Zenger* trial was the last of its kind under the royal judges; on the revolution's eve, grand juries thwarted such prosecutions by refusing to indict. However, this did not mean that political dissent went unpunished. Imitating Parliament, the colonial assemblies took to prosecuting and imprisoning those who spoke out against them. Even after the revolution, seditious libel remained a powerful tool for suppressing dissent – but by then, it was used by the states to punish loyalist expression.

The First Amendment

Unknown – and unknowable – is the extent to which the First Amendment was intended to depart from English law in affording protection for utterances critical of the government. This is because there were two starkly different realities that prevailed at the time: established law was harshly repressive, but the behavior of the press was remarkably free. Since those who framed and ratified the First Amendment said virtually nothing about the specific freedoms it would afford, we are left to wonder: Did they choose to protect the broad liberty actually practiced by the press or the sharply truncated privilege embodied in existing law?

Any answer to this question must account for the long shadow cast by the Sedition Act of 1798. Enacted only seven years after the First Amendment's ratification, the Sedition Act criminalized opinions critical of Congress or the president. If Congress could pass such a law, if prominent founders like Alexander Hamilton and William Paterson could support it and if the federal courts could unanimously uphold it, just what *did* the First Amendment mean in providing that, "Congress shall make no law ... abridging the freedom of speech, or of the press"?

The answer likely lies in the cramped legal conception of expressive freedom that prevailed at that time. In the 18th century, the liberty of speech and the liberty of the press had far narrower meanings than they do today. The former specified a purely parliamentary privilege, attached only to legislative debates. The latter, famously articulated by Blackstone, was confined to freedom from the prior restraint of a licensor. That the framers and ratifiers of the First Amendment barely bothered to define their terms would suggest a continuing adherence to these norms, because departing from them would have required extensive debate.

It was only after the First Amendment's ratification that efforts to specify the scope of its protection found their way into print. It is in the writings of James Madison, Tunis Wortman and George Hay that the seeds were sown for a modern, libertarian conception of free speech and press, one that transcended Blackstone to include a broad impunity for political dissent. But this libertarian ideal – which did not fully surface until 1800 – cannot plausibly be attributed to those who wrought the First Amendment. By word and deed, the founders evinced a conception of expressive freedom that was narrowly Blackstonian.

In 1787, James Wilson observed that, "What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government."[3] James Madison, who later became the most prominent exponent of the libertarian view, deferred to Blackstone in the midst of the founding. At the Virginia ratifying convention in 1788, he stood by in silence while his closest political supporter defined freedom of the press as the absence of a licensing act.

Even Thomas Jefferson, though he pardoned political allies prosecuted under the Sedition Act, proved all too willing to seek post-publication punishment of his political antagonists. Jefferson's commitment to press freedom was limited even further by his vision of federalism. He wrote that, although Congress might be powerless to regulate speech, the States enjoyed broad authority to punish "the overwhelming torrent of slander" unleashed by the American press.[4]

Thus, notwithstanding the enormous freedom actually practiced by the press, the libertarian view of expressive freedom – which repudiated the whole notion that government may punish its critics – remained a purely theoretical ideal, never attaining the force of law until midway through the 20th century. As a consequence, dissenting voices in the 19th century remained legally vulnerable to harsh suppression. The most dramatic examples involved punishment of anti-slavery speech in the South and crackdowns on anti-war speech in the North.

In the pre-Civil War South, state legislatures enacted ferocious punishments for anti-slavery speech. In the book *Fettered Freedom: Civil Liberties and the Slavery Controversy*, Russell B. Nye states that, in 1849, Virginia law imposed a one-year jail term and a $500 fine for saying or writing "that owners have no right in the property of slaves." In North Carolina, the punishment for this speech crime was a lashing and one year in jail for the first offense, and death for the second offense. Russell Nye also states that, in Louisiana, the penalty for conversation "having a tendency to promote discontent among free colored people, or insubordination among slaves," ranged from 21 years of hard labor to death.

In the North, President Lincoln's administration vigorously suppressed calls for a peace treaty with the South and an end to the Civil War. The most prominent target of this censorship was Clement L. Vallandigham, a Democratic critic of Lincoln's war policy who was campaigning for Ohio's governorship. Four days after giving an anti-war speech, Vallandigham was arrested in the middle of the night by a company of 150 Union soldiers, acting under orders from General Ambrose Burnside that were later ratified by Lincoln. Denied entry to Vallandigham's home, the soldiers broke down his door, seized him in his bedroom and transported him to prison in Cincinnati.

Brought before a military commission, he was tried and convicted "of having expressed sympathy" for the enemy and

having uttered "disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government [to suppress] an unlawful rebellion."[5] For his punishment, Lincoln chose banishment. Vallandigham was delivered by a detachment of Union cavalry, under a flag of truce, to a Confederate outpost in Tennessee. When the *Chicago Times* published an angry protest, its editorial offices were seized by Union troops.

The decades spanning the late 19th and early 20th centuries featured a new chorus of dissenting voices – socialists, feminists, anarchists, and radical labor groups like the Industrial Workers of the World – voices that were targeted for official suppression. Throughout this period and deep into the 20th century, government officials sought to punish such provocative sentiments as advocating that women have access to birth control, opposing U.S. involvement in World War I, calling for "class struggle" and "revolutionary mass action," belonging to the Communist Party, waving a red flag, and burning the American flag.

In response to these prosecutions, the Supreme Court developed a constitutional standard that, starting with the "clear and present danger" test and culminating in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), grew ever more protective of speech. While originally permitting punishment for mere opposition to government policies, the court subsequently rejected criminal liability even for speech that had a "dangerous tendency" to start an insurrection. Finally, in *Brandenburg*, the court established an even more protective standard, permitting punishment only for incitement that is both intended and likely to produce "imminent lawless action."

Thus, the modern court has ruled that Julian Bond could not be denied a seat in the Georgia House of Representatives for expressing "sympathy with, and support [for] the men in this country who are unwilling to respond to the military draft," *Bond v. Floyd*, 385 U.S. 116, 120 (1966); and that an anti-war activist could not be prosecuted for saying, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," *Watts v. United States*, 394 U.S. 705, 706 (1969). Bearing in mind that Algernon Sidney was beheaded in 1683 for merely *suggesting* that the king was accountable to the people, these decisions indicate just how far our law has evolved in affording protection for dissident speech.

Endnotes

1. Thomas L. Tedford, *Freedom of Speech in the United States*, vol. 13, 1985.

2. Sir William Blackstone, *Commentaries on the Laws of England*, *151-52, vol. 4 (London, Strahan & Cadell 1783) (emphasis is original).

3. *The Documentary History of the Ratification of the Constitution*, 455, vol. 2 (Merrill Jensen ed., 1976).

4. *The Writings of Thomas Jefferson*, 51, vol. 11 (Andrew A. Lipscomb ed., 1905) (letter to Abigail Adams, Sept. 11, 1804).

5. James M. McPherson, *Battle Cry of Freedom: The Civil War Era*, 597 (1988).

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