FREEDOM OF SPEECH AND FREEDOM OF THE PRESS

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This sixteenth annual lecture was delivered April 17, 1964.

In a famous aphorism Mr. Justice Holmes once said : "[I]t ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."[1] In regard to the subject which I am discussing today we can paraphrase this by saying: "In a democracy freedom of speech is not a duty; it is only a necessity." The essential feature of a democratic system of government is the freedom that is given to the people to choose those who will represent them in carrying on the government of the country, but such a choice would be an empty one unless there were liberty to discuss and to consider those who were being elected. We are all acquainted with the strange elections that are held from time to time in the totalitarian countries; the practical unanimity which is achieved in them is meaningless because no choice is offered.

Nor could a democracy function properly without a free press on those occasions when the people are called on to decide what steps should be taken in regard to some matter of great importance. A sensible decision cannot be reached unless adequate information is given to them, but this is impossible if the press is muzzled. This is true in particular in regard to foreign affairs because here it is so easy to stir up prejudice by issuing misleading statements. We can find ample illustrations in history showing how peaceful nations can be turned into war-like aggressors in the briefest possible period by false propaganda appealing to national pride. The only protection against this is freedom of speech which will enable those who realise that the people are being misled to try and tell them the truth.

But even if the suppression of truth does not lead immediately to such drastic consequences, it may nevertheless endanger the safety of the State because it may encourage the people to underestimate the strength of their

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1. HOLMES, *Learning and Science,* in OCCASIONAL SPEECHES at 85 (Howe ed. 1962).

possible opponents. Unless there is freedom of speech a government may lull the people to sleep. We have seen an illustration of this in Great Britain during the inter-war years when adequate information concerning the growing strength of the German armed forces was deliberately suppressed so that there should not be any public apprehension. There is also the opposite danger, that the strength of one's friends may be over-estimated. It may be regarded as impolitic to point out that the reliance which is being placed on them has not got a sound foundation. The Maginot Line was known by many of those in authority to be inadequate, but the truth was carefully hidden from the people. One result of this was that when the Line was breached a sense of panic led to immediate disaster.

It is not only in the field of international affairs, however, that the denial of freedom of speech may prove injurious to a democracy. Such a denial may destroy democracy itself. A nation can flourish under a beneficent dictator because he may be able to choose wisely the steps that are necessary to produce domestic peace and prosperity. Here again there are many illustrations in history of countries that have been well and happily governed by a few powerful men. The only unanswerable criticism of such a system of government is that it denies to the ordinary man the right to think and choose for himself. But in a democracy the ultimate right to govern is in the hands of the majority of the people themselves, and if they are misinformed, then the whole system will break down because without adequate knowledge the people will act blindly. It is therefore essential in a democracy that the criticisms and the novel ideas of the minorities must not be suppressed on the ground that they are "heretical," and therefore dangerous. If we are to advance it may be necessary to teach the majority things that it does not like. In a brilliant essay entitled "The Pragmatic Necessity for Freedom"[2] Professor Henry Steele Commager has emphasised that the attempts to base freedom of speech on natural rights or, on "the dignity of man," are not always convincing because such generalities are not sufficiently precise. A more practical support can be found in the material value of independence of thought. Without such independence we will have to entrust the duty to establish what are considered safe ideas to those who purport to know what is the correct view. In such circumstances "public opinion may create a situation where independence and originality simply do not emerge. . . . The greatest danger that threatens us is neither heterodox thought nor orthodox thought, but the absence of thought."[3] The second danger of the suppression of free thought is that "first-rate men and women will not and

2. Commager, *The Pragmatic Necessity for Freedom,* in CIVIL LIBERTIES UNDER ATTACK 1 (Wilcox ed. 1951).

3. *Id.* at 8.

cannot work under conditions fixed by those who are afraid of ideas."[4] Thus scientists will refuse to work under conditions that all but guarantee ineffective and inconclusive work, and civil servants or potential government employees will prefer employment in private industry. A third consequence will be the development of a situation in which freedom of enquiry and of criticism will not flourish because people will hesitate to discuss certain issues and to join minority parties or organisations where these are debated. Anyone who disapproves or questions the beliefs of the majority will be guilty of error, *i.e.*, of heresy. The doctrine of "guilt by association" has proved particularly harmful in preventing men and women from joining any association which may possibly come under attack. The price for this will be paid by the scholars, the scientists and the students of the future. We will therefore be sacrificing the greatest advantage we have in our competition with the Communist countries. Commager concludes that "of all our resources, the most affluent are in the minds and spirits of free men. These we must not fritter away."[5]

Fortunately the atmosphere that existed in the United States during the McCarthy era no longer exists to the same degree today because a few brave men were willing to face the threats of blackmail and abuse to which many weaker men succumbed. But there is always the danger that similar conditions may arise in the future unless the guardians of freedom show adequate vigilance.

Strange to say, the danger that is most imminent today is found in the pendulum swing which seems to have followed the destruction of the immediate threat of McCarthyism. There is a tendency today to think of freedom of speech and of the press as absolutes, a tendency which may prove to be disastrous if it is not controlled. In the last public address which Abraham Lincoln delivered on 11th April, 1865 he said: "Important principles may, and must, be flexible."[6] Absolute freedom of speech may be as dangerous as no freedom of speech. The view that truth will always triumph in the long run is an over-optimistic one because there may be no long run. Here again we need only go back a few years so as to remember how close civilisation came to destruction. We must not forget that the power of the lie is tremendous. Both Mussolini and Hitler were journalists who realised this. These political gangsters claimed absolute freedom of speech for themselves, but as soon as they got into power they destroyed the freedom which they had demanded.[7]

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4. *Ibid.*
5. *Id.* at 22.
6. 8 LINCOLN, COLLECTED WORKS 405 (Basler ed. 1953).
7. See O. HALE, THE CAPTIVE PRESS IN THE THIRD REICH 76-101 (1964).

We have seen the same result in some of the recently emerging countries. The leaders of the freedom movements in them insisted on freedom of speech, and as a gesture a bill of rights was written into their new constitutions, but in many of them these have become empty words. A constitution is effective only if the people who believe in it are prepared to support it. The step from democracy to tyranny may be a very short one. Perhaps we can remember that within less than three years after the Declaration of the Rights of Man and of the Citizen was proclaimed in France in 1789, heads were rolling under the guillotine. Professor A. V. Dicey pointed out in his classical book *The Law of the Constitution*[8] that the revolutionists of France borrowed their ideas about freedom of opinion and liberty of the press from England, but at no time has there in England been any proclamation concerning the nature of these liberties. In Dicey's words, "as every lawyer knows, the phrases 'freedom of discussion' or 'liberty of the press' are rarely found in any part of the statute-book nor among the maxims of the common law. As terms of art they are indeed quite unknown to our courts."[9] The English law can be summed up in a single sentence: "Our present law permits anyone to say, write, and publish what he pleases; but if he make a bad use of this liberty, he must be punished."[10] In other words, there has never been an absolute right to freedom of speech in English law: it is a qualified right which is limited by the law where necessary. This does not mean that this qualified right is not of great importance; there is a fundamental difference between saying, "you can publish anything you wish but you may be punished if you exceed the reasonable limits," and saying, as the totalitarians do, "you must not say or publish anything unless we give you permission to do so."

It is interesting to consider whether those who drafted the first amendment to the Constitution were thinking in terms of an absolute right, as expressed by some of the French philosophers, or in terms of qualified rights as they exist in the common law. There is something to be said for the first view on the ground that on the subject of freedom of speech there seems to have been a close relationship between the American and the French ideas. Thus the *Encyclopaedia Britannica,* in its article on "The Declaration of the Rights of Man and of the Citizen," said: "Historians have traced a connexion with the declarations of rights which preceded the constitution of some of the states of the American Union, especially of Virginia, but the situation in France at the time, and the influence of the writings of the

8. DICEY, THE LAW OF THE CONSTITUTION (10th ed. 1959).

9. *Id.* at 239.

10. ODGERS, LIBEL AND SLANDER 12 (6th ed. Odgers & Ritson 1929).

philosophes made the proposal for such a statement very natural."[11] I think, however, that there is much more to be said for the second view because many of those who drafted the amendment were not abstract philosophers but practical lawyers. They had been brought up in the common law with its dislike of vague principles: the hero of the common law is the reasonable man who is guided by Aristotle's ideal of the golden mean. There is only one principle in the common law which can be stated in general terms without attaching any proviso to it. This is: "You can do anything you wish unless it is forbidden by the law." It follows from this that the best way in which to deal with the law concerning freedom of speech and freedom of the press is to do so in negative terms by considering what particular limitations are placed on the general principle of freedom which is the unexpressed foundation of all English law. I shall do so in three divisions. The first is the limitations on the freedom of speech of the individual in his own home; the second is the limitations on the freedom of speech of the individual in public surroundings; and the third is the limitations on the freedom of the press.

I. Freedom of Speech in the Home

It is a popular maxim that an Englishman's home is his castle, but this is merely a dramatic way of saying that no public officer is entitled to enter a man's house unless he has specific legal authority for doing so. This is true in particular concerning illegal searches and seizures. It may be suggested that the law relating to such searches ought to be considered as part of the law relating to freedom of speech and of publication because in most instances the purpose of these searches was to discover incriminating documents, but this would be inconvenient because the history of the law concerning general warrants is a long and difficult one. Moreover it is of little practical importance today because the question was answered for all time by Lord Camden's masterly judgment in *Entick v. Carrington.*[12]

But although the common law gives much freedom to the individual in his home, this is not absolute because there are many things that he cannot say or write there, just as there are many things that he cannot do there. Thus if he kills another man without legal justification, this will be murder

11. 23 Encyclopaedia Britannica 342 (11th ed. 1910).

12. 19 How. State Tr. 1029 (1765). This was an action in trespass against agents of the crown who had searched the plaintiff's home and seized private papers as proof of seditious libel. The court distinguished the search and seizure of goods believed to be stolen and reasoned that the convicting evidence in a libel case was already published, thus in the public domain. As a result, the court, in finding for the plaintiff, held "that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void." *Id.* at 1074.

even if the killing is done on his own land; similarly he can be held guilty of fraud even though the fraudulent words are spoken in his own home. When we look at the list of the crimes that can be committed by words alone the list is a surprisingly long one.

The first and greatest crime that can be committed by words is that of treason. The Statute of Treason enacted in the time of Edward III[13] is still the law. It provides that it is treason (a) to compass or imagine the king's death, (b) to levy war against the king, and (c) to adhere to his enemies. Here the intention to kill the king or to levy war against the king can be shown by words of the accused evidencing such an intention. This early statute has been widely interpreted, especially dating from the time of Queen Elizabeth when there were so many threats and conspiracies against her life. By the beginning of the seventeenth century the judges had introduced the constructive extension of the statute. Thus in *Algernon Sidney's case*[14] the judges ruled that a writing, even if not published, which in effect alleged that the king was subject to Parliament and that kings could be deposed, constituted constructive treason because to argue that the king could be deposed might lead to his death. A similar wide interpretation of the provision concerning levying war against the king led in the case of *Dammaree and Purchase*[15] to their conviction of treason for raising a riot to destroy all dissenting meeting-houses since a riot was a form of levying war. In view of these wide definitions of treason it is strange that prosecutions for the commission of this crime were not brought more frequently against authors and publishers. The answer seems to be that the terrifying punishment attached to a conviction for treason, which included hanging, disembowelling and quartering, made juries reluctant to give a verdict of guilty merely for words. Another reason why there was a strong reluctance to use this crime was that there was a special procedure which made convictions difficult. There does not seem to have been any case in the American colonies in which a person was convicted of treason by words.

The second crime that can be committed by the use of words is seditious libel, or, as it is called more briefly, sedition. Today it is probably obsolete both in Great Britain and in the United States, but it has an exciting and chequered history. It began in the Star Chamber, but when that hated court was abolished in 1641, it was taken over by the common law courts where it became a centre of controversy for nearly two hundred years. It was not a capital offence, but the penalties that the judges could inflict were extremely severe. The actual scope of the crime was never clearly deter-

13. Statute of Treason, 1351, 25 Edw. 3, St. 5, c. 2.
14. 9 How. State Tr. 818 (K.B. 1683).
15. 15 How. State Tr. 522 (1710) (Sessions House of Old Bailey).

mined. In *R. v. Tutchin*,[16] Holt, C. J. said: "If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. . . . And nothing can be worse to any government, than to endeavor to procure animosities, as to the management of it; this has always been looked upon as a crime, and no government can be safe without it be punished."[17] It must be remembered that this was said before the idea of political parties had developed, so that any criticism of the government in power or any opposition to it at that time bordered on treason. This, of course, is true of some of the totalitarian countries today. Such a wide interpretation of sedition naturally gave rise to difficulties, but an additional problem arose concerning the respective functions of the judge and the jury. In the Star Chamber there had been no jury so that the judges had to decide both the facts and the law; in the common law courts the judges, as a general rule, instructed the jury concerning the relevant law, and then the jury, by its verdict, determined whether the accused was guilty or not. In the case of seditious libel, however, a different system governed, because the judges ruled that it was for the jury to determine whether the accused had published the words while it was for them, the judges, to decide, as a question of law, whether the words could be held to be libellous. Gradually the juries began to take the bit in their teeth, and in those cases in which they disagreed with the prosecution, they refused to obey the judge's instructions and acquitted the accused. It is of interest that perhaps the leading case on this point was that of the printer John Peter Zenger in 1727 in New York City.[18] When he was charged with having published a seditious libel on the royal governor, his counsel, the famous Philadelphia lawyer, Andrew Hamilton, persuaded the jury to bring in a verdict of not guilty although the evidence clearly showed that he was the printer.[19] A report of the trial was published in London the following year, and ran into four editions. During the disturbed years towards the end of the eighteenth century, the Government brought a number of prosecutions for sedition against John Wilkes[20] and others, but most of them failed. Finally in 1792 Fox's Libel Act[21] brought the controversy to an end by providing that the jury had the right to decide, not only whether the accused had published the words, but also whether they were seditious. This in practice was what most English juries had done before 1776, but the law in the books was different.

16. 14 How. State Tr. 1095 (1704) (Guildhall of London).
17. *Id.* at 1128.
18. 17 How. State Tr. 675 (1735) (New York).
19. *Id.* at 723.
20. R. v. Wilkes, 4 Burr. 2527, 19 How. State Tr. 1075 (1768) (King's Bench & House of Lords).
21. Fox's Libel Act, 1792, 32 Geo. 3, c. 60.

If Fox's Libel Act had been enacted before the American Revolution there would have been no "need for the hundreds of provisions still to be found in American constitutions giving the jury the right to try both the law and the facts in libel prosecution."[22] This is an important point to remember when interpreting the first amendment, because it is wrong to say that it was rejecting the common law regarding freedom of speech: in fact it was amending it, just as Fox's Libel Act was amending it simultaneously in England, while the juries, by exercising their independence, had already answered the problem in both countries. In *Bridges v. California*[23] Mr. Justice Black, in delivering the opinion of the Court, said "to assume that English common law in this field [freedom of speech] became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' "[24] This view that the English law, which had established all censorship before publication at a time when this was the almost universal practice in all other countries, was being "got rid of" seems to be more patriotic than historical. It is true that the famous, or rather infamous, American Sedition Act of 1798,[25] which expired by its own terms in 1801, was framed in large part on the definition of sedition given in some of the English judgments, but these had been pronounced before the enactment of Fox's Libel Act in 1792. As Mr. Siebert has said: "Fox's Libel Act unfortunately came too late to be included in the fundamental law of the now independent colonies."[26] Apart from this there seems to be no authority for saying that the law in the American colonies in regard to freedom of the press differed from that in England.

The third crime that can be committed by words is that of criminal libel. This, like sedition, is almost obsolete, but it may still be of importance in the English law in special circumstances.[27] A libel has been defined as a defamatory statement which if published of and concerning a person is calculated to expose him to "hatred, contempt and ridicule."[28] The interesting, and often misunderstood, fact is that truth is a complete defence to a civil action

22. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND 1476-1776, at 389 (1952). This book contains an admirably clear history of the law concerning the press in England. For more detailed references see HOLDSWORTH, A HISTORY OF ENGLISH LAW, especially vols. III & VIII.

23. 314 U.S. 252 (1941).

24. *Id.* at 264, quoting Schofield, *Freedom of the Press in the United States,* 9 PUBLICATIONS AMER. SOCIOL. SOC. 67, 76.

25. Act of July 14, 1798, ch. 74, 1 Stat. 596.

26. Siebert, *op. cit. supra* note 22, at 391.

27. R. v. Mylius, discussed in 130 L.T. 329 (1911).

28. Thorley v. Lord Kerry, 4 Taunt. 355, 364, 128 Eng. Rep. 367, 370 (1812) (*per* Mansfield, C.J.).

for libel, but it is not a defence to a prosecution for a defamatory libel unless it is for the public benefit that the matters charged should be published. The essence of a criminal libel is the likelihood that it may lead to a breach of the peace.

Nor is there freedom of speech in regard to libels in the civil law. It is a common belief on the part of some men and of most women that what they say or write in their homes, especially if it is marked as being "confidential," is not subject to the law of libel and slander, but this is a myth. Full liability arises in these circumstances in spite of the fact that the unfortunate defendants regard this as unreasonable. Although the criminal law of libel is, as has been said, of little effect today, the civil law is a powerful deterrent in England because juries are prepared in certain circumstances to award punitive damages. The courts have, however, held that these must be within the bounds of reason. There has recently been expressed some doubt concerning the justice of such damages, for they may represent emotional prejudice rather than reason on the part of the jury.

A fourth crime in the English law which concerns the relationship between freedom of speech and government is that created by the Official Secrets Acts, 1911 and 1920.[29] These provide, in part, that the wrongful communication of documents or information obtained in confidence from one holding public office, or the wrongful receiving of information obtained in contravention of the Acts, is a criminal offence. These Acts have proved to be useful because they have, in large part, removed from the press any temptation to obtain or to publish any secret official information. The undesirable practice of "leaking" secret information to a particular newspaper is, therefore, not recognised as a proper part of political life; it is too dangerous.

Fifthly, it is a crime to incite or to attempt to incite by words others to commit a felony. Here one of the most interesting recent problems in England is that relating to communism. It is not a crime to give a lecture in favor of communism as a system of government because beliefs are never criminal by themselves. Thus lectures in support of the communist doctrine have been given at Oxford and at other British Universities. Is it, however, a crime to persuade a man to belong to the Communist Party? It is not criminal in Great Britain because the British Communist Party does not advocate, and certainly does not attempt to put into action, the overthrow of the national government by force. A different conclusion might be reached if the facts showed, as they apparently did in *Dennis v. United States*[30] that there was a criminal conspiracy to use force where possible.

29. Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28; Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75.

30. 341 U. S. 494, 497-98 (1951).

Finally, reference must be made to criminal fraud, which in many cases consists in a deliberate or reckless statement of an untruth. It would be strange if the principle of freedom of speech could be advanced as a defence in such circumstances. If such a principle were recognised, then the foundation on which commercial and industrial life is based would be destroyed.

There are other ways in which speech in the home or under other private conditions may prove to be criminal, but the list that has been given here is enough to show that there is no universal principle of freedom of speech in the home so far as the criminal law is concerned. If it were to be held that freedom of speech governed in these cases, then the order on which our social life depends would be seriously impaired.

II. Freedom of Speech in Public

The second group of limitations on the individual's freedom of speech concerns statements made in public. Of course all the rules relating to the limitations on this freedom in the home also apply here, but there are a number of important additions in regard to public speech.

There is a general right for people to use the highway, and in doing so they can carry billboards and other expressions of opinion provided that these do not violate other legal rules, such as the prohibition against incitement to violence. But even if the expression of opinion is in itself entirely legal, this will not justify a procession which obstructs the ordinary use of the highway. It is under this heading that the problems relating to peaceful picketing arise.[31]

While walking on the highway itself is obviously legal as this is the purpose which the highway serves, sitting down on it is not. The highway, as has been said, must not be used as a bed or a chair. Sit-down demonstrations, even if they do not completely obstruct the passage of others, are illegal under the common law of nuisance. They have recently become a special nuisance in Great Britain because anybody can sit down without effort or discomfort to himself or herself. It is, therefore, a particularly easy way in which to express one's opinions which might not otherwise attract the attention of the public. The courts have therefore shown a tendency to adopt a strong line when dealing with these cases.

Of far greater importance is the problem concerning the legality of public speeches. Contrary to the general opinion, there is no right of public meeting as such unless some place has been dedicated or otherwise opened for such a meeting. No one can of his own will collect and address a crowd in the street as this constitutes an obstruction, however justifiable the purpose of

31. Arrowsmith v. Jenkins, [1963] 2 Weekly L.R. 856 (C.A.).

the meeting may be. But even if the meeting is being held under legal conditions, there are limitations on what can be said by those who are addressing it. Such an obvious limitation is found where the speaker directly and intentionally incites the members of the public to commit violence. But the law goes further than this. Until recently the case of *Wise v. Dunning*[32] was the leading authority on this subject. A Protestant churchman took it on himself to deliver in a public place, in a predominantly Catholic neighborhood in Liverpool, violent attacks on the Pope. He was bound over to keep the peace. It is not necessary to consider the legal controversy to which this case gave rise because an authoritative statement concerning the law on this subject has been given recently in the leading case of *Jordan v. Burgoyne*,[33] the facts of which can be briefly stated. Section five of the Public Order Act, 1936,[34] provides that "any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence." In the present case Jordan addressed a public meeting held in Trafalgar Square on July 1, 1962. He was wearing an arm-band with a swastika on it. He said: "More and more people every day are opening their eyes and coming to say with us Hitler was right." Disorder followed and there was a general surge forward towards the platform. A Superintendent of Police then stopped the meeting. Jordan was thereafter charged with having violated the Public Order Act, 1936,[35] and on conviction the Magistrate sentenced him to two months imprisonment. London Quarter Sessions, the first appellate court, quashed Jordan's conviction on the ground that, although the words used by him were highly insulting, they were not likely to lead ordinary reasonable persons to commit breaches of the peace. The prosecution appealed to the Queen's Bench Division, which restored the conviction. Lord Parker, the Lord Chief Justice, said that this was a Public Order Act that the Court was interpreting, and that if the words used by Jordan threatened, abused or insulted members of the audience so that it became likely that they would be provoked to commit a breach of the peace, then the speaker was guilty of an offence. The Lord Chief Justice's concluding words are of such importance that they must be quoted in full:

> The defendant . . . has been inclined to elevate this case into a *cause célèbre* in the sense that, if he is convicted, then there is some inroad into the doctrine of free speech. It is nothing of the sort. A man is

32. [1902] 1 K.B. 167 (1901).
33. [1963] 2 Q.B. 744.
34. 1 Edw. 8 & 1 Geo. 6, c. 6.
35. *Ibid.*

> entitled to express his own views as strongly as he likes, to criticise his opponents, to say disagreeable things about his opponents and about their policies, and to do anything of that sort. But what he must not do is—and these are the words of the section—he must not threaten, he must not be abusive and he must not insult them, "insult" in the sense of "hit by words." It seems to me that this is a perfectly clear case and that the defendant was guilty of the offence charged.[36]

This case illustrates the force of Lord Chesterfield's dictum that people forget an injury much more readily than they forget an insult.

The House of Lords refused to grant leave for a further appeal.[37]

III. Freedom of the Press

An anonymous poem published in the *Freeman's Journal (North American Intelligencer)* June 27, 1787, reads:

> Where dwells the man that dare suppress
> The noble freedom of the press?
> Sure he who would attempt the thing,
> On Haman's gallows ought to swing.

This suggests that freedom of the press was not a new idea invented by the first amendment to the Constitution which provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." As a matter of fact the phrase had been a popular one in the courts since 1732.[38]

It is important to note that the words "freedom of the press" are used to denote two entirely separate ideas. The first is that the law must not impose any censorship or require a licence to be obtained *before* anything can be printed or published. The second is that the author or publisher of anything that is written must not be held responsible, criminally or civilly, afterwards for what it contains. The extent of this second freedom has never been precisely determined.

There has been no censorship on written matter, either in Great Britain or in America, since 1694 except on rare occasions during the crisis of a war or a rebellion or in regard to special publications such as confidential government papers. Nevertheless the history of this censorship is of importance because on it the modern concept of freedom of the press has, in large part, been founded.

For the first fifty years after William Caxton printed his first book in England in 1477 no attempt to control printing was made as it was not recognised to be a social or political force. But as more and more books

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36. Jordan v. Burgoyne, *supra* note 33, at 749.

37. The history of this case is discussed in detail in Note, 79 L.Q. Rev. 322 (1963).

38. Siebert, *op. cit. supra* note 22, at 383.

appeared it was realised that some control must be established, so that in 1530 the first secular licensing system was created. It was based on the assumption that the king's authority to control the press was unlimited, this power being exercised by the Privy Council which issued proclamations and orders from time to time. It also acted as a court, later known as the Star Chamber, in trying any cases in which charges relating to printing offences were brought.

The religious controversies that followed Henry VIII's divorce made control of the press of special importance. The Proclamation of 1538 therefore set up a licensing system for all books printed in English which was to be administered by the Privy Council. There were heavy penalties for any breach of the regulations which were strictly enforced at first, but which in time tended to be disregarded. To deal with this problem the Stationers' Company was chartered in 1557, giving the Company wide powers of control. Although individual books were not censored, the same result was obtained by the threat to withdraw licenses.

As the Civil War in England approached, the control of printing exercised by the Stationers' Company became more and more unpopular both on economic grounds as giving a monopoly to a limited number of printers, and on religious grounds as a handicap to those who dissented from the established order. The Puritans, in particular, were violent in their protests. The whole system broke down when the Star Chamber was abolished on July 5, 1641. At the same time the Stationers' Company was rent by internal conflicts.

It did not occur to Parliament, however, that the censorship of the press should come to an end. It merely replaced the king by taking over for itself control of the printers and publishers, and on 14th June, 1643, it issued an Ordinance for the Regulating of Printing. The limited few who had hoped for an unfettered press were bitterly disappointed; their views were expressed by John Milton in 1644 in his famous pamphlet entitled "Areopagitica; a Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing to the Parliament of England."[39] Milton was not unprejudiced because in the previous year he had written a pamphlet on divorce, based on his dispute with his wife, which had been rejected by the Committee on Printing.

Milton's attack on the licensing system had very little effect on public opinion because the Puritans, having achieved control, were no more anxious to support freedom of printing than the Royalists had been. It took nearly a century before the cogency and power of his arguments were recognised both in England and abroad. In 1788 Mirabeau translated the

39. 4 COMPLETE PROSE WORKS OF JOHN MILTON 293 (Patterson ed. 1931).

tract into French so that it could be used in the preparation of the Declaration of the Rights of Man. The Declaration, however, lacked Milton's precision and clarity so that its generalities have led to misunderstanding. It is unfortunate that Milton has been so highly praised but so rarely read. He himself foresaw this result because he expressed the fear, "lest I should be condemn'd of introducing licence, while I oppose licencing." He certainly did not support the view that after a book had been published the printer would not be held responsible for what he had published. He wrote:

> I deny not, but, that it is of greatest concernment in the Church and Commonwealth, to have a vigilant eye how Bookes demeane themselves, as well as men; and thereafter to confine, imprison, and do sharpest justice on them as malefactors. For Books are not absolutely dead things, but doe contain a potencie of life in them to be as active as that soule whose progeny they are . . . .[40]

In particular Milton insisted that any attack on religion or on morality must be punished. It would have been strange, indeed, if a Puritan had taken any other view. There is nothing in the history of New England to suggest that the colonists were in favour of unbridled expression. No date has ever been given for the staggering change that must have taken place if the first amendment really means that obscenity is not punishable.

In 1692 it became necessary for Parliament to renew the Regulation of Printing Act for two years, which it did after receiving various petitions opposing it. In 1694 the final scene was enacted. The House of Lords voted to continue the law, but the House of Commons failed to agree. It sent to the Lords a long statement of its reasons, which had probably been drafted by John Locke, whose famous *Two Treatises of Government,* published in 1690, became one of the foundation stones of the United States Constitution. Nothing was said in the statement concerning a universal principle of freedom of the press. It was entirely practical, pointing out that it was difficult to enforce the existing law, that it did not suppress matters which should be suppressed, and that it was in restraint of trade which enhanced the price of books. In his *History of England,* Lord Macaulay said: "On the great question of principle, on the question whether the liberty of unlicensed printing be, on the whole, a blessing or a curse to society, not a word is said."[41]

From time to time thereafter attempts were made to re-introduce licensing, but all of them proved unsuccessful. The flood of new pamphlets that poured from the presses worried Parliament, which tried to find some new method of stemming it. In 1712 an ingenious idea occurred to Henry St.

40. *Id.* at 297-98.

41. There are numerous editions of Lord Macaulay's *History of England.*

John, Viscount Bolingbroke, which would at the same time limit undesirable publications and increase the public revenue. He introduced a stamp tax on newspapers, which proved successful in both regards. It was opposed by the publishers and paper makers, but it was not generally unpopular. It is of special interest for Americans that in 1765, when the expenses of the French-Indian War had proved a great strain on the British Exchequer, Parliament established a similar Stamp Tax in the American colonies, but this proved so unpopular that it had to be repealed the following year. The Stamp Tax in England was not finally abolished until 1855.

After the expiry of the Regulation of Printing Act in 1694 there was no further censorship of the British press. The legal control now passed entirely into the hands of the courts. The press was now substantially in the same position as was the individual. It was free to publish whatever it wanted to, but it could be punished if in doing so it violated the law. As long as the law concerning seditious libel remained in active use, it provided strict control over the press as the government could always argue that any attack on it was a crime, but this depended on the support given by the juries, which became increasingly unreliable. As a result, the practice of bringing prosecutions for seditious libel gradually faded away until it virtually disappeared in the nineteenth century.

The newspapers, however, remained open to prosecutions for criminal libel, and to actions for civil libel which were more effective as they could prove to be very expensive. The newspapers were particularly vulnerable to such claims because, however careful they might be, they might unwittingly publish defamatory statments. They, therefore, sought special protection, which has been given to them by a number of statutes,[42] the most recent of which is the Defamation Act, 1952.[43] This, in substance, provides that the damages which a person who has been libelled can recover will be limited if an apology is published. It provides, however, that there is no such limitation if the matter published was not of public concern, and the publication was not for the public benefit.[44] This has proved a useful provision in stopping the publication of so-called "scandal sheets."

The press, having won its battle to be treated on the same terms as the individual in being subject to no censorship, has recently advanced the claim to have special privileges given to it so that it can protect the public interest in cases in which it is difficult to obtain the necessary information. It has argued that it has a special privilege not to disclose in any legal proceeding the names of those persons who have given it confidential informa-

42. The first act was Lord Campbell's Act, 1843, 6 & 7 Vict. c. 96.
43. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66.
44. 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, 7 (3) at 524.

tion. It was said that the idea of freedom of the press to speak must also involve the freedom of the press not to speak, because if it were forced on all occasions to state the source from which it had obtained its information, there might be difficulty in obtaining it. Can a newspaper reporter therefore refuse to give such evidence at a trial if this evidence is relevant in ascertaining the truth? This point was considered at length in connection with what has been called the Vassall Affair.[45]

On October 21st, 1962, a man named Vassall, who was employed by the Admiralty, was convicted of communicating secret information to the Russians and sentenced to eighteen years imprisonment. Various rumours circulated and a journalist named Mulholland wrote an article stating that "it was the sponsorship of two high-ranking officials which led to Vassall avoiding the strictest part of the Admiralty's security vetting."[46] Thereafter a Tribunal of Inquiry under the Tribunals of Inquiry (Evidence) Act, 1921, was appointed under the chairmanship of Lord Radcliffe to determine whether special privileges had been given to Vassall. When Mulholland was called as a witness, he was asked where he had obtained his information but he refused to answer on the ground that it had been given to him in confidence. He thereupon was sentenced to six months imprisonment. He appealed to the Court of Appeal. He argued that a journalist had a privilege not to give his source of information as it was in the interest of the public that journalists should obtain confidential information, but they would not be able to do so unless they kept the sources secret. Lord Denning, the Master of the Rolls, in denying that there was such a privilege said that the judges could, if they thought it proper, hold that a journalist need not disclose his source, but where the safety of the community was at stake, no such consideration could arise. Mulholland was therefore held to be in contempt of court and sentenced to six months imprisonment.

In a comment on this case it was said, "much has been said concerning the freedom of the Press, but does this necessarily include the freedom to publish anonymous rumours? The history of McCarthyism in the United States has shown how tragic may be the consequences of such rumours, and what a terrible weapon they may be in the hands of a ruthless man."[47]

In conclusion it may be pointed out that neither the priest who has heard a confession, nor the doctor who has been consulted by a patient, nor a banker who has been entrusted by a client with his business secrets, can claim a privilege against giving evidence if he is ordered to do so by a judge. Such

45. Attorney Gen. v. Mulholland, [1963] 2 Weekly L.R. 658 (C.A.). For a more complete statement of the facts of this case see Note, 79 L.Q. REV. 167-70 (1963).

46. Note, 79 L.Q. REV. 167 (1963).

47. *Id.* at 169.

an order will, however, be given with great reluctance and only where it is found to be essential in the interest of justice.

A final point concerning the freedom of the press may be made here. It has been argued that if the press is subject to any control by the threat of punishment, then its so-called freedom is illusory because any publication can be stopped if the threat of punishment is sufficiently severe. A similar argument has been advanced in regard to taxation, for it has been said that the power to tax is also the power to destroy.[48] It will be remembered, however, that Mr. Justice Holmes answered this by saying that this was not true as long as the Supreme Court sits.[49] It may be suggested that the same is true in regard to freedom of the press because under the Constitution a publication can only be subject to a penalty if there is a reasonable ground on which such a penalty can be based. Moreover if a penalty is applied, it also must be a reasonable one. The danger which a publisher faces is therefore the same as that which any individual faces in regard to the ordinary criminal law. His protection is found in the principle that this law must be reasonable.

A. *Freedom of the Press and Contempt of Court*

In *Bridges v. California*[50] Mr. Justice Black said: "For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[51] There is no such trying choice in English law because the courts have repeatedly held that the due administration of justice, which means a fair trial, is the foundation of our civilization. There is no such choice, because free speech itself will die if there are no fair trials. For that matter it is almost always the first victim when such trials are no longer held.

The possible clash between freedom of the press and contempt of court may arise in two ways. The first is found in the limited number of cases in which a verbal attack has been made on the judge in his capacity as a judge. To say that he is prejudiced, dishonest, or incompetent would fall within this category because such statements are harmful to him in the performance of his office. Perhaps the most frequently cited case on this point is *R. v. Gray*[52] in which Mr. Justice Darling was held up to contempt by the defendant newspaper. There have been few, if any, such cases in

48. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

49. Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928).

50. 314 U.S. 252 (1941).

51. *Id.* at 260.

52. [1900] 2 Q.B. 36.

recent times, due perhaps, in part, to the fact that there has been no litigation that has given rise to strong emotions.

The second, and by far the more important, form of newspaper contempt is found in the publication of material that may prejudice a jury, for this strikes at the heart of criminal justice. It is essential to guard against this because jurors are ordinary men and women who may be misled by matters that it is not proper for them to consider when reaching a verdict. Almost the whole law of evidence is concerned with this; thus, as everyone who has ever attended a trial in court or has watched one on the cinema knows, hearsay evidence is strictly excluded because it is unreliable and not subject to cross-examination. It is also improper to introduce during a trial evidence that the prisoner has a criminal record because this will inevitably prejudice the jury against him, although there are exceptions to this rule. But if this evidence must be excluded *in* court, why should the newspapers be allowed to publish it *outside* of court in circumstances which make it highly probable that some prospective or acting juror will have read it? Such interference with justice is particularly marked in two instances. The first is when a newspaper publishes a statement that the prisoner has made a full confession which may later be excluded at the trial on the ground that it was improperly obtained. The second is when the photograph of a suspect is published because this invalidates any later identification by witnesses as they may have been unconsciously influenced by having seen it. It is not intentionally false evidence that must be guarded against; far more dangerous is the honest evidence based on an error or on prejudice. It is for this reason that the English courts have taken so strong a line in defence of fair trial. In the *Daily Mirror* case in 1949,[53] this newspaper, which has the largest circulation in Great Britain, was fined heavily and the editor was sent to prison for three months for publishing an article which described in lurid terms the criminal history of a man about to be tried for a peculiarly horrible murder. The newspapers have been more careful ever since, and nobody seems to have been worse off because of this.

B. *Freedom of the Press and Immorality*

There is at present a school of thought in certain legal circles which holds the view that the freedom of the press guaranteed by the first amendment ought to protect the publisher of a book or of a newspaper against any charge of obscenity. This emphasis on obscenity illustrates the Anglo-American feeling that sexual immorality differs in nature from other forms of immorality, but there is nothing in the first amendment to support this view.

53. R. v. Bolam, discussed in 93 Sol. J. 220 (1949).

It would seem, therefore, that any book, however persuasive it might be to the young, describing and advocating the grossest disloyalty, dishonesty or cruelty, would be given the same protection claimed for obscenity. Whether the authors of the first amendment intended to give such unlimited scope to the press seems doubtful, to say the least.

There are, however, two arguments which may be said to support totally uncontrolled publication. The first is that no written or spoken words can ever do any harm because these can always be refuted; it is only acts that count from the standpoint of the criminal law. This strangely anti-intellectual view seems to disregard the relationship between cause and effect; it is the idea, expressed in words, which causes the act. A similar misconception of the relationship between thought and action is found in the phrase that "those who can, do; those who can't, teach." This fails to recognise that the most effective form of action may be found in words. The action of the mind is more important than the action of the hands.

The second argument against control is that even though some published words may do harm, any attempt to prevent their publication would do much greater harm in the long run by discouraging the printing of other useful books. This, at first sight, is an attractive argument because it is prima facie undesirable to prevent any one from expressing his ideas on any subject.[54] This is true especially where moral questions are at issue because there would be no change or progress if the dominant views of a particular time and place were accepted as strictly binding on future generations. Perhaps the pragmatic answer to this argument may be found in the principle of gradualism, the importance of which has not been sufficiently recognised. A sudden and extreme shock can kill people physically in circumstances where no harm would have been done if the same thing had been attempted more slowly. Perhaps, it may be suggested, this is equally true in the moral sphere. A gradual change is inevitable; a violent change may be devastating. A moral shock may weaken the spiritual welfare of a person just as a physical shock may affect his body. In every community there is a general moral sense, a recognition that there are certain duties or standards that have been accepted as an essential part of its life. If these are disregarded, then the existence of the community may be endangered. It is for this reason that in almost every country in the world there is some legal provision to control the circulation of books which may corrupt. Perhaps "corrupt" can be defined as anything that will weaken or destroy the moral fibre of a person, just as a disease may weaken or destroy his body. If legal action can be taken against the latter in the large number of statutes relating to health, why cannot it

54. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959).

also be taken against the former, which may prove to be equally dangerous to the community? This does not mean that there is a universal standard which will be applied; the question concerning the nature of the things that may corrupt depends on the circumstances of the time and the place.

Perhaps an analogy can be found in the law against indecent physical exposure which can be found in almost every legal system. It is illegal because it gives a shock to the feelings of others, and because it encourages immorality. The English law does not prohibit nudist camps, but if a person attempted to practice nudism in a public street he would be arrested, even if he thought that it was his religious duty to do so.

But what is indecent physical exposure varies from time to time and from country to country. In certain countries it would be regarded as indecent for a married woman to show her face, while in other countries, such as the United States, the standards are less severe. The important thing, however, is that there are standards and that these are enforced.

When we turn to obscenity in the books the difficulty is not so much in finding a general principle as in determining what precise matters should govern the decision whether or not a book will tend to corrupt, and who is to make the decision.

The first problem concerns those who are likely to read the book. A poem in Latin will hardly affect those who have never studied the classics. Similarly an expensive book, published privately, will not have the same reading public as will a paper-back. It is for this reason that the recent revolution in the cost of books has made the present question such an important one, because the large audience of juvenile, impressionable readers has seriously altered the picture. This emphasis on the reader is reflected in section one of the Obscene Publications Act, 1959,[55] which provides that a book shall be deemed to be obscene if its effect is "such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." It is a question of degree which cannot be answered by any hard and fast rules.

Another fact that may be taken into consideration is the artistic or literary quality of the book. It has been argued that if a book, a painting, or a statue is of high artistic quality, then it cannot be obscene, but it is difficult to support this view. It is true that a novel may be so interesting or a poem so beautiful that the reader may not be affected by its sexual implications, but it is also true that, as has been said, art may be used to glorify sex. This point was made in a most interesting judgment delivered by Chief Justice Tanaka of the Supreme Court of Japan when the publisher and translator of D. H.

55. 7 & 8 Eliz. 2, c. 66.

Lawrence's *Lady Chatterley's Lover* were charged with publishing "an obscene writing."[56] He said:

> It must be clearly noted that art and obscenity are concepts which belong to two separate, distinct dimensions; and it cannot be said that they cannot exist side by side. . . . The obscene nature of the work cannot be denied solely for the reason that the work in question is artistic literature. This is so because even the finest piece of artistic product can be evaluated as being obscene from the ethical and legal point of view. Such a conclusion is not impossible because art, law and morality can exist in entirely different dimensions."[57]

This is a matter of great importance for it emphasizes that obscenity is a matter of degree, depending on various considerations. It is its effect on the reader, who can be expected to read it, which determines its quality. A practical test would be: if you wished to corrupt or deprave X (X being representative of a particular group), would you give him a copy of this book? The intention of the author and the literary quality of the book would be relevant only in so far as they affected the answer to this question. We are inclined to think that some of the Victorian critics were absurd when they labelled certain passages in Shakespeare as obscene which we regard as innocuous, but this is to forget that the effect of words and of ideas on people may change from generation to generation.

I believe, therefore, that the authors of the first amendment did not mean to establish by "freedom of the press" totally uncontrolled publication of all printed matter so that no steps could be taken to limit obscenity. But does not such a construction render the amendment valueless, as it will leave the courts free to impose a new censorship on the press under another name? This is not true if we construe the amendment as meaning that no *unrea-*

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56. This judgment was published in part in 75 L.Q. REV. 183 (1959).

57. *Id.* at 184. Chief Judge Tanaka also said that the book could not be considered obscene merely because it advocated a view concerning a new sex morality which was in conflict with the accepted views on this subject.

> To be obscene the literature in question must be such that it is harmful to the normal feelings of shame and, runs counter to good moral concepts regarding sex. . . . The fact that mankind possesses a sense of shame, regardless of race, climate, history, or degree of civilisation, is one of the essential characteristics which distinguishes human beings from animals. The sense of shame is one of the most basic feelings which a human being has along with the feeling of compassion and reverence. . . . Such sense of shame must be respected; to reject it as hypocrisy would be antagonistic to human nature.

A test of this sense of shame could be found in the embarrassment which ordinary people find in reciting obscenity "within the family circle or at a public gathering." The law is concerned only with the duty of maintaining the minimum standard of morality. It is in this spirit that pornographic writings are held to be criminal and are forbidden under Article 175 of the Japanese Code.

sonable limitation or hindrance shall be placed on publication. Thus the fourteenth amendment provides that no person shall be deprived of property without due process of law, but this does not mean that he has an absolute right to the use of his property, disregarding the standards set by the community.

The difficulty of the problem in regard to obscenity is therefore one of fact and not of law. In the analogous case of user of land the courts are well qualified to decide what is reasonable and what is not because this is rarely a matter of personal feeling; when necessary, experts can be called to give evidence on matters in dispute. But a different situation arises when obscenity is in issue, because how is the standard of morality to be determined, and how is the effect on the reader by its reach to be measured? In practice this is less difficult than it seems to be, provided it is realised that no certain answer can be expected. The reasonable man of the common law has answered equally difficult questions in the past, helped by advice from the judge, and by the evidence of experts where necessary. In that way we shall be protected against the two dangers of uncontrolled licence on the one hand and of undue restrictions on the other.