Freedom of Speech and Press: Development of a Concept

ROBERT B. DOWNS

The Founding Fathers acted with premeditation and forethought when in adopting the Bill of Rights they placed the freedom of information at the top of the first ten amendments to the Constitution. Burned into our consciences and consciousness for nearly two hundred years—though not infrequently violated in practice—are the admonitions in the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

To understand the motivations and strong emotional involvement of the framers of the Constitution, with its appended Bill of Rights, one must retrace a series of events in English and colonial American history. The First Amendment's prohibition against interference with free speech and free press was a direct consequence of centuries of bitter experience living under extremely repressive English laws controlling speech and press. The authority of government was long regarded as supreme, irresistible, and absolute. Prior to the English Revolution of 1688, unqualified sovereignty had been exercised by the Crown; subsequently, the same power was vested in parliamentary authority. Any criticism of the government was considered not only objectionable but dangerous heresy which must be ruthlessly suppressed. That entire concept was rejected by the First Amendment.

For five hundred years before adoption of the American Constitution, a struggle between tyranny and freedom had been under way in England. The Anglo-Saxon precedents in the field may be dated from the English treason statute of 1351, during the reign of Edward III. Parliament persuaded or compelled Edward III to narrow the crime of treason by limiting it to making war on the King or com-

Robert B. Downs is Dean of Library Administration, University of Illinois at Urbana.
Freedom of Speech and Press

passing or imagining his death. But in subsequent centuries the statute was broken down by judicial interpretation and expanded by new acts of Parliament. Officials in power used the charge of treason to send their adversaries to the scaffold—and then lost their own heads when they fell out of favor with the King. Parliament added new treasons to the statutory list, with no requirement that an overt act be proved. The omission, noted Sir Matthew Hale in his *Pleas of the Crown*, “subjected men to the great punishment of treason for their very thought.” The body of repressive laws continued to build up until the death of Henry VIII, when legislation was enacted wiping out all forms of treason except those contained in the statute of Edward III.

Nevertheless, with or without the sanction of law, the slaughter of dissidents persisted. Catholic Queen Mary killed off the Protestants and Protestant Elizabeth similarly dispatched the Catholics—along with sundry rivals and ex-lovers. The orgy of persecution continued without diminution during the eighty-five year Stuart epoch and Cromwell’s Puritan Revolution.

The significance of the written and printed word was fully recognized by Elizabeth, Cromwell, and the Stuarts. From the time William Caxton set up the first printing press in England, in 1476, a new force was released in the world, but until Henry VIII’s split with the Catholic Church, printed books were predominantly concerned with orthodox religion or were non-controversial in subject matter. Thereafter the country was flooded with Anabaptist, Presbyterian, Quaker, and Papist tracts. As soon as products of the printing press started to reach the masses, restraints began to be set up. Treason, felony, and heresy statutes directed against authors and publishers were enacted in Elizabeth’s time and strengthened by a licensing system to control the printers and their presses. Only the government was free to express opinion through the spoken or written word.

A blow against censorship and prior restraint was struck by John Milton in 1644 in his classic polemic, *Areopagitica*, contending against parliamentary censorship and for unlicensed printing. Milton’s stirring defense for liberty of the press went unheeded, and governmental censorship continued for another fifty years. The Licensing Act of 1662, made law after the Restoration, prohibited seditious and heretical books and pamphlets; forbade printing any material unlicensed by the Stationers’ Company, a governmental monopoly; made illegal the importation or selling of a book without a license, and required...
that all printing presses be registered with the Stationers’ Company. The system did not come to an end until 1694, six years after the “Glorious Revolution” threw out the last of the Stuarts.

Meanwhile, on the other side of the Atlantic, the English colonies in America, forced to operate under the laws of the motherland, were experiencing similar travails. One myth that should be dispelled is the popular belief that freedom of expression was cherished in the colonial American society. As Leonard W. Levy points out in his *Freedom of Speech and Press in Early American History*:

The evidence provides little comfort for the notion that the colonies hospitably received advocates of obnoxious or detestable ideas on matters that counted. Nor is there reason to believe that rambunctious unorthodoxies suffered only from Puritan bigots and tyrannous royal judges. The American people simply did not understand that freedom of thought and expression means equal freedom for the other fellow, especially the one with hated ideas.

Colonial America was marked by great diversity of opinion on religion, politics, and other matters, but violent conflicts were avoided for the most part by the separation of groups with varying points of view. John P. Roche sums up the prevailing situation quite accurately: “Colonial America was an open society dotted with closed enclaves, and one could generally settle in with his cobe lievers in safety and comfort and exercise the right of oppression.” Thus, Unitarians avoided Anglican or Puritan communities; Puritans stayed away from the Anglican colonies; Quakers and Anabaptists confined their activities principally to Pennsylvania and Rhode Island; and Catholics were concentrated in Maryland. The atheist met with toleration nowhere.

Strangely, again contrary to tradition, the most severe suppression of freedom of expression came not from royal judges or governors appointed by the Crown, but from the popularly elected assemblies. During the eighteenth century especially, the law of seditious libel was enforced in America chiefly by the provincial legislatures. The assemblies, considering themselves immune from criticism, issued warrants of arrest for, interrogated, fined, and imprisoned anyone accused of libeling its members, or the body as a whole, by written, printed, or spoken words. One historian concludes, “Literally scores of persons, probably hundreds, throughout the colonies were tracked down by the various messengers and sergeants and brought into the
Freedom of Speech and Press

house to make inglorious submission for words spoken in the heat of anger or for writings which intentionally or otherwise had given offense."

None of the colonies was an exception. The first assembly to meet on American soil, the Virginia House of Burgesses, decided that a Captain Henry Spellman was guilty of "treasonable words" and stripped him of his rank. The prevailing attitude in the Old Dominion was expressed in Governor William Berkeley's famous remark, "I thank God, there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both!"

Even in Pennsylvania, reputedly the most tolerant of the colonies, printing was stringently regulated. William Penn himself presided over a council meeting in 1683 when it was ordered that the laws of the colony should not be printed. In what is believed to be the first criminal trial in America involving freedom of the press, Pennsylvania's first printer, William Bradford, had his press seized by the government, was charged with seditious libel, and spent more than a year in prison for printing a pamphlet entitled the Frame of Government which was a copy of the colony's charter.

The ruling powers were especially suspicious of newspapers. The first newspaper to be published in the American colonies, entitled Public Occurences, expired after its first issue. Issued by Richard Pierce in 1690 in Boston, the paper was immediately suppressed because it mentioned the Indian Wars and commented on local affairs.

A more celebrated event was the trial of John Peter Zenger, a case which contributed greatly to establishing the principle of a free press in British North America. Zenger's newspaper, The New York Weekly Journal, had printed satirical ballads reflecting on William Cosby, the highly unpopular governor, and his council. The issues condemned were described "as having in them many things tending to raise seditions and tumuluts among the people of this province, and to fill their minds with a contempt for his majesty's government." The grand jury failed to indict Zenger and the General Assembly refused to take action, but acting under the Governor's orders, the attorney general filed an information. At the trial of the prisoner, in 1735, the defense was conducted by Andrew Hamilton, a Quaker lawyer from Philadelphia who was Speaker of the Pennsylvania Assembly. Despite a packed court, the defendant was acquitted with a verdict based on

JULY, 1970
The principle that in cases of libel the jury should judge both the law and the facts.

The concept of freedom of speech and press, so strikingly absent in America before the Zenger case of 1735, remained inconspicuous for a considerable period afterward. Leonard Levy’s assertion that “it is difficult to find a libertarian theory in America before the American Revolution—or even before the First Amendment” is doubtless accurate. Benjamin Franklin’s celebrated “Apology for Printers,” though influential, could hardly be characterized as profound. The first colonial writer to develop a true philosophy of freedom of speech and press was James Alexander, founder of the American Philosophical Society, a prominent public figure and man of versatile talents, who masterminded the Zenger defense. Alexander’s A Brief Narrative of the Case and Tryal of John Peter Zenger (1736) was a widely known source of libertarian thought in America and England during the eighteenth century. Less familiar, but of outstanding quality, was his four-part essay on the history and theory of freedom of speech, published in Franklin’s Pennsylvania Gazette in 1737. A primary principle stated by Alexander is that “Freedom of speech is a principal pillar in a free government: when this support is taken away, the constitution is dissolved and tyranny is erected on its ruins.”

The framers of the U.S. Constitution of 1787 were educated, highly literate, and widely-read men intimately acquainted with the centuries of struggle between tyranny and freedom that had been going on in England and more recently in America. The long record of oppression and suppression formed a backdrop as the leaders proceeded to build the government of the United States on the sovereignty of the people and their rights as citizens of a republic.

Originally, however, the Constitution did not contain a bill of rights, because the convention delegates at Philadelphia felt that individual rights were in no danger and would be protected by the states. Nonetheless, the absence of a bill of rights became the strongest objection to the ratification of the Constitution. Under the influence of his friend Thomas Jefferson, and yielding to the general demand for a bill of rights, James Madison became the principal draftsman of the first ten amendments.

A basically new approach to the crime of seditious libel was made by the authors of the First Amendment. Even after the victory over censorship in England in 1695, the people continued to view their rulers as their superiors who must not be censured directly in news-
papers and pamphlets, but only through petitions to elected parliamentary representatives. Now came Madison and his associates who regarded governmental authorities as servants of the people. As stated by Madison, "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." In effect, sedition ceased to be a crime under the broad prohibitions of the First Amendment, though breaches of the peace which destroyed or endangered life, limb, or property were still punishable by law.

The Bill of Rights had been in effect less than a decade when it met with its first serious challenge. In 1798, war with France seemed imminent. Thousands of French refugees were in the United States, espionage activities were prevalent, and radicals supported the French cause. President John Adams even objected to the visit of a group of French scientists, arguing that "learned societies" had "disorganized the world" and were "incompatible with social order." The popular hysteria led to Congress' enactment of a series of alien and sedition laws. One such law made it a crime, for example, to publish any "false, scandalous and malicious" writing against the government, the Congress, or the President "with intent to defame" them or to bring them "into contempt or disrepute" or "to stir up sedition." The crime carried a penalty of $2,000 fine and two years in jail.

An immediate uproar ensued. One side contended that "a conspiracy against the Constitution, the government, the peace and safety of this country is formed and is in full operation. It embraces members of all classes; the Representatives of the people on this floor, the wild and visionary theorist in the bloody philosophy of the day, the learned and the ignorant." Such arguments were met with impassioned pleas for freedom of speech and the press, led by Thomas Jefferson and James Madison. The alien and sedition laws became a prime issue in the presidential campaign of 1800. When Jefferson was elected he promptly pardoned all those who had been convicted under the 1798 laws, Congress passed laws remitting fines, and the Sedition Act expired with the Fifth Congress in 1801.

The next major attack on the First Amendment's proscriptions against any law abridging freedom of speech and of the press occurred in 1835, when President Andrew Jackson proposed to Congress the passage of a law which would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection." A special committee, under the chairmanship of John C. Calhoun of
ROBERT B. DOWNS

South Carolina, reported adversely on the proposal on the ground that it was in conflict with the First Amendment, though a majority of the committee was in sympathy with the bill's intent. Calhoun, in turn, introduced a bill to make it unlawful "for any deputy postmaster, in any State, Territory, or District of the United States, knowingly to deliver to any person whatever, any pamphlet, newspaper, handbill, or other printed matter or pictorial representation touching the subject of slavery, where, by the laws of the said State, Territory, or District, their circulation is prohibited; and any deputy postmaster who shall be guilty thereof, shall be forthwith removed from office." The Calhoun bill was likewise defeated.

Counterattacking, the opponents of Calhoun's proposal introduced and succeeded in passing an act that in principle prohibited the post office department from censoring the mail. More than a century later, Judge Thurman W. Arnold in his opinion in the *Esquire* case stated: "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.'"

Three so-called "Civil War amendments," destined to have a profound impact on civil liberties and intellectual freedom, were adopted from 1865 to 1870. The Thirteenth Amendment abolished slavery and the Fifteenth provided that "The rights of citizens of the United States to vote shall not be abridged... on account of race, color, or previous condition of servitude." It is the Fourteenth Amendment, however, which is most frequently linked with the First as a protection against censorship and as a guarantee of free expression. Pertinent sections state: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The significance of the Fourteenth Amendment from the point of view of civil liberties lies in the growth of national power as opposed to state power. As John P. Roche points out so cogently:

Specifically, the growth of federal power has led to the implementation of a principle of national protection of individual liberty against the actions of states or municipalities by the judiciary and to judicial decisions excluding the states from areas of jurisdiction of vital significance in civil liberty. Moreover, with a full recognition of the
dangerous potentialities of unchecked national power, it is con-
tended that the national institutions have provided a far higher level
of juridical defense and have shown a far greater sensitivity to the
rights of the individual than have the states.10

Every generation since 1790—in fact, virtually every decade—has
redefined and re-interpreted the First Amendment. Though the lan-
guage is clear and explicit, “Congress shall make no law . . . abridging
the freedom of speech, or of the press,” Congress, the courts, and
executive powers have repeatedly done, or at least attempted to do,
exactly that. One theory used to circumscribe or circumvent the
Amendment was use—abuse or liberty versus license. Under this no-
tion, a distinction was made between right and wrong use of speech
and press, i.e., liberty as against license. Superseding that doctrine to
some extent was Justice Holmes’ “clear and present danger” test, ac-
cording to which liberty of press and speech would remain unre-
stricted as long as public safety was not imperiled. A classic example
is Justice Holmes’ “fire in a crowded theatre” statement. A new theory
that has come into vogue in more recent judicial decisions is “balancing
of interests,” as between public and private rights and welfare. All
of these theories, it should be noted, infringe on the unqualified guar-
antees of the First Amendment.

The most blatant attacks on the principles contained in the First
Amendment occurred after the two world wars. A notorious case was
the raids carried on under the direction of A. Mitchell Palmer, Wood-
row Wilson’s Attorney General. On January 2, 1920, one minute after
midnight, about 500 FBI agents and police swooped down on 3,000
Russian, Finnish, Polish, German, Italian, and other alien workmen,
looking for Communists to deport. The victims were hustled off to
jail and arrested without warrants, homes were ransacked without
legal authorization, and all literature and letters were seized. Irving
Brant suggests that the actual substance of the supposed crime of these
hapless victims of Palmer’s “Red Raids” was nothing more nor less
than the ancient crime of “compassing or imagining the death of the
King,” in this instance “compassing or imagining the death of the
Republic.”11

An even more virulent epidemic, from which the nation has not yet
fully recovered, is “McCarthyism,” a phenomenon of the early nine-
teen fifties. The Senate Permanent Subcommittee on Investigations
of the Committee on Government Operations was used as a platform
by its chairman, Senator Joseph R. McCarthy of Wisconsin, to air his
unsubstantiated, irresponsible charges that the federal government was thoroughly infiltrated by Communist agents. McCarthy's attacks on the U.S. information libraries abroad led to the burning of some books accused of being Communist propaganda, the resignations of numerous librarians, and the closing of a considerable number of libraries because of reduced congressional support.

In past eras religious heresy was a common basis for thought suppression. There is rarely a case of censorship for religious heresy in present-day society. A more persistent ground for attacks on intellectual freedom is unorthodox political opinions, as has been shown in the foregoing discussion. Political questions remain lively and controversial issues in the modern world. A third area for censorial attacks is the problem of obscenity and pornography.

For almost a century after the American Revolution, the United States managed to get along without any censorship laws in the field of obscenity. The full flower of repression bloomed with the Comstock era in 1868, under the inspiration of a young man by the name of Anthony Comstock, who had emerged from the backwoods of Connecticut to lead a crusade against what he considered indecent literature. Under a special act of the New York State Legislature, Comstock organized the New York Society for the Suppression of Vice. The law gave the Society a monopoly in its field and its agents the rights of search, seizure, and arrest—rights which had previously belonged exclusively to the police authorities. The crowning touch came in 1873, when the moral forces obtained the passage of the federal statute entitled the "Comstock Law," which provided penalties for mailing allegedly obscene publications. Hundreds of thousands of books were confiscated and thousands of defendants arrested. Eventually, this kind of censorship was discredited by ridicule, by the growth of liberal thought, by changing literary taste, and by certain landmark court decisions.

In its 1957 decision in the Roth case, the Supreme Court made solid progress in striking the shackles of censorship from literature. The Court ruled that a work could not be considered obscene unless it met all of three separate and distinct tests: it had to go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex or nudity; the work must appeal to the prurient interest of the average adult; and the work must be utterly without redeeming social importance. Under the Court's liberalizing influence of the past decade, literature has become increasingly free

[ 16 ]
and candid, though a step backward was taken in the *Ginzburg* case in 1965, when the Court ruled that the publisher’s method of advertising and promoting a book must be taken into account in judging questions of obscenity.

A new dimension was added in 1968 when an eighteen-member Commission on Obscenity and Pornography was appointed by President Lyndon B. Johnson. It is anticipated that under President Nixon’s urging, the commission will recommend some type of strict federal legislation, possibly aimed at counteracting the liberal opinions of the Supreme Court.

The fundamental freedom of the press is constantly under attack and “eternal vigilance,” as Thomas Jefferson warned, is required to preserve it. The First Amendment is presumably in no danger of repeal, but it is always imperiled by erosion and qualification. As the federal bureaucracy grows steadily larger and more complex, official interference with the public’s right to know is common practice. In his Pulitzer Prize-winning editorial of many years ago, William Allen White had a highly relevant statement applicable to current conditions:

You say that freedom of utterance is not for time of stress, and I reply with the sad truth that only in time of stress is freedom of utterance in danger. No one questions it in calm days, because it is not needed. And the reverse is true also; only when free utterance is suppressed is it needed, and when it is most needed, it is most vital to justice. . . . This state . . . is in more danger from suppression than from violence, because, in the end, suppression leads to violence. Violence indeed, is the child of suppression.¹²

Also memorable is a defense of freedom of expression stated by Supreme Court Justice Brandeis, concurred in by his colleague Justice Holmes:

[Those who won our independence] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹³

Perhaps psychologists and psychiatrists may be able to offer ex-
ROBERT B. DOWNS

Explanations for the state of mind which produces censorship pressures. In the United States, since the end of World War II, many Americans have been uneasy about revolutions around the world, the growth in power of the Soviet Union and Red China, and the tensions of the Cold War. At home, the people find themselves trapped in a collective nightmare of choking cities, polluted land, water, and air, casual murders of tens of thousands along the highways, mammoth problems of racial integration, student unrest, and large-scale juvenile delinquency. In a period of tension, frustration, and worry, therefore, the people are prone to attack what they consider a visible enemy, e.g., threatening ideas in published form. Removing subversive books from circulation, they reason, will undermine the Communist controversy, and taking obscene books off the shelves will end juvenile delinquency and stop the crime wave.

But despite the psychological and other handicaps under which the literary world labors, reading materials of all kinds are available to Americans in greater quantities than ever before. Viewed objectively, we remain a free people in the field of reading. It is a freedom, however, that cannot be taken for granted, casually and indifferently.

References

10. Roche, op. cit., p. 156.