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The ‘Censorship of Public Opinion’: James Madison, the Sedition Act Crisis and Democratic Press Liberty

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The essential difference between the British government, and the American constitutions, will place this subject [the freedom of the press] in the clearest light. ... In the United States ... the people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, but from the subsequent penalty of laws.¹

Amidst an undeclared naval war with France in 1798, President John Adams and his allies in the United States Congress passed a law banning seditious libel. They justified this provision of the Sedition Act by drawing on long-standing English legal norms and the eminently reasonable argument that wartime conditions made critiques of the government even more dangerous than usual. Indeed, only six years prior, an English jury had found Thomas Paine guilty of seditious libel for his arguments in *The Rights of Man, Part Two*, despite the able defence provided by Thomas Erskine. What is remarkable, then, about this particular moment of censorship is not that an established government would pursue it with some public support, but rather the fact that James

Madison, Thomas Jefferson, and eventually the mass of the American people would reject this logic so completely and embrace a theory of free expression of unprecedented breadth and depth.

Despite being arguably the freest government in European history, England in the late eighteenth century was still a monarchy, if a limited one, and the prohibition against seditious libel remained a pillar of the common law. Respect for, and deference to, the government was seen as a necessary condition for public order; accordingly, seditious libel (that is, criticism of government) had the damaging tendency to bring government officials into disrepute, undermining the needed deference. Some legal scholars even argued that any truth in such criticism of government officials would actually make matters worse, because though the public might well ignore dubious accusations of official corruption, accurate claims would be more likely to reduce deference and even bring popular unrest.

Adams's 'Federalist' party was thus on fairly solid ground when it criminalized 'any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute' (20). They argued, with considerable plausibility, that the new American legal system still drew in many ways on the English common law, despite achieving independence two decades earlier. From this perspective, the law was simply formalizing these traditional legal principles. What is more, the Federalists believed they were adapting those established legal norms to American conditions when they made two changes that seemed to open up avenues for legitimate political dissent. First, the law gave defendants the right to prove the truth of their allegedly false libel and, second, it gave the jury the power to decide whether the published words really amounted to seditious libel (rather than limiting the jury to determining only whether the defendant was indeed the author of the libel, as did some English precedents). Admittedly, the First Amendment (1791) to the American Constitution (1787) declared that 'Congress shall make no law...abridging the freedom of speech, or of the press,' but the Federalist Congress was only codifying what 'freedom of the press' properly meant.

At issue, then, were the theoretical foundations of the novel notion of popular sovereignty that the United States was modelling for the world. But the moment was not limited to questions of philosophical fundamentals: Federalist officials – and juries packed with their supporters – would spend the next two years prosecuting and jailing newspaper editors who had opposed the Adams administration by publishing articles critical of the government. The partisan

purposes of the law were unmistakable. Federalist critics of Jeffersonian members of Congress would never face even the hint of prosecution, and the law notably failed to criminalize criticism of the Vice-President, Thomas Jefferson. Moreover, the Act provided for its own expiration at the end of Adams's term in office.

For James Madison, who had split with the Federalists years earlier and was now the leading spokesman of the opposition, the biased enforcement was not nearly as important as the debate over the very meaning of popular government. The nature of the American government was, in his view, something altogether new. The people, not the legislature, were sovereign. And this sovereignty was not merely some philosophical postulate, a conceptual proposition meant to remain in the theoretical background. Defending the Virginia legislature's 1798 Resolutions criticizing the Sedition Act – resolutions he had drafted – Madison articulated his long-standing notion of an active popular sovereignty rooted in democratic power. Indeed, it was not only the right of citizens to discuss and criticize governmental policies and practices, it was their 'duty' to 'control [government proceedings] by the censorship of public opinion' (225). This 'censorship' would not be legal or institutional, but public sentiment would be no less effective, if broad-based enough.

This unprecedented power of the citizenry to genuinely rule their government had been no more evident than when public debate ratified a new understanding of constitutional foundations in 1787–1788. The Federalist approach to the freedom of the press misunderstood the demands of truly meaningful popular sovereignty, according to Madison. For starters, lacking a monarch, and given the comparatively limited powers of the US president, the threat of governmental overreach was now also, or even especially, likely to emerge from the legislature. While this might seem a fairly simple deduction from the new claim of popular, rather than parliamentary, sovereignty, it was, in fact, a monumental step for democratic theory. When John Adams observed in 1776 that a 'democratic despotism is a contradiction in terms,' he was merely expressing the then common understanding that a people could not oppress itself.² Madison's explication of a constitution as the supreme articulation of popular sovereignty, however, newly recognized the dual threats posed by popularly elected legislatures: both when they act counter to the popular will (aggrandizing themselves) and when they act following the majority's desire to tyrannize the minority.

Whether the Sedition Act was indeed an example of majority tyranny was, for Madison, ultimately to be decided by public opinion, which in turn would

be informed by public discourse, including Virginia's Resolutions and Madison's *Report*. But for this public opinion to be most effective, there must be practical mechanisms for its expression, especially meaningful elections. But these elections in turn relied on the very freedom of the press that the Federalists' Sedition Act was undermining.

'The right of electing members of the government', Madison explained, is 'the essence of a free and responsible government'. But for this right to have any real value, the public must have an 'equal freedom... of examining and discussing [the] merits and demerits' of both incumbents and challengers (227). And between elections, a free press is the only channel that can circulate 'an adequate knowledge' thereby giving 'efficacy to [government's] responsibility to its constituents' (224).

Madison's concern with majority as well as minority tyranny and, especially, his novel theory of an ongoing public discourse via an effective mass media (newspapers, broadsides, pamphlets) were significant developments in the theory of democratic press liberty. But, drawing on the Anti-Federalist critics of the proposed Constitution of 1787–1788 and various democratic radicals of the 1790s, Madison went even further. Because true popular sovereignty required continuous public accountability, which in turn required a robust democratic public sphere, only eliminating 'previous restraint' (prior censorship by some government licenser) was not nearly enough protection. Citizens must feel confident that they are safe also from subsequent punishment, such as the fines and imprisonment threatened by the Sedition Act. If an author had to worry that his political criticism might result in punishment, he would likely think twice before publishing. The law would thus induce a kind of self-censorship, what we now call a 'chilling effect', which effectively restrains the critic and thus undermines public debate. This 'mockery', Madison insisted, simply can 'never be admitted to be the American idea' of freedom of the press (220).

Political speech, then, must be free from all criminal sanction. Only overt acts, actual 'resistance', can be proscribed and punished (219). Did not this mean that even false accusations might go unpunished? Yes, insisted Madison and other members of the emerging Democratic-Republican party. The Federalists' Sedition Act convictions amply demonstrated the futility of allowing defendants to prove their innocence by permitting evidence of the truth of their statements, Madison explained. Even 'simple and naked facts' are, in actual practice, rarely provable 'with the full and formal proof necessary in a court of law'. More importantly, in political discourse, opinion is 'in many cases inseparable from the facts', or – more likely – it is the statement of opinion that is deemed libellous.

And opinions simply 'cannot be the subjects of that kind of proof which appertains to facts, before a court of law' (226).

For Federalists then, and many critics today, this expansive notion of press liberty is too extreme, virtually guaranteeing abuse of this freedom and a host of resulting ill effects. Neither Madison nor his Jeffersonian colleagues disagreed. He explicitly conceded that 'some degree of abuse is inseparable' from the proper use of the political press. But 'it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits'. Despite its dangers, the unprecedented expansiveness of American press liberty was on balance advantageous to democratic governance. Indeed, 'to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity, over error and oppression'. More specifically, the press had made the United States a 'free' nation and 'improved [its] political system' (222).

As radical as Madison's theory was, other Democratic-Republicans would take the argument even further. The New York lawyer Tunis Wortman, for example, would follow Madison in asserting that only actual conduct should be punished. But Wortman took the Sedition Act crisis as an opportunity to develop an exhaustive theory of democratic press liberty in his important book *A Treatise Concerning Political Enquiry and the Liberty of the Press* (1800). Here, he shared Madison's concern with any laws that might chill political speech but went into further detail, specifying that even civil suits for harm to the reputation of a maligned politician had to be strictly limited or the law would 'constantly damp the energy of Public Spirit and awe the timid and the irresolute into an abdication of their rights'.³

Wortman also took free speech theory further by analysing the other threats to a democratic public sphere. Any existing administration, for example, would have a great many practical advantages in public debate, not least a coterie of friends in the press and elsewhere that sought personal advantage by cozying up to those in power. Economic clout was another way in which existing elites could minimize public challenges to their position: 'Wealth exerts a pernicious empire over Manners and Morals.'⁴ The goal of press liberty for Wortman was a public sphere that allowed all sides to be heard, despite Federalist judges who rejected such thinking, declaring from the bench that the 'truth has but one side, and listening to error, and falsehood is indeed a strange way to discover truth'.⁵ For Wortman even more intensely than Madison, a public sphere of robust dissent 'produces Collision, engenders Argument, and

affords exercise and energy to the intellectual powers; it corrects our errors, removes our prejudices, and strengthens our perceptions; it compels us to seek for the evidences of our knowledge, and habituates us to a frequent revisal of our sentiments.⁶ Ultimately, it allows for all of society to influence the public opinion that rules in a democracy.

For all of Wortman's advances, it was Madison's like-minded associate Thomas Cooper who developed the most thoroughgoing theory of the place of political dissent in democratic press liberty. A British expatriate and naturalized American citizen, Cooper argued during the Sedition Act crisis for a concept of press liberty that not only tolerated falsity but actively encouraged dissenting views, whether they were true or not. In a series of political essays – some written with Elizabeth Ryland Priestley, the daughter-in-law of his old friend, the famed chemist Joseph Priestley⁷ – Cooper espoused a novel appreciation of the centrality of dissent to democracy. He maintained that even if an author's 'opinions be false, still it *may* be of importance and *can* be of no detriment that they should [be published]. At all events the greater is the chance of settling the point in question, and of striking out collateral knowledge during the discussion.'⁸ Nor was this mere theory for Cooper: he was convicted in 1800 of seditious libel and punished with a heavy fine and six months in jail.

However, the example of Cooper's radical theory of press liberty is telling in more ways than one. Though he had been an outspoken critic of the slave trade in his youth, Cooper moved to South Carolina in 1819 to take up a professorship and eventually changed his views, espousing scientific racism and states' rights. These changes occasioned shifts in his approach to press liberty, and by 1826 he argued that untrue statements are punishable. More broadly, nineteenth-century America would see state-based (rather than federal) laws limiting political expression and even occasional mob violence against printers.

But if these examples demonstrate that conceptualizing American press liberty involves ongoing moral and political struggles, Madison's own practice suggests that this radical approach is practically possible as well as philosophically robust. As the US president during the War of 1812 against the British, Madison saw a great many threats to the fledgling republic. Many of his critics were nearly treasonous in their opposition to the war and their support for the British (by late 1814, there was even a movement towards secession in New England). Moreover, this was a genuinely existential threat, as enemy soldiers occupied various parts of the country, even burning much of Washington, DC, including the White House. Yet, in the face of all these

threats, Madison never considered legal efforts to silence the press, thereby demonstrating practically the viability of his political theory.

The theory of democratic press liberty espoused by Jeffersonians during the Sedition Act crisis, and elucidated by Madison in his *Report*, was the most expansive conception the world had ever seen. And to this day, America maintains a distinctively broad approach to political press liberty. The Sedition Act itself expired at the end of Adams's term and was never formally overruled. But the Supreme Court in 1964 famously maintained that 'the attack on its validity has carried the day in the court of history'. The 'lesson' of this episode was clear: 'restraint ... imposed upon criticism of government and public officials [is] inconsistent' with freedom of the press and democratic government.⁹