THE STATE OF FREE SPEECH DOCTRINE IN 1917

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Contrary to the assumption of most legal scholars and judges since 1917, there was substantial adjudication of free speech issues throughout the state and federal judicial systems in the late nineteenth and early twentieth centuries.[1] The decisions overwhelmingly rejected free speech claims. No court was more hostile to them than the United States Supreme Court.[2] The judicial hostility extended beyond any individual issue or litigant. Some of the most restrictive decisions were written by Oliver Wendell Holmes, Jr., first as a judge on the Supreme Judicial Court of Massachusetts and subsequently as a justice on the United States Supreme Court.[3] The most common judicial analysis allowed the punishment of speech for its alleged "bad tendency."[4] A few decisions, mostly in the state courts, protected free speech, typically by limiting or rejecting the bad tendency approach.[5] Decisions under the Espionage Act of 1917, passed by Congress soon after the United States entered World War I, extended the prewar restrictive tradition of reliance on the bad tendency of speech to deny free speech claims.[6] But, as before the war, a few decisions limited or rejected evaluating the legality of speech by its alleged bad tendency. Judge Learned Hand's decision in *Masses Publishing Company v. Patten* was one of those few decisions.[7] Unsurprisingly, the Second Circuit, relying on the familiar bad tendency approach, promptly reversed Hand.[8]

The bad tendency test derived from Sir William Blackstone's famous *Commentaries on the Laws of England*, which were published soon before the American Revolution and were enormously influential in the United

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1. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 129–76 (Arthur McEvoy & Christopher Tomlins eds., Cambridge Univ. Press 1997) (challenging this assumption).
2. *Id.* at 131.
3. *Id.* at 132–34, 140–41, 153, 166.
4. *Id.* at 132–46.
5. *Id.* at 145–46.
6. *Id.* at 255–58.
7. 244 F. 535 (S.D.N.Y. 1917); RABBAN, *supra* note 1, at 261–65.
8. Masses Publ'g Co. v. Patten, 246 F. 24, 38–39 (2d Cir. 1917).

States throughout the nineteenth century.[9] Blackstone invoked it immediately after his famous definition of liberty of the press as "laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published."[10] He added that

> to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty.[11]

In his discussion of criminal libels, Blackstone referred to their bad tendency. "The direct tendency of these libels," he wrote, "is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed."[12]

Hundreds of state and federal courts relied on the bad tendency of expression in denying free speech claims, often citing Blackstone. Holmes's opinion for eight members of the Supreme Court in *Patterson v. Colorado*[13] is a good example. Patterson was a Democratic Senator from Colorado who also published and edited newspapers in the state. He published articles, editorials, and cartoons ridiculing Republican members of the state supreme court for invalidating a referendum that amended the state constitution to provide home rule to Denver, a Democratic stronghold.[14] "Their common theme was that the judges essentially acted as the tools of the utility corporations, which controlled the Republican Party. The attorney general of Colorado brought criminal contempt proceedings against Patterson on behalf of the state supreme court."[15] The United States Supreme Court upheld Patterson's contempt conviction. In rejecting his claim that the conviction violated his First Amendment rights, Holmes cited Blackstone and used the bad tendency approach.[16] Observing that Blackstone applied bad tendency to

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9. William G. Hammond, *Preface to the Eighth Edition* of 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at iii–iv, viii (William G. Hammond ed., San Francisco, Bancroft–Whitney Co., 8th ed. 1890) (1778); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 16, 88–89, 98, 145 (1973).

10. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 189 (William G. Hammond ed., San Francisco, Bancroft–Whitney Co., 8th ed. 1890) (1778).

11. *Id.* at 189–90.

12. *Id.* at 187.

13. 205 U.S. 454 (1907).

14. RABBAN, *supra* note 1, at 132.

15. *Id.*

16. *Patterson*, 205 U.S. at 462.

criminal libels, Holmes asserted that it "applies yet more . . . to contempts" because they "tend to obstruct the administration of justice."[17]

United States ex rel. Turner v. Williams, a unanimous Supreme Court decision upholding the deportation of an English anarchist under the Alien Immigration Law of 1903, illustrates the use of bad tendency in a different context.[18] Passed soon after President William McKinley was assassinated by an anarchist, the law excluded from the United States "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government . . . or the assassination of public officials."[19] Clarence Darrow and Edgar Lee Masters, who represented the English anarchist, argued that arresting him for the contents of his lecture in the United States violated his First Amendment right to free speech.[20] Asserting that anarchists "are distinguished by a definite creed and not by the *means* proposed to propagate the creed,"[21] they stressed that no evidence against their client indicated that he personally urged the use of force or violence.[22] An opinion joined by eight justices maintained that there could be no First Amendment objection to the Act even if it defined anarchists as "political philosophers, innocent of evil intent."[23] Congress could legitimately conclude "that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population."[24] The opinion added that it should not "be understood as depreciating the vital importance of freedom of speech and of the press,"[25] a frequent comment made by American judges while rejecting free speech claims.[26]

The lower federal and state courts applied the bad tendency test in many contexts beyond libel and contempt. In prosecutions under the federal Comstock Act of 1873, federal courts adopted the test of obscenity from an English decision in 1868, which asked "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort

17. *Id.*
18. United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 293 (1904).
19. *Id.*
20. Brief and Argument of Appellant at 26, United States *ex. rel.* Turner v. Williams, 194 U.S. 279 (1904).
21. *Id.* at 36.
22. *Id.* at 6.
23. *Turner*, 194 U.S. at 294.
24. *Id.*
25. *Id.*
26. RABBAN, *supra* note 1, at 175.

may fall."[27] Courts referred to the bad tendency of speech in other cases involving public morals. Affirming a conviction under a law that prohibited publications composed principally of criminal news and other "stories of deeds" of "bloodshed" and "lust," a Connecticut court reasoned: "It is impossible to say . . . that such publications do not tend to public demoralization, as truly as descriptions of mere obscenity."[28]

Extending the bad tendency approach to speech by radicals, courts upheld convictions of prominent anarchists. The anarchist editor, Johann Most, was convicted under a New York statute that prohibited assembling with others to attempt or threaten "any act tending toward a breach of the peace."[29] The court applied this statute to a speech Most gave to a meeting of anarchists the day after the defendants convicted of conspiracy in the notorious Haymarket bombing in Chicago had been hanged.[30] A decade later, Most was convicted for republishing, the day after President McKinley was shot by an anarchist, an article that "manifestly tended toward" a breach of the public peace.[31] In rejecting Emma Goldman's request for an injunction to prevent officials in Philadelphia from denying a public hall for her lectures, a Pennsylvania court reasoned that "dangerous and disturbing sentiments tending to disturb the peace would be uttered."[32]

Some courts used the bad tendency approach to attribute responsibility to speakers for the potential lawlessness of hostile audiences, however moderate the expression or unreasonable the response. Convicting the muckraking author Upton Sinclair for leading a peaceful demonstration in front of the Standard Oil Company building in New York, the court reasoned that if a demonstration is likely "to be resented," it "is unlawful as tending to a breach of the peace."[33] A Massachusetts decision upheld a conviction under a state law prohibiting the public display of a red flag, reasoning that statutes designed to protect the public safety "cannot be stricken down as unconstitutional unless they manifestly have no tendency to produce that result."[34]

Courts used other theories to deny free speech claims in addition to the pervasive bad tendency approach. Two famous decisions by Holmes while

27. R v. Hicklin (1868) 3 LRQB 360, 371 (Eng.), *quoted in* United States v. Bennett, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14, 571).
28. State v. McKee, 46 A. 409, 412–13 (Conn. 1900).
29. People v. Most, 27 N.E. 970, 970 (N.Y. 1891).
30. *Id.*
31. People v. Most, 64 N.E. 175, 178 (N.Y. 1902).
32. Goldman v. Reyburn, 18 Pa. D. 883, 884 (Pa. Ct. Com. Pl. 1909).
33. People on Complaint of Wilson v. Sinclair, 149 N.Y.S. 54, 61 (Ct. Gen. Sess. 1914).
34. Commonwealth v. Karvonen, 106 N.E. 556, 557 (Mass. 1914).

serving on the Supreme Judicial Court of Massachusetts provide good illustrations. He rejected objections by a police officer to his dismissal for violating a regulation that prohibited solicitation of money for political purposes.[35] "The petitioner may have a constitutional right to talk politics," Holmes wrote in one of his best known epigrams, "but he has no constitutional right to be a policeman."[36] Another decision by Holmes upheld the arrest of a minister for violating a Boston ordinance that prohibited public addresses on public property without a permit from the mayor.[37] "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park," Holmes declared, "is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[38] Courts rejected free speech claims in numerous other contexts, such as excluding material from the mail, regulating political campaigns, issuing injunctions in labor disputes, and denying protection to commercial speech and movies.[39]

Although federal and state courts overwhelmingly rejected free speech claims, it is important to recognize that judges occasionally did not penalize expression that typically would have led to convictions. Courts in New Jersey refused to hold a radical labor leader responsible for the crowd he attracted[40] or to punish the "hot and intemperate language" of an anarchist.[41] A few years before he decided the *Masses* case, Learned Hand objected to judging obscenity by its alleged bad tendency even though he felt compelled by precedent to do so. Hand complained that the bad tendency test forced society "to accept for its own limitations those which may perhaps be necessary to the weakest of its members."[42]

An interesting and unusual decision by the Supreme Court of Kansas allowed a qualified privilege for defamatory falsehoods made in good faith.[43] The court rejected the claim by a candidate for reelection as state attorney general, who alleged that a newspaper libeled him by stating false facts related to his official conduct in connection with a school fund transaction.[44] The decision stressed that the people should be able to "discuss the character

35. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).
36. *Id.*
37. Commonwealth v. Davis, 39 N.E. 113, 113 (Mass. 1895).
38. *Id.*
39. *See generally* RABBAN, *supra* note 1, at 129–76.
40. Haywood v. Ryan, 88 A. 820, 821–22 (N.J. 1913).
41. State v. Scott, 90 A. 235, 237 (N.J. 1914).
42. United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913).
43. Coleman v. MacLennan, 98 P. 281 (Kan. 1908).
44. *Id.*

and qualifications of candidates" for political office.[45] "The importance to the state and to society of such discussions is so vast and the advantages derived are so great," the court reasoned, "that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great."[46] Justice Brennan quoted this language over fifty years later immediately after stating the dramatic new holding in *New York Times Co. v. Sullivan*, which applied the First Amendment to limit the reach of state libel law.[47] Brennan understood the First Amendment to require:

> [A] federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[48]

Probably because it recognized that its decision differed so substantially from the prevailing interpretation of the law of libel, the Supreme Court of Kansas included a long historical discussion about the relationship between the First Amendment and defamation. It conceded that this relationship had not been clarified and that "judicial decisions had often been narrow, illiberal, and confusing."[49] It cited the "ill starred" Sedition Act of 1798 as an example of "how far ideas relating to the protection of personal character and governmental institutions were then unreconciled in legal theory with freedom of thought and expression upon public questions."[50] Apparently justifying its novel analysis, it emphasized the necessity to take into account "the needs, and the will of society at the present time."[51] Justice Brennan similarly referred to "the great controversy over the Sedition Act of 1798."[52] The "lesson to be drawn from" it, he asserted, is that "neither factual error nor defamatory content," independently or in combination, "suffices to remove the constitutional shield from criticism of official conduct."[53]

In my opinion, the relatively few protective decisions underline the general restrictiveness of the judicial treatment of expression in the decades before Hand wrote his *Masses* opinion in 1917. The protective decisions

45. *Id.* at 285.
46. *Id.* at 286.
47. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281 (1964).
48. *Id.* at 279–80.
49. *Coleman*, 98 P. at 283.
50. *Id.*
51. *Id.*
52. *Sullivan*, 376 U.S. at 273.
53. *Id.*

indicate that judges were not simply unable to conceive of more generous interpretations of constitutional guarantees of free speech. The fact that some judges could be sympathetic to free speech claims suggests that the restrictive tradition was not so dominant that only an intellectual breakthrough in constitutional interpretation could have created the possibility of different results. The existence of the protective decisions, even more than their relative paucity, emphasizes the general judicial hostility toward free speech during this period.

Gilbert Roe, who represented *The Masses* in the case decided by Hand, was very familiar with the state of free speech doctrine in 1917. He had represented people making free speech claims in a great variety of cases.[54] In Congressional hearings about the bill that became the Espionage Act, he made more trenchant and prescient criticisms than any other witness. He focused on the provisions of the bill under which the government ultimately brought and won most prosecutions.[55] These provisions prohibited willfully causing insubordination in the armed forces and obstructing recruitment, and punished violations with fines up to $10,000 and imprisonment up to twenty years.[56] Drawing on his previous experience litigating free speech cases, Roe warned that these provisions would allow juries and judges to punish democratic debate about American war policy for its alleged bad tendency to cause insubordination or to obstruct recruitment.[57]

Most Espionage Act decisions in the lower courts, as well as the Supreme Court's first Espionage Act decisions written by Holmes for a unanimous Court, fulfilled Roe's prediction.[58] Yet just as a small minority of free speech cases before World War I limited or rejected the bad tendency approach, so did a small minority of decisions construing the Espionage Act. Hand's opinion in *Masses* was one of those few cases, just as his opinion protesting the use of bad tendency to define obscenity was one of the few prewar cases. In *Masses*, he asserted that punishing antiwar speech for its bad tendency "would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper."[59] While limiting the application

54. *See* RABBAN, *supra* note 1, at 47, 55–57, 69, 71–72, 120–21, 139–40. For comprehensive treatment of Roe's career litigating free speech cases, see ERIC M. EASTON, DEFENDING THE MASSES: A PROGRESSIVE LAWYER'S BATTLES FOR FREE SPEECH (2018).

55. 1918 ATT'Y GEN. ANN. REP. 46–47; 1917 ATT'Y GEN. ANN. REP. 74; *see* RABBAN, *supra* note 1, at 255.

56. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219; *see* RABBAN, *supra* note 1, at 254.

57. RABBAN, *supra* note 1, at 248, 255.

58. *Id.* at 255–58.

59. Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).

of libel law to speech about candidates for political office, the Supreme Court of Kansas recognized its deviation from "narrow, illiberal, and confusing" precedents and wrote a lengthy analysis explaining its different interpretation.[60] Hand, by contrast, did not refer to precedents, which actually did contradict what he called "the normal assumption of democratic government."[61] Although Hand had acknowledged the prevalent use of bad tendency in evaluating obscenity even as he objected to it,[62] he did not recognize, as Gilbert Roe knew from experience, that courts had also used bad tendency to punish political expression.

Hand was more realistic about the prior judicial tradition a few years later. In 1920, Zechariah Chafee, Jr., dedicated his book, *Freedom of Speech*, to Hand, "who during the turmoil of war courageously maintained the tradition of English-speaking freedom and gave it new clearness and strength for the wiser years to come."[63] Writing Chafee after he finished reading the book, Hand confided that in preparing his opinion in *Masses* "I kept feeling . . . it was well that I knew no more than I did. Like the heathen I was saved by my invincible ignorance."[64] Hand was charmingly self-deprecatory, but he was also correct. Hand more explicitly admitted his lack of knowledge about the history of free speech in another letter to Chafee:

> It may interest you to know that when I was suddenly faced with the decision, I looked back with the greatest regret at my wasted days. "Here," I thought, "if you only knew enough, there is a place to state correctly, based on scholarship, what is the right rule. You don't know your job; you don't know anything about the history of the subject, and you must fire off your own funny ideas about what ought or oughtn't to be."[65]

In writing *Masses*, he probably was not familiar with the long tradition of judicial hostility to free speech claims and the extent to which his opinion was an extreme outlier.

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60. Coleman v. MacLennan, 98 P. 281, 283 (Kan. 1908).

61. *Masses Publ'g Co.*, 244 F. at 540.

62. United States v. Kennerley, 209 F. 119, 121 (S.D.N.Y. 1913).

63. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH, at iii (1920).

64. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 769 (1975) (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)). Gunther observed that "Hand's invocation of history was essentially impressionistic: he actually had little acquaintance with the history of American civil liberties, or indeed with American history generally." *Id.* at 727.

65. *Id.* at 768 (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. (Dec. 3, 1920)).