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Political and Jurisprudential Worlds in Conflict in the New Republic

The numerous commentators on the Sedition Act of 1798 have typically been so appalled at its role in American history that they have largely neglected to examine its enactment and enforcement in the light of the jurisprudence of which it was an integral part. How was it possible for the generation of the Framers who had so wisely launched this country with the Revolution, the Declaration of Independence, the Constitution, and the Bill of Rights to have adopted this repressive statute? The Act went so far as to criminalize "any false, scandalous, and malicious writing . . . against the [federal] government . . . or either house of the Congress or the President, with intent to defame . . . or to bring . . . either of them, into contempt or disrepute." It was then employed in a determined effort to shut down the opposition Republican press by prosecuting and jailing editors of numerous leading Republican newspapers on the eve of the 1800 presidential election. Truly, it was one of the country's most unattractive political episodes.

This volume seeks to review this deservedly much condemned episode in American legal history in the light of the accepted jurisprudential and constitutional standards of the times. As we will see, it was not a departure from the legal standards of the age. Criminal libel[1] was only one element of the repressive jurisprudence of the times. This is a critical dimension that the discussions of the Sedition Act have failed to take adequately into account. Although this examination will neither rehabilitate the Act nor ease the acute modern discomfort with this episode in American history, it should

[1] Common-law criminal libel provided for criminal punishment of persons maliciously defaming the subject (individual or government) and subjecting it to hatred, contempt, disrepute, or ridicule. It was called seditious libel when it involved the government or government officers with respect to their official conduct. Criminal libel so prominent many years ago has virtually faded away.

help explain its unquestionable legitimacy under the legal standards of the period.

Review of the turbulent experience for more than two decades with criminal libel and the Sedition Act in the early days of the New Republic occupies only one portion of this comprehensive examination of the repressive jurisprudence of the times. Allied doctrines included common-law bodies of law criminalizing libel, blasphemy, and out-of-chamber criticism of the courts and the legislature, among others.

Contrary to modern concepts of the sweeping scope of the constitutional guaranties of free speech and press, the constitutionality of the doctrines so dramatically restricting the range of criticism of the established institutions of the society were routinely upheld for more than 150 years, before finally being swept away by an avalanche of revisionist decisions in the middle of the 20th century.

The reality is that the jurisprudence of the Early American Republic was fundamentally incompatible with the political ideals of the Revolution incorporated into the new Constitution. This is the very essence of the problem. In 1776, a political revolution took place. The monarchy was abolished, and its ally, the established church, was abolished in most states. However, the political revolution was not matched by a legal revolution. Far from it; although the English legal system was a jurisprudence that implemented English political institutions, the new states adopted it lock, stock, and barrel.

They did so even though in numerous conceptual areas the established English legal doctrines had been shaped to serve the peculiar needs of that very English political system that had been repudiated in the Revolution. Monarchical rule had developed a rigorous doctrine of criminal libel to reinforce the stability of the Crown. The existence of an established church and Christianity as the prevailing religion had given rise to the law of blasphemy. In the same manner to encourage obedience to the commands of the judiciary and the Parliament, sweeping doctrines of contempt of court and contempt of the legislature flourished that extended as far as to punish critical publications far from the judicial or legislative chamber.

Judicial contempt was a highly useful weapon for those in power because it provided an alternative prosecutorial remedy to criminal libel that was not dependent on a jury. In this manner, relying on criminal libel, Chief Justice Thomas McKean of Pennsylvania, who had been unable to dragoon a grand jury into voting an indictment of a persistent critic, Eleazer Oswald, was enabled to penalize his critic by means of this alternative remedy. He

was able to punish the critic without jury participation by holding him in contempt for his critical attacks although they occurred out of the court room.[2]

Still another common-law doctrine reinforced this repressive jurisprudence. This was the "binding over" doctrine empowering courts in their discretion on arraignment for criminal libel to require the defendants to post a "good behavior" bond. The bond would be forfeited in the event of his or her publication of still another criminal libel during the interval between arraignment and trial. This is a dramatic example of "preventive law" resting on the objective of anticipating and preventing "breaches of the peace" and promotion of the "good order" of the established society. In reality, defendants, often newspaper editors, were in effect muzzled *before* their conviction of any criminal offence. It was a survival of the pernicious system of prior restraints that had been abandoned in other respects by the English.

Along with the Alien and Sedition Acts, the busy Federalist Congress in July 1798 enacted a complementary statute expressly authorizing federal judges proceeding under the Sedition Act to require such bonds. They regularly did so. As we will see, "binding over" was one of the legal weapons prominently used along with criminal libel by partisan judges in the New Republic to silence the opposition. Although under the English law, as Blackstone made clear, the courts were required to satisfy themselves of the existence of "probable cause" for concern about repetition of the offence before ordering a "good behavior" bond, the 1798 American statute omitted any reference to such a requirement. Accordingly, "probable cause" played no role in the federal "binding over" cases, and, similarly, it was routinely ignored in practice in the state courts of the period.[3]

In at least two prominent Sedition Act cases, the editors of two leading Republican newspapers, the New York *Time Piece* and the New London *Bee*, ceased publication long before trial for fear that any critical articles would be found to have violated the terms of the bonds they had been required to provide. Further, as in a celebrated "binding over" case under Pennsylvania law involving that scurrilous Federalist William Cobbett, who wrote as "Peter Porcupine," the editor being unsuccessfully attacked under the criminal libel laws when a grand jury refused to indict was, nevertheless, subsequently held

[2] Respublica v. Oswald, 1 U.S. (1 Dall.) 319 (1788).
[3] 1 Stat. 609 (1798). *See* 4 William Blackstone, *Commentaries on the Laws of England* 248 (1769, repr. 1992) (hereinafter Blackstone).

to have forfeited his good behavior bond for statements made while awaiting action by the grand jury.[4]

With these doctrines crippling dissenting speech, the English jurisprudence protected the established institutions of the English society, including the monarch, the Parliament, the judiciary, and the Christian church. Although the English common law also protected freedom of speech and press, this extended no further than prohibiting prior restraints. Persons were free to publish whatever they chose, but were subject to criminal penalties under these doctrines in the event their statements were deemed abusive.

As the law of England, this body of jurisprudence had become the law of each of the Colonies. Then, following the Declaration of Independence, when the former Colonies became states, almost all enacted so-called reception laws accepting their Colonial law, which was the English law, virtually *in toto*. In so doing they incorporated into their own law each of these invidious legal doctrines making up the repressive English jurisprudence that had emerged in support of the very political and religious system that had been repudiated by the Revolution.[5]

Thus, the Sedition Act of 1798, criminalizing political speech attacking the reputation of political opponents whenever a jury could be persuaded that it was a "false, scandalous and malicious" statement, made nothing unlawful that was not already unlawful at state common law. Prior to the Act, criminal libel in its rigorous English common-law form had been recognized by federal and state courts alike. The new Act did not go as far. Instead, in several important respects, it was more liberal than the existing American federal and state common law. Evidence of truth, not admissible under the common law, was made admissible, and the highly restricted role of the jury at common law was decisively expanded. Further, proof of "intent" was introduced as an additional element of the crime. Although, as we will see, these statutory

[4] Respublica v. William Cobbett, 3 U.S. (3 Dall.) 93, 99 (1800); 1800 Pa. LEXIS 56 (1800). The next year, another editor being prosecuted for criminal libel and bonded to assure his good behavior was similarly found guilty for contempt of court for out-of-court publications violating his bond. United States v. Duane, 25 F. Cas. 920, 1801 U.S. App. LEXIS 271, 1 Wall. Cir. Ct. 102 (C.C.D. Pa. 1801) (No. 14,997).

[5] Connecticut and Rhode Island were the only exceptions. Virginia subsequently adapted a statutory criminal law. The reception laws – sometimes constitutional and sometimes statutory – typically provided that the English law being adopted did not include matter contrary to the statutory and constitutional provisions of the State. *See* Ford W. Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791 (1951).

Moreover, the terms of art in those enactments such as freedom of speech and press also received the same historic common-law meaning. *See generally* 1 Morton Horwitz, *The Transformation of American Law* 4 n.18 (1977, repr. 1992); 1 Oliver Wendell Holmes Devise, *History of the Supreme Court of the United States*; Julius Goebel, Jr., *Antecedents and Beginnings to 1801* 109–118 (1971).

improvements were far from effective in practice, their enactment in the federal jurisprudence encouraged similar changes in the states.

Although the federal government had previously not been impeded in its efforts to punish criminal libel with common-law prosecutions in the federal courts, its jurisdiction to do so had been challenged, albeit unsuccessfully. Thus, from the Federalist point of view, the Act served a useful purpose because it provided a less debatable statutory foundation for federal criminal prosecution. It provided an alternative jurisdictional basis to supplement the federal criminal common-law doctrine under which prosecutions had proceeded before, during, and after the expiration of the Act.[6]

After the Revolution, the various states and in 1791 the new federal government with its adoption of the Bill of Rights incorporated into their Constitutions provisions guaranteeing freedom of speech and press and religion. These seemingly democratized their legal structure to match the revolution in their political structure. However, although these new constitutional provisions – federal and state alike – of freedom of speech and press and of freedom of religion may appear to modern observers to have assured the repudiation of the English repressive doctrines, this did not prove to be the case.

In contrast to the well-established common-law doctrines of English (now American) libel law known to every lawyer of the time, there was virtually no judicial experience with the scope of the free speech and press provisions in the then seven-year-old federal Bill of Rights. Prior to the introduction of the Bill that led to the enactment of the 1798 Act, there had been little consideration of the scope of the free speech provisions of the Bill of Rights adopted a few years earlier. Were they intended to have application to the accepted doctrines of the criminal common law of libel, or were they were intended only to implement the English understanding as set forth by Blackstone that freedom of speech and press meant no more than prohibiting prior governmental restraints of the press, such as government licensing. The English common law had advanced so far and no further.

The opponents of the Act challenged its constitutionality in two important respects. A major source of opposition was the opposition of the "states' rights" Congressmen to the expansion of federal power. Leading opponents, such as Nathaniel Macon of North Carolina, soon to become Speaker of

[6] With the solitary exception of Justice Chase, all the Supreme Court Justices of the time who addressed the issue in the circuit courts – Federalists to the man – upheld the assertion of federal criminal common-law jurisdiction. However, 12 years later, the Supreme Court, by then under the control of Justices appointed by Presidents Jefferson and Madison, held that federal criminal common-law jurisdiction did not exist. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). For discussion of this issue, readers are referred to Ch. 5.

the House after the Jeffersonian triumph in 1800, denounced the Act as an unconstitutional attempt by the national government to enlarge its powers at the expense of the states. There was no express provision in the Constitution supporting the enactment of the Sedition Act, nor was there any express federal power over the press. Its constitutionality had to rest as a "necessary and proper" implied power of some expressly delegated power to the new federal government. Behind their opposition to the Act, the Southerners who headed the opposition to the Act were no doubt fearful of any assertion of the existence of any implied powers for the national government out of concern that it would serve as a precedent that might eventually lead to national efforts to interfere with slavery.

The other important source of opposition rested on the First Amendment and the alleged incompatibility of the Act with the guaranties of free speech and press in the First Amendment. However, while arguing that the Act violated the free speech and press provisions of the federal Constitution, the Jeffersonians did not attempt to explain why, if they were correct, the even more harsh criminal libel law in their own states[7] was not also unconstitutional under the comparable free speech and press provisions of the state constitutions.[8] Quite the contrary, the Republicans attacking the Act argued that the Act was duplicatory and unnecessary because any offenses could be punished under the existing criminal libel laws of the states.[9]

Far from recognizing the constitutional guaranties as a repudiation of English doctrine, as we will see, the American courts when called upon to construe the provisions universally turned to the English law to determine their meaning. The American courts without exception followed Blackstone. They gave the provisions for "free speech" and "free press" no more scope than the cramped meaning that the English law had fashioned to serve the needs of the monarchial system. For more than 150 years, the American courts followed the English law, although as was eloquently argued at the time by such persons as Madison[10] unrestrained freedom of discussion was essential for the free political debate required by a free democratic society.

[7] It was a number of years after the Sedition Act of 1798 before the states began expanding the role of truth and the jury in criminal libel cases. During the period discussed, with isolated exceptions, they followed the rigorous English common-law doctrine as enunciated by Blackstone.

[8] Each state except Vermont and Rhode Island had such constitutional or statutory provisions.

[9] *See* Nathaniel Macon, *Annals of the Congress*, 5th Cong., 2d. Sess. 2104–2106 (1798) ("the States have complete power on that subject"); Letter, Thomas Jefferson to Abigail Adams (Sept. 11, 1804), 11 *Writings of Thomas Jefferson* 50–51 (Andrew Lipscomb ed. 1904).

[10] *See* Majority Report of the Virginia Legislature on the Resolution over the Sedition Act, Jan. 7, 1800 (of which Madison was the author), James Madison, *Writings* 608–662 (Libr. Am. 1999).

In like manner, the constitutional guaranties did not interfere with the continued judicial enforcement of the wide-ranging English common-law criminal contempt doctrines, empowering both the judiciary and the legislatures to jail their critics for critical publications. These were wide ranging, criminalizing critical publications even when the publication appeared far from the court house or the legislative chamber. They did so even when the publication could not have interfered in any way with the continued ability of the court or the legislature to transact its business. As with speech in the political arena, freedom of speech and a free press when exercised out of the judicial and legislative chambers seemed essential to assure the accountability of the judicial and legislative branches of the government. However, as in the case of criminal libel, constitutional guaranties provided no protection. Finally, there is no instance that can be found that any court using the doctrine of binding over felt it necessary to determine the constitutionality of the practice.

With these English doctrines fully accepted, the law of the New Republic contained an extensive arsenal of jurisprudential doctrines serving to protect the government and all its branches – executive, legislative, and judicial – against critical speech. Of these, the Sedition Act of 1798 and the substantial body of criminal libel litigation are the most prominent and the most important examples, but they represented only a part of the generally accepted contemporary jurisprudence. As for the statute, it was enacted as one of a series of crisis measures to prepare for the war with France that appeared at hand. Hence, it can be readily understood how the Federalist Congress turned to the Act and why it was at the outset enthusiastically embraced by most of the population. Thus, in the 1798 elections, every Congressman who voted for the Act was reelected, and the Federalists increased their margin in the House. Only later with the evaporation of the threat of war with France and the highly partisan nature of the prosecutions under the Sedition Act did the Act and the Federalists become highly unpopular. Then, they were overwhelmingly repudiated by the Republican sweep in the 1800 congressional elections in which the Republicans captured overwhelming control of the House and the Senate, while Jefferson narrowly gained the presidency. Although this was a political revolution, it did not affect the underlying jurisprudence. The repressive jurisprudence continued unchanged, and for more than 150 years, every judicial decision involving any of the doctrines routinely continued to uphold its constitutionality.

The battery of repressive doctrines in the jurisprudence of the times available to punish criticism of each of the branches of government – criminal

libel, contempt of court and legislature for out-of-chamber publications, and binding over – were not the only accepted criminal doctrines protecting established institutions against dissenting speech. Still another accepted doctrine was the common-law crime of blasphemy. For centuries, the English law of blasphemy had protected the Christian church. As Blackstone confirmed, "Christianity is part of the laws of England."[11] Following the Revolution and the reception statutes, the English common-law crime of blasphemy similarly became part of the American common law. It was subsequently reinforced by the enactment of statutes criminalizing blasphemy in virtually all the states.

Despite the abolition of the established church in most of the new states, English blasphemy law was American law. Thus, in the Early American Republic, the federal and state constitutional provisions protecting freedom of religion had no more impact on the continued acceptance of the doctrine than the companion guaranties of freedom of speech and press had proved to be barriers to criminal libel, contempt, and binding over.

Finally in the early 19th century, still another peculiarly American doctrine similarly suppressing anti-establishment speech emerged in the jurisprudence of the Early American Republic. With increasing apprehension in the South over the possibility of bloody slave revolts, a concern widely shared in the North as well, every slaveholding state enacted statutes criminalizing speech challenging the legitimacy of slavery.[12] In addition to the criminal cases instituted by state prosecutors, local Postmasters – federal appointees although they were – helped enforce the statutes by intercepting and disposing of abolitionist pamphlets and newspapers in the U.S. mails. Presidents Jackson and Van Buren acquiesced in such actions by U.S. Postmasters censoring the mails and preventing the delivery in Southern states of newspapers and mass mailings of pamphlets challenging the institution of slavery. In similar manner, Presidents Monroe and John Quincy Adams remained inactive in the face of South Carolina's continued enforcement of its free black sailors' act. This provided for the jailing of free black sailors while their ships were in port to prevent their communicating dangerous ideas to South Carolina's black population. They took no action although the Act had been declared unconstitutional in a Circuit Court proceeding conducted by Justice William Johnson. In the very first exercise of its "nullification" policy, South Carolina

[11] *See* 4 Blackstone, note 3, at 59.
[12] Although this experience came several decades after the period under review, it serves to show the undeveloped nature of constitutional protection of freedom of speech and press in the Early American Republic.

ignored the decision and Department of State protests and continued to enforce the statute.

In addition to the inertia of these four Presidents, the House of Representatives lent further support to the Southern program of stifling discussion of the emancipation of the slave population. For seven years from 1837 to 1844, the House of Representatives operated under rules rejecting the receipt of anti-slavery petitions. This unhappy development is examined at length in Chapter 8.

Insofar as constitutional guaranties of freedom of speech and press were concerned, in not one of the dozens of cases in these critical areas – criminal libel, contempt of court and of legislature, binding over, blasphemy, and suppression of discussion of slavery – that raised (or could have raised) the issue, did even a single judge challenge the constitutionality of any of these doctrines. It was many, many decades, if not more than a century, later before any one of these repressive doctrines was held unconstitutional or greatly confined in its use. As for Southern suppression of discussion of slavery, it took four years of bloody internecine warfare to bury that doctrine. The same may also be said about the ineffectiveness of the constitutional guaranty of freedom of religion and the doctrine of separation of church and state to end the law of blasphemy.

However, in contrast to the impatience with which the Federalist judges received contentions of unconstitutionality in the Seditious Act litigations, when contentions of unconstitutionality arose with respect to the blasphemy laws some decades later, they received careful and respectful examination from two of the most distinguished state court judges of the time, Chancellor James Kent of New York and Chief Justice Lemuel Shaw of Massachusetts. However, the arguments did not prevail. As with the bulk of the bench and bar, the judges looked to Blackstone for the definitive statement of the English (and hence the American) law. They followed Blackstone and accepted his cramped formulation of the limited scope of free speech and press and freedom of religion.[13]

As construed by the courts of the time, the law of the Early American Republic possessed a very different understanding of the meaning of the constitutional guaranties of freedom of speech and press and religion than the one that ultimately prevailed as the nation developed into a strong, stable, democratic society. Understood as no more than still another repressive legal

[13] *See* People v. Croswell, 1 Cai. R. 149, 3 Johns. Cas. 337, 1803 N.Y. LEXIS 1068 (Sup. Ct. 1803), 1804 N.Y. LEXIS 175 (N.Y. 1804) (Kent, Ch.) (common-law criminal libel); Commonweath v. Kneeland, 37 Mass. (20 Pick.) 206, 1838 Mass. LEXIS 35 (1838) (Shaw, C.J.) (blasphemy).

doctrine in a society that was accustomed to a jurisprudence providing for the widespread suppression of dissenting speech, the Sedition Act becomes comprehensible. It was fully compatible with the jurisprudence of the times even if strikingly contrary to the political ideals of the Revolution. Evaluation of the Sedition Act of 1798 through a 20th- or 21st-century lens coupled with distaste for its partisan enforcement by the Adams administration inevitably produces misunderstanding of the legitimacy of its adoption. Set in context, it is no less unattractive, but its legitimacy in the law of the times must be acknowledged.

Legal doctrines useful for the stability of a sociopolitical order resting on a monarchy and an established church had no place in the New Republic. The story of the times is the extended struggle before American constitutional jurisprudence was able to rid itself completely of the repressive doctrines that it had inherited in 1776 from the monarchical English society and to develop more liberal doctrines in keeping with democratic government in a republic. It took 150 years of evolution of an expanding constitutional jurisprudence giving increasingly broader and broader scope to the provisions of the Bill of Rights before the Supreme Court struck down the last of these pernicious doctrines.

Although the repressive nature of the country's jurisprudence is plain, it is striking that along with the dramatic decisions of the courts uniformly upholding its various doctrines, the political society of the day widely ignored "the law in the books." The actual practice featured some of the most vigorous political debate in American history. As Merrill Jensen summarized: "Despite the law, there was freedom in fact. . . . No governmental institution, political faction, or individual was free from attack."[14] Repressive jurisprudence despite its uniform success in the courts when invoked by political leaders did not result in a repressed society.

This volume is a legal scholar's examination of the constitutional jurisprudence of the Early Republic to demonstrate the limited scope of the First Amendment as construed long ago by the judges of the time. This examination also serves to place the Sedition Act and criminal libel in the context of the times and better explain its acceptance by a revolutionary society that had carved out a new country based on fundamentally different political values. Since then, American courts have substantially expanded the scope of American constitutional guaranties, but this is modern law commencing

[14] Merrill Jensen, Legacy of Oppression, 75 Harv. L. Rev. 457 (book review), *cited by* Jeffery Alan Smith, *Printers and Press Freedom: The Ideology of American Journalism* 5 (1988).