THE CONTROL OF SEDITIOUS LIBEL AS A BASIS FOR THE DEVELOPMENT OF THE LAW OF OBSCENITY†

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I. INTRODUCTION

IN THE UNITED STATES there are government controls of at least two types of press, seditious libel and obscenity. Even though the first amendment protects speech and press, libels against the government and obscenity have not been given free reign, and have been consistently controlled. Although the conflicts over seditious libel aided the development of current standards of freedom of the press, the controls of obscenity have not yet completed that development and are inconsistent with those first amendment standards.

Control of libel against the government can be traced through centuries of English history. Methods of dealing with this form of libel have ranged from licensing and prior restraints, to the more powerful control of common law seditious libel. Control of obscenity, however, is of a more recent vintage and has developed independently since the mid-nineteenth century. Although these two types of press appear to be different and control of each has developed in completely different times and circumstances, there is a striking similarity of the law concerning these controls.

The control of seditious libel evolved through several forms in England and the United States before reaching its present stage. The law in the United States requires that “seditious” speech involve some call to action or some actual danger before it will be controlled. The exact nature of these rules shall, of course, be discussed later. The law concerning obscenity, however, still allows control of speech with no showing of any actual danger. In addition, other forms of control of obscenity, such as licensing and internal private controls, were originally developed for seditious libel, but passed from use in England in the seventeenth century.

It is argued that control of obscenity is paralleling the development of the control of seditious libel except that the control of obscenity has not yet evolved to as high a level as that of libel. However, it appears that

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the present law of obscenity is based on methods of control developed under past political conditions.

When controls of seditious libel first arose in England, it was under the strong monarchial government of Henry VIII. The different steps and changes in the evolution of seditious libel are closely aligned with the changes in political sovereignty, from the monarchial to parliamentary sovereignty in England, and eventually to a popular sovereignty in the United States. Although controls of the press have developed in accordance with these political changes, the control of obscenity, which developed under the popular sovereignty, has continued to use methods of control developed under monarchial and parliamentary sovereignties.

Many of the conflicts over controls of obscenity may be traced to the tension created in using methods of control which do not correspond to the form of government in the United States. In order to make the law of obscenity internally consistent with the form of sovereignty in the United States, the first amendment, and the development of other controls of the press, control of obscenity would have to be relaxed to the point where only that press which creates a real danger of violating another law is prohibited. It should be noted that it is not suggested that this ruling would be readily accepted by a majority of the United States citizens. The public may feel that the United States does not need that extent of freedom. It is only recommended that the changes are necessary to bring the law of obscenity into compliance with the United States Constitution.

II. HISTORICAL TREATMENT OF LIBEL AGAINST GOVERNMENT

A. Early Development of Controls

Control of the printed word began in England within a few decades of the actual commencement of printing in 1476. For almost fifty years the control was more concerned with encouraging the press, and printers received considerable advertising value and protection from piracy by obtaining the King’s approval. When Henry VIII declared his religious doctrines, however, he began restricting the flow of printed material to that which was favorable to this position. By the mid to late sixteenth century, he had set up a censorship and licensing system and turned over complete control of this type of prior restraint to the Privy Council.

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1 F. Siebert, Freedom of the Press in England, 1476-1776, at 22-23 (1952) [hereinafter cited as F. Siebert].
2 Id. at 31-37.
3 Id. at 35-51.
During the reign of Queen Elizabeth, the licensing system reached its full power. In 1586, the Star Chamber Decree was issued, which provided licensing provisions, penalties, and the formation of the Star Chamber for the trial of printers who violated the decree. In addition, a substantial amount of the administration of the licensing system was turned over to the Stationers Company. This company was a private craft organization of printers which originally had been created by Queen Mary in 1557. Under Queen Elizabeth, they welcomed the administrative duties since it enabled them to give their own members considerable protection in exchange for regulating the craft in accordance with the Queen's policy.

After the reign of Elizabeth, however, the monarch's authority over the press began to decline. During the early seventeenth century and through the English Civil War, Parliament took over control of the press. In 1689, when Parliament managed to secure sovereignty in itself, before allowing William and Mary to rule, the King and Queen were required to subscribe to a Bill of Rights. One of the provisions of that Bill of Rights secured free debate in Parliament. Once Parliament adopted free debate within its halls, it began to find it necessary to prevent free debate within the populace.

Although Parliament tried to continue using the licensing system which had been successful for the monarchs, the last licensing act was allowed to expire in 1694. The statutory controls had been vague and the Stationers Company had maintained too much power. In addition, the licensing was ineffective, and there was a better means of control at common law in the form of a prosecution for seditious libel. Possibly an overriding problem was that Parliament was beginning to form a party system and due to either a desire for free debate or fear of opposition control, the licensing had to cease.

Since prior restraint and licensing were not readily adaptable to the parliamentary sovereignty, a new method of control had been developed and was implemented. Between the mid-seventeenth century and the time of the American Revolution in both England and America, the case of De Libellis Famosis provided the definitive statement of the law of seditious libel. Basically, the law provided that prosecutions could be started

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4 Id. at 69.
5 Id. at 55-71.
6 Id. at 90-116; 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 43 (B. Schwartz ed. 1971) [hereinafter cited as THE BILL OF RIGHTS].
7 L. LEVY, LEGACY OF SUPPRESSION 89-115 (1960).
8 F. SIEBERT, supra note 1, at 226-63.
by information, and thus indictment by grand jury was unnecessary.\textsuperscript{10} In the Star Chamber proceeding, all issues had been decided by the judges and this was carried over into the common law courts in order to allow the judges to decide all issues except publication.\textsuperscript{11} Therefore, although the jury was returning a general verdict of guilty, the only issue they resolved was whether the material had been published; the judge was required to decide if the material was libelous.\textsuperscript{12}

Truth in a seditious libel action was not a defense and frequently did not matter.\textsuperscript{13} If truth had any importance, it tended to aggravate the defendant's alleged criminal act. Since the underlying motive of the prosecution was to prevent disruptions of the peace, truth obviously had a greater tendency to disturb the peace, and therefore, "the greater the truth, the greater the libel."\textsuperscript{14}

With the fall of licensing, liberal authors attacked the procedures of seditious libel. Although some writings published under the name of Cato sought complete freedom, the main thrust of the material was to allow truth as a defense and to allow the jury to decide all the issues of law and fact.\textsuperscript{15}

In 1765, Blackstone's Commentaries set out the details of the law for controlling the press. He made it clear that freedom of the press required that there be no prior restraint and did not refer to punishment for libels.\textsuperscript{16} In prosecution for libel, Blackstone explained that all libels tended to breach the peace, and therefore, the truth or falsity was not important. He explained that the provocation to breach of the peace was being punished, not the falsity of the statement.\textsuperscript{17}

During the colonial period of America, many of the colonies exercised some control of the press. From the beginning, however, the First Continental Congress expressed a broad view of freedom of the press. In its "Address to the Inhabitants of Quebec" this Congress stated:

\textsuperscript{10} L. Levy, Legacy of Suppression 12 (1960).

\textsuperscript{11} Id.; Shientag, From Seditious Libel to Freedom of the Press, 11 Brooklyn L.R. 125, 129-32.

\textsuperscript{12} F. Siebert, supra note 1, at 237.

\textsuperscript{13} Id. at 274.

\textsuperscript{14} Shientag, supra note 11, at 129. It was suggested that if an injured party could not revenge a true libel in court, he would have to revenge it privately causing a breach of the peace. 77 Eng. Rep. at 250, 5 Coke Rep. at 125(a).

\textsuperscript{15} L. Levy, supra note 7, at 116-20.

\textsuperscript{16} 4 W. Blackstone, Commentaries 152 (8th ed. 1778).

\textsuperscript{17} Id. at 150-51.
The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.\(^1\)

While drafting the Constitution, there was debate over how the press should be protected. The anti-federalist consistently complained of the lack of a bill of rights while the federalist defended that the bill of rights was not necessary.\(^2\) One of the best statements of the federalist position was contained in the *Federalist Papers*, a collection of essays that were prepared to help passage of the Constitution in the state of New York. *The Federalist No. 84* set out the position for no bill of rights, based on the idea that the people retained all power not specifically granted to the government.

It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. . . .\(^3\)

It was even argued that a bill of rights could imply powers that Congress did not otherwise have.

I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, would it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.\(^4\)

After ratification of the Constitution, one of the newly elected members

18 THE BILL OF RIGHTS, *supra* note 6, at 223.
19 *Id.* at 436-38, 444-46, 454, 474, 592-619.
21 *Id.* at 513-14.
of the House of Representatives, James Madison, proposed amending the Constitution with a bill of rights. It is interesting that Madison's first draft contained a section that would have extended the freedom of the press to the states. "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The restriction against the states was eventually dropped by the Senate when they passed the amendments and no record of the debate concerning that deletion was retained. The Senate also made a proposal that the press should be free "in as ample a manner as hath at anytime been secured by the common law" but it was defeated and the debate was not retained. The required ten states ratified ten of the submitted amendments by December 15, 1791.

Under the pressure of the federalist administration of John Adams, the Sedition Act of 1798 was passed. This Act caused further debate over the power of the federal government to punish seditious libel. The federalists supported the Sedition Act since they were in control of the government. The anti-federalists fought the passage and use of the Act and, along with Jefferson, felt that although states could punish libel, Congress had not been granted that power in the Constitution. Madison explained the anti-federalist position in his report on the Virginia Resolution. After stating that the Act was unconstitutional, Madison explained the invalidity of the Act based on the idea that a popular government cannot be libeled. Seditious libel arose in England when Parliament was all-powerful and rights were only established for protection against royal prerogative. In the United States the people were sovereign, not the government, and all of the government was limited. Madison felt that the enumerated powers did not grant Congress the power to control seditious libel, and that if any doubt had arisen, the first amendment was intended to be a complete removal of any such power.

The Sedition Act never came to the Supreme Court for review of its constitutionality. Moreover, the statute expired in 1801 after the Federalist Party had lost the election of 1800. Upon being elected, Jefferson

22 THE BILL OF RIGHTS, supra note 6, at 1027.
23 Id. at 1053, 1146.
24 Id. at 1148.
25 Id. at 1162-72.
26 L. LEVY, supra note 7, at 246.
27 Id. at 264-67.
28 Id. at 273.
29 Z. CHAFEE, FREEDOM OF SPEECH 20 (1920).
30 L. LEVY, supra note 7, at 277.
pardoned all persons in prison under the Act, Congress repaid all of the fines, and there has never been another statute passed by Congress which attempts to punish libel against the government without the additional showing of some public danger.\textsuperscript{31}

Although the federal government did not prosecute anyone for seditious libel between 1813 and 1914, the common law continued to develop in state courts. In 1798, Justice Cushing of the Massachusetts Supreme Court exchanged letters with John Adams, and Cushing stated that truth should be an absolute defense to libel, but Adams wrote that truth should only be a defense if it were published for the public good.\textsuperscript{32} In 1810, the Supreme Court of Massachusetts ruled on that issue, stating that all libels have a direct tendency to breach the peace and must be punished. If a libel was made, it was no justification that the statement was true.\textsuperscript{33} The court, however, saw the need to allow evidence of truth to be admitted. The crime of libel required proof of the defendant’s intent to defame an individual, and evidence of the truth or falsity of the statement would be probative of that intent.\textsuperscript{34}

Other than the state control of seditious libel discussed above, there was little other attempt to control the press up to the period of World War I. Even during the Civil War, the only attempt to control press was through restriction of the mail, and no attempt was apparently made to punish the press directly.\textsuperscript{35}

B. \textit{Twentieth Century Treatment of Controls}

Prosecution of criminal libel began to increase around the turn of the century and culminated in the passage of the Espionage Act of June 3, 1917, as amended on May 16, 1918.\textsuperscript{36} Most of the cases that arose under these statutes were prosecuted under the original Act since the war was almost over before the amendment was passed. That section was viewed at the time of passage as a military act, and not as a pure sedition act. The cases did not reach the Supreme Court until 1919, which was


\textsuperscript{32} 27 Mass. L.Q. 12 (1942).

\textsuperscript{33} Commonwealth v. Clapp, 4 Mass. 163, 167 (1808).

\textsuperscript{34} Id. at 169. \textit{See also} People v. Croswell, 3 Johns. Cas. 337 (N.Y. 1804).

\textsuperscript{35} \textit{FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT} xxiii-xxv (H. Nelson ed. 1967) [hereinafter cited as H. Nelson].

\textsuperscript{36} Espionage Act of 1917, ch. 30, 40 Stat. 217, as amended by Act of May 16, 1918, ch. 75, 40 Stat. 553.
after armistice, and the Court clearly established what was to be the rule concerning control of seditious libel in a popular sovereignty.87

The most important case which reached the Supreme Court concerning the World War I speech problems was Schenk v. United States.88 The defendant in that case had been indicted on three counts of violating the Espionage Act of 1917, for seeking to cause insubordination in the military.89 The materials which the defendant had been distributing sought to obstruct the operation of the military.40 The opinion by Justice Holmes stated that in ordinary times the defendant may have been protected, but that "every act depends upon the circumstances in which it is done."41 The Court then expressed how the test was to be applied: "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."42

At the same time the Schenck case was decided, three additional cases were also decided under the 1917 statute.43 Each of these cases involved different fact situations but each provided an opportunity for the Court to restate the "clear and present danger" test.

During World War I an additional method of control of seditious speech was used extensively. The Postmaster General of the United States specified exactly what type of material could be sent through the mails.44 Under the decision of Ex Parte Jackson,45 the use of postal service was seen as a privilege subject to limitation since other means of distribution were available. In 1921, the Postmaster had been revoking second class postage privileges for mail which he determined to be in violation of the Espionage Act of 1917. The Court there held that second class mail was a privilege and the power to grant that privilege implied the power to revoke it.46

It was not until 1946, in the obscenity case of Hannegan v. Esquire, Inc.,47 that the activities of the Postmaster were brought within first amendment protection.

87 For a view of the World War I developments from a perspective closer in time, see Z. Chafee, supra note 29, at 87-150.
88 249 U.S. 47 (1919).
89 Id. at 48-49.
90 Id. at 51. See also Z. Chafee, supra note 29, at 88-89.
91 249 U.S. at 52.
92 Id.
94 H. Nelson, supra note 35, at xxxiv.
95 96 U.S. 727 (1878).
97 327 U.S. 146 (1946).
1. Federal Standards for State Control

The early decision of Barron v. Baltimore\(^{48}\) held that the restraints of the first amendment did not apply to the states and this theory has remained unchallenged. The fourteenth amendment, passed subsequent to the Civil War, did not immediately place the first amendment restraints upon the states. The period around the First World War, however, resulted in the application of the first amendment to the states by operation of the fourteenth amendment.

In 1923, the case of Gitlow v. New York\(^ {49}\) reviewed a state conviction for advocating the violent overthrow of the government. In that case, the Court held that states could not impair the privileges of the first amendment. In issuing that opinion, the Court, however, explained that the states could punish speech which tended to corrupt public morals, incite crime, or disturb the peace, and upheld the defendant's conviction.\(^ {50}\) This wording introduced the "bad tendency" test from which Justices Holmes and Brandeis both dissented, claiming that the rule should be the same for federal prosecutions.\(^ {51}\)

Subsequently, however, the rule of law for application of the protection of expression from federal and state control was gradually found to be the same. In the famous footnote of the Carolene Products Company Case in 1938, the same scope of constitutional review was stated for the first ten amendments, as they were made applicable to the states under the fourteenth amendment.\(^ {52}\) In a labor dispute in 1944, a state action was overturned because of a failure to apply the "clear and present danger" test.\(^ {53}\) It is now generally accepted that in cases involving seditious libel, the rules applied are the same whether they involve action by the federal or state government.\(^ {54}\)

2. Unconstitutionality of Prior Restraints

Possibly the oldest form of control of the press has been through licensing or prior restraint. As of the seventeenth century, however, that form of control had come under attack, and by the eighteenth century, it was generally agreed that the ideals of freedom of the press at least required

\(^{48}\) 32 U.S. 243 (1833).

\(^{49}\) 268 U.S. 652 (1925).

\(^{50}\) Id. at 667.

\(^{51}\) T. Emerson, Toward a General Theory of the First Amendment 50 (1966); 268 U.S. at 672-73 (Holmes, J., dissenting).

\(^{52}\) 304 U.S. 144, 152 n.4 (1938).


that there be no prior restraint. This point was of sufficiently universal acceptance that Blackstone's *Commentaries* recited that doctrine in detail. With that historical setting, the issue of prior restraints has not been frequently raised; that form of control of the press has seldom been used in the United States. In 1931, however, the Supreme Court was forced to issue an opinion on a form of prior restraint.

In the case of *Near v. Minnesota*, the defendant had published a magazine which accused the police of cooperating with organized crime, and the state brought an action to enjoin the publication. The state court held that the magazine was a public nuisance and enjoined any further publications. That court, using theories which had not been advocated since the early 1800's, stated that even if a fact were true, there was no absolute right to publish it. Truth could only be published where it was for good purposes. The Supreme Court reversed by first noting that prior restraints of this type had not been used for 150 years. The Court also stated that one of the chief purposes of the freedom of the press was to prevent such restraints and cited Blackstone as authority. In contrast to the state court's understanding of the use of truth, the main purpose was to prevent prior restraint, and that control could not be used even if the materials were false. Any punishment would have to be after publication for abuse.

In 1936, the Court handed down a decision which involved taxation as a form of prior restraint. The state of Louisiana had levied a gross receipts tax which only affected a small group of newspapers, and was directed only at those with a large circulation. The Court again explained that the history of freedom of the press at least required that no prior restraint could exist, and that the first amendment must mean more than that since prior restraint was completely dead by the time of the Revolution. The opinion dealt at length with taxing provisions, and held that *Near v. Minnesota* could be read to extend to this type of case. Although not a pure prior restraint case, the Court noted that the taxing provision operated in the same manner as a prior restraint.

In 1938, the Court faced a third prior restraint case where a city ordinance required the acquisition of a license prior to distribution of any

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53 283 U.S. 697 (1931).
54 *Id.* at 709-10.
55 *Id.* at 713, 718.
56 *Id.* at 714-15.
58 297 U.S. at 245-49.
59 *Id.* at 249.
material. The Court again noted that the first amendment was a limitation on licensing and that the mere fact that distribution and not publication was being licensed, was irrelevant. Distribution, the Court held, was as important as publication.\(^{62}\)

In a 1940 case before the Supreme Court, the defendant was arrested for selling religious material without state approval.\(^{63}\) Although much of the case dealt with the religious clauses of the first amendment, the Court cited *Near v. Minnesota* and declared that there can be no prior restraint of this type.\(^{64}\)

It is interesting, therefore, that for 150 years the use of prior restraints had been avoided, yet during a ten year period, the Supreme Court was faced with several different forms of that control. The four above mentioned cases do seem to indicate that prior restraint of expression against the government will not be upheld. *Near v. Minnesota* overruled a pure use of prior restraint, the second case attacked the use of taxes for control, and the other two cases overruled restraints that were directed at distribution of materials. By reading these four cases together, one can safely conclude that prior restraint is unconstitutional.\(^{65}\)

3. The Clear and Present Danger Test

The period leading up to and including World War II produced, among some, the fear that a return to the suppression of the First World War would occur. Possibly because of the use of the "clear and present danger" test, this did not happen.\(^{66}\) The Court throughout the period had been confronted with many different attempts to control expression which appeared to be against government, and yet was able to find first amendment protection for most of them. The one aberrational problem has been the threat of communism, which has been the basis of further development of the law of seditious libel and must be viewed separately. The Court for a time viewed that form of seditious libel in a different manner, but ultimately has been working to align that area of law with the first amendment as expressed by the "clear and present danger" test.

The cases which did not involve communism presented two problem areas. One line of cases dealt with government attempts to enforce beliefs,
while the other line of cases involved activities which were claimed to be symbolic speech.\(^67\)

In *Board of Education v. Barnette*,\(^68\) the Court explained that government could not require citizens to hold any particular beliefs. In that case, the state had sought to require flag saluting, although it conflicted with the religious beliefs of certain individuals. The Court struck down that requirement, and stated a general theory of the first amendment: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."\(^69\)

Several different types of activities which were claimed to be symbolic speech have been reviewed by the Supreme Court. In *Thornhill v. Alabama*,\(^70\) the defendant was convicted of picketing and loitering. The Court held that the law was too broad and it limited activities which did not present a clear and present danger.\(^71\) In 1965, the Court ruled on another picketing case which arose from a civil rights demonstration. In reversing the conviction, it held that freedom of speech is intended to be "provocative and challenging.\(^72\)

In *United States v. O'Brien*,\(^73\) the defendant was convicted for burning his selective service card. Although the defendant claimed his action was symbolic speech, the Court confirmed his conviction. It held that the governmental interest in maintaining documentation was unrelated to speech and could be subject to reasonable regulation.\(^74\)

It appears from these cases, therefore, that the Court retained a general theory in dealing with the first amendment. The freedom of belief without coercion was upheld, and even mixtures of words and actions would be permitted if they did not create a clear and present danger. The Court did carve out the possibility that the government would be allowed to operate

\(^67\) A case which does not fit either classification of this section is *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). This case declared that speech which could be called "fighting words" was not protected by the first amendment.

\(^68\) 319 U.S. 624 (1943).

\(^69\) *Id.* at 641. See also *NAACP v. Alabama*, 357 U.S. 449 (1958); *Taylor v. Mississippi*, 319 U.S. 583 (1943).

\(^70\) 310 U.S. 88 (1940).

\(^71\) *Id.* at 101-105.


\(^73\) 391 U.S. 376 (1968).

\(^74\) *Id.* at 370-80. The case of *Street v. New York*, 394 U.S. 576 (1969) offered a peculiar problem. The defendant was arrested after using vulgar language about the flag of the United States and then burning it. The Court reversed saying he had been convicted for his words alone. Chief Justice Warren dissented and stated that there may be a governmental interest in not having flags burned.
in areas which were not speech related, even though the claim of symbolic speech was made.

Although this line of cases followed the decisions handed down during the First World War, they are outside the mainstream of developing law. The important developments concerning controls of the press since World War I have revolved around communism.

In the 1930's, communism was apparently treated by the Supreme Court as merely another form of speech against the accepted form of government. In *DeJonge v. Oregon*, the defendant had been convicted for holding a Communist Party meeting. Although the Court found that the Communist Party had some criminal aspects, there was no showing that this meeting was being used to incite people to crime and without such a showing, the conviction was reversed. Around the mid-1940's, however, the view of communism began to change. A good example of the shift in thinking appears in *Schneiderman v. United States*. Although this case deals with revocation of naturalization which is an issue separate from seditious libel, it indicated certain feelings about the Communist Party. The Court declared that the Communist Party itself was a clear and present danger. With this theory operating, it was no longer necessary to prove this element of danger, as had been necessary under *Schenck*.

With the accepted view that communism was a clear and present danger, government action against anything with communist overtones became quite easy. The courts upheld the requirement that the NLRB did not have to act on a complaint unless a non-communist affidavit was signed, because of the threat to commerce. A board of education was allowed to use a loyalty oath to protect the sensitive nature of schools. Of course, it was also during this period that the McCarthy hearings began and the act requiring the registration of all communists was passed.

The most serious problem arose with the case of *Dennis v. United States*. The defendant had been convicted under a statute which had been passed in 1940 to punish the advocation of a violent overthrow of the government, on the allegation that he had been organizing a Communist Party. The Court discussed all of the prior cases and reached the conclusion

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78 299 U.S. 353 (1937).
79 320 U.S. 118 (1943).
80 American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
82 341 U.S. 494 (1951).
that some speech could be punished in spite of the "clear and present danger" test. It was then declared that the jury charge, that they could convict if they found that the defendant wanted to overthrow the government "as speedily as circumstances would permit," was sufficient.\(^{82}\) This instruction, however, must be read in light of the fact that the Court had already declared that communism was itself a danger of overthrow of the government.\(^{83}\) It has been suggested that this case put the "clear and present danger" test to rest.\(^{84}\) It is true that the full power of Schenck was lost, but it does not appear that the test was put into disuse. The real problem with the case was that it was being assumed that communism was a clear and present danger. The past development as discussed above, and the case itself, took great effort to explain the violence that communism could cause. The subsequent cases which developed, recognized this problem and rather than changing the law, merely began requiring proof of that danger which had, in fact, been the law under Schenck.

In 1957, the Supreme Court reviewed another conviction under the same statute as in the Dennis case and in that case, the Court relied on Schenck to order a new trial.\(^{85}\) The Court said that the statute was aimed at punishing actual, individual advocation of overthrow of the government. In reviewing the jury instruction, it found that these elements had not been made clear.\(^{86}\)

In 1960, in Scales v. United States,\(^{87}\) the Court again dealt with a conviction under the 1940 statute. In that case, it held that not only must the group intend the overthrow of the government, but the individual must have that "specific intent" and be an "active" member in his organization.\(^{88}\)

In 1969, the Court finally interpreted the reasoning of the communism cases in accordance with the general theory of the first amendment. In Brandenburg v. Ohio,\(^{89}\) the defendant had been convicted for participating in certain activities with the Ku Klux Klan. The Court reversed this conviction, using a form of the "clear and present danger" test, and stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing immi-

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\(^{82}\) Id. at 510 (1951). The statute under which this defendant was prosecuted was the Alien and Sedition Act of 1940, 439, 54 Stat. 670.

\(^{83}\) 341 U.S. at 498.

\(^{84}\) H. Nelson, supra note 35, at xlii.


\(^{86}\) Id. at 320-24.


\(^{88}\) Id. at 220-29.

nent lawless action and is likely to incite or produce such action." In a footnote to that passage, the Court explained that this was the rule of law that the Communist Party cases had intended to express.

In reviewing these cases, therefore, it is apparent that since the decision in the Dennis case, the Court has acknowledged the first amendment rights which are involved when dealing with communism. The theory of the first amendment had not changed with Dennis but the case had assumed one element that Schenck had required to be proven; the case had assumed that communism itself was a clear and present danger. The more recent cases, however, indicate the trend to return to requiring proof of that element.

Although the case of New York Times Co. v. Sullivan dealt with a civil libel action, the opinion summarized the law in the field of seditious libel. The Court stated that for seditious libel, the only test was a "clear and present danger" test and that neither factual error nor defamatory content would remove that protection. In reviewing the history of libel, it was noted that the Sedition Act of 1798 had not been tested in court but had been held invalid by its own history. The Court then concluded that the reason that such libel was not punishable in the United States was that the people and not the government possessed absolute sovereignty.

C. Seditious Libel and the First Amendment

It seems that by reviewing the previous material it should be possible to articulate some general ideas about what freedom of the press means in relation to the law of seditious libel. One possible view which contends that the framers intended to support the common law claim of seditious

90 Id. at 447.
91 It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. § 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis v. United States, 341 U.S. 494 (1951). That this was the basis for Dennis was emphasized in Yates v. United States, 354 U.S. 298, 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy unrelated to its tendency to produce forcible action. Id. at 447 n.2. In yet another footnote, the Court relied on De Jong v. Oregon, 299 U.S. 353 (1937) to protect the right of assembly. De Jong was decided prior to the time the Court began assuming that the Communist Party was a clear and present danger. 395 U.S. at 449 n.4. In addition, the Court provides a string citation for cases protecting speech. None of the cases cited were decided between 1937 and 1957, which was the period during which the assumption was being made. 395 U.S. at 448.
94 Id. at 271-73.
95 Id. at 274-76.
libel after passage of the first amendment and which receives continuing support, is presented by Leonard Levy in his book Legacy of Suppression.\textsuperscript{96} Mr. Levy looks at the early history and asks whether it was the intent of the framers to overturn the common law of seditious libel. His book first reviews the destruction of prior restraint in England before the Revolution and admits that this concept was not clearly incorporated into the first amendment.\textsuperscript{97} He then describes, in detail, all of the prosecutions under the common law of seditious libel in the states and the laws authorizing those prosecutions. This demonstrates that at the time of the formation of the Constitution, this practice of prior restraint was accepted in the states.\textsuperscript{98} Based on this practice in the states, Levy contends that the framers' definition of freedom of press only required no prior restraint; they allowed prosecution at common law.\textsuperscript{99} In further support of the argument, Levy asserts that there is no good debate on the first amendment, and the passage of the Sedition Act just seven years after the passage of that amendment indicates that they did not intend to exclude the law of seditious libel.\textsuperscript{100} Although Madison argued against the Sedition Act, it is suggested that he was merely arguing an opinion he had developed in 1800, not one he supported in 1791.\textsuperscript{101}

The problem with this approach is that it overlooks the development of the law over an extended time period and seeks to limit the time frame to the period surrounding the Revolution. Secondly, it overlooks some very important evidence of the meaning of the first amendment at the time of its framing. As this study has already explained, the control of expression has developed over a long period of history, spanning several different forms of government. In the earliest period under monarchs, licensing and prior restraints were the chief methods of control; but when Parliament became sovereign in the 1600's very important changes occurred. Parliament, as a larger body, was unable to adopt licensing to their satisfaction and put common law prosecution to great use. At the same time they insured, by a bill of rights, that members of Parliament would have freedom of expression. When the American Revolution occurred, there was another

\textsuperscript{96} L. Levy, supra note 7 at x.
\textsuperscript{97} Id. at 1-18, 89-120.
\textsuperscript{98} Id. at 19, 126-34, 193-96.
\textsuperscript{99} Id. at 234-37. If this argument was valid, it would produce a strange result in relation to establishment of religion. England and most of the colonies at the time of the Revolution had established state churches. It was not until the 19th century that the states disestablished their churches. Under Levy's theory, how could the framers have understood a government without an established religion?
\textsuperscript{100} Id. at 221, 237. As an alternative, Levy suggests that maybe the framers were not aware of what they were doing. Id. at 236.
\textsuperscript{101} Id. at 282.
shift in sovereignty to the people.\textsuperscript{102} To accept Levy's approach, it would have to be assumed that this change did not create any changes in the law, which is a proposition history does not support.

When the Constitution was drafted, the people, as sovereign, intended to give themselves the same freedom of expression from federal control that Parliament had obtained in the 1600's. Contrary to Levy, the whole argument over the Constitution was not whether there would be freedom of the press, but how it would be protected. Not only did Madison declare in 1800 that a sovereign people must be free, but Hamilton, in \textit{The Federalist No. 84}, felt that a bill of rights was unnecessary because of that fact. The country had just disposed of a Confederation Agreement which needed no express protection for the press because the central government was not being given any power over speech or press. Surely the framers did not intend to adopt the whole of the common law by stating that Congress would not have any power over the press. This is what Hamilton warned of in the \textit{Federalist Papers}, and this is the position that Levy accepts.

The discussion about the state seditious libel trials supports this point. The people felt a need for complete freedom from control by the federal government although the states would be allowed to punish speech. Even though the freedom was based on states' rights claims and not on a general moral philosophy of free speech, it was just as absolute as far as the federal government was concerned. As an example of this idea, the debate in the Congress must be considered. As mentioned earlier, Madison's attempt to protect press in the states was defeated, but an attempt by the Senate to make the press subject to the common law was also defeated.\textsuperscript{103}

The history of the Sedition Act of 1798 also supports the view that the press in a popular sovereignty must be free. Although the statute was passed, as has already been discussed, its subsequent history shows that the people did not accept it as valid. The control of the press by a popular sovereign received its best articulation in the \textit{Schenck} decision. Even when the law seemed to wander away from this line during the communism crisis, the more recent decisions are returning to that ideal: words can only be restricted when they present a clear and present danger that they will bring about a substantive evil that Congress has a right to prevent.

As mentioned in the introduction, this development of law concerning one type of press should help to provide a general theory of the first amendment applicable to all forms of press. A review of the law concerning obscenity in light of this history should produce an interesting parallel.


\textsuperscript{103} See notes 22-25 \textit{supra}.
Obscenity is chosen although it seems on the surface to be different from seditious libel. But with the broad protection given libel under the first amendment, declaring material obscene is currently the easiest method of control of the press.

III. HISTORICAL TREATMENT OF OBSCENITY

Since obscenity and seditious libel appear to represent different types of press, one would expect to find that their controls have different origins, different purposes, and different techniques. Surprisingly, however, the control of obscenity is a direct descendent of the control of seditious libel and the stated purposes for the control of obscenity are identical to those given for libel. The methods of control, however, do represent a difference. Although the control of libel has evolved a "clear and present danger" test over six centuries and at least three forms of government, the control of obscenity has continued to use techniques of earlier origins. It will be argued that obscenity controls need to be adjusted to fit the same test which has been developed for libel, and thereby produce a general theory of first amendment treatment for the press which is consistent with popular sovereignty in the United States.

A. Development of Controls

The first sustained indictment for publication of an obscene booklet in England was *Rex v. Curl* in 1727. As the first case, it offers a good explanation of the law prior to 1727 and indicates the law being relied on to sustain a prosecution for obscenity in printing a pamphlet entitled "The Nun in Her Smock." In argument to the court, the defense made it clear that the only other obscenity case was dismissed and sent to the spiritual courts for disposition and there was no precedent for punishing obscenity in law courts.

In arguing the case for the government, the Attorney General based his claim on disturbing the peace. He alleged that the peace and good order of the community could be disrupted by seditious libel, heresy, and obscenity. He argued that the spiritual courts punished for mere spoken words, and if they were put in writing, it could be punished "as a libel." As precedent, the prosecutor relied on *de Libellis Famosis*, the Star Chamber seditious libel case reported by Lord Coke, to declare that libel must be read to include this "obscene little book." He closed his argument by saying

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106 Id. at 850, 2 Strange at 790.
107 See note 9, supra.
that libel is not a technical word, but "if it tends to disturb the civil order of society, I think it is a temporal offense."¹⁰⁹

The court adopted the logic of the Attorney General and sent the defendant to the pillory. It was held that libel was any writing which would tend to breach the peace and obscenity was within that definition.¹¹⁰ The only case the court could rely on was an indecent exposure case of Sir Charles Sedley.¹¹¹ Reliance on that case produced a dissent because that conviction had been based, not on the indecency, but on the occurrence of an actual disturbance. Justice Fortescue, in his dissent in the case, may have written the first clear and present danger opinion.

Common law is common usage, and where there is no law, there can be no transgression.... This is but a general solicitation of chastity and not indictable.... To make it indictable there should be a breach of peace, or something tending to it, of which there is nothing in this case.... And in Sir Charles Sedley's case there was a force in throwing out bottles upon the people's heads.¹¹²

The first obscenity case to appear in the United States was Commonwealth v. Holmes¹¹³ where the defendant had been convicted for publishing "Memoirs of a Woman of Pleasure." Again, the court faced the basic problem of trying to determine how to obtain jurisdiction over the crime. The court declared that obscenity was under the same jurisdiction as the common law of libel.¹¹⁴

During the period immediately before World War I, a case developed which illustrates the close connection between obscenity and seditious libel. While the United States was trying to rally support for the British war effort, a movie about the American Revolution, entitled "The Spirit of '76," was produced. The movie was confiscated and the director of the film was prosecuted because the movie presented the British in an offensive manner. A close reading of the cases concerning the confiscation and prosecution, however, reveals a difficulty in determining the true theory of the cases. The opinions kept suggesting that the movie made the British soldiers look evil by showing them dragging away young American girls for immoral purposes.¹¹⁵

The United States Supreme Court did not face the conflict between

¹⁰⁹ Id.
¹¹⁰ Id. at 851, 2 Strange at 791.
¹¹² 93 Eng. Rep. at 850-51, 2 Strange at 791.
¹¹³ 17 Mass. 336 (1921).
¹¹⁴ Id. at 338-40.
¹¹⁵ Goldstein v. United States, 258 F. 908 (9th Cir. 1919); United States v. Motion Picture Film "The Spirit of '76," 252 F. 946 (S.D. Cal. 1917).
control of obscenity and the first amendment for over 150 years. During the period between Holmes and the first Supreme Court opinion, there were, however, many methods of controlling obscene publications. The framers were not accustomed to censoring obscenity, but in the early to mid-nineteenth century, the age of Victorian morality took control. The Congress had not passed any obscenity statutes until 1842, but by 1958 twenty such statutes had been passed. Also, during this period, the case of Queen v. Hicklin was decided in England; this became the leading case providing that obscenity could be judged by isolated passages as they affected the most susceptible person. During the development of the control of obscenity, the purpose which was constantly stated for needing to exercise the control was that obscenity could cause a breach of the peace by inciting individuals to anti-social law violations by sexual conduct. Using the Hicklin rule, it was also stated that this material was not healthy for children.

The first Supreme Court decision which dealt with this test was the case of Butler v. Michigan. This case overruled the application of the Hicklin test of applying the most susceptible person standard in measuring obscenity. This test, the Court reasoned, would reduce the adult population to reading only books fit for children. This case also made it clear that state standards, due to the fourteenth amendment, would be made identical to first amendment standards.

In 1959, in Kingsley Internation Pictures Corp. v. Regents of the University of the State of New York, the Supreme Court came very close to expressing a "clear and present danger" test by reversing a decision which had prevented the showing of a movie. Although it did not need to reach the first amendment issue, in dicta, the Court stated that mere ad-

116 Commentaries on Obcenity, supra note 104, at 12-13, 90. The leading figure in early American censorship was Anthony Comstock.
119 T. Emerson, Toward a General Theory of the First Amendment 89 (1960); Commentaries on Obcenity, supra note 104, at 91.
120 352 U.S. 380 (1957).
121 Id. at 383; Commentaries on Obcenity, supra note 104, at 14, 92-93. The Court has, of course, held that children can be protected. Ginsburg v. New York, 390 U.S. 629 (1968).
vocacy of conduct proscribed by law was not a justification of censorship if there was nothing to indicate that it would be immediately acted upon.\textsuperscript{124}

The Supreme Court squarely faced the conflict between the first amendment and control of obscenity in \textit{Roth v. United States}\textsuperscript{125} and declared that obscenity had always been outside of first amendment protection. Relying on the "Address to the Inhabitants of Quebec," the opinion claimed that the framers only sought to protect those things which had some social value. As precedent of the theory that speech is not absolutely protected, the court relied on the case of \textit{Chaplinsky v. New Hampshire},\textsuperscript{126} which had held "fighting words" to be outside first amendment protection. Justice Brennan, in quoting from \textit{Chaplinsky}, however, was very careful to delete passages in that case which require proof of clear and present danger.\textsuperscript{127} Since Brennan found that obscenity was clearly not protected by the first amendment, he held that the "clear and present danger" test did not apply, and discussed the proper test to use.\textsuperscript{128}

In 1973, the Court reformulated the test for obscenity in \textit{Miller v. California}.\textsuperscript{129} In setting out the new test and in a companion case of \textit{Kaplan v. California},\textsuperscript{130} the Court again explained why obscenity was not protected by the first amendment. The reason set out in \textit{Kaplan} was that obscenity may possibly lead to criminal or anti-social sexual behavior. Although this nexus with criminal behavior had not been proven, the Court held that legislatures could assume that it might exist and pass reasonable regulations for safeguards. The reason the Court then gave for allowing the legislatures to make these assumptions was that obscene material was not protected by the first amendment.\textsuperscript{131}

It should be apparent, therefore, that control of obscenity had its historic beginnings closely linked with the beginnings of seditious libel. The early cases, in fact, found jurisdiction from seditious libel cases. In addition,

\textsuperscript{124} \textit{Id.} at 689.
\textsuperscript{126} 315 U.S. 568 (1942).
\textsuperscript{127} \textit{See} \textit{Roth v. United States}, 354 U.S. 476, 479-85 (1957); \textit{Commentaries on Obscenity, supra} note 104, at 21-22.
\textsuperscript{128} 354 U.S. at 486-92.
one of the justifications for controlling obscenity, the fact that it may lead to a breach of the peace, is the same justification which was always given for seditious libel, and found its best expression in Blackstone. The difference is, of course, that seditious libel now requires proof of the clear and present danger of that breach of the peace, while legislators are allowed to assume that connection with obscenity. The logical flaw with the obscenity cases is that the argument which allows the legislators to make this assumption is circular. As is shown by the Miller and Kaplan opinions, the Court assumes the answer to the problem it seeks to solve, that is, that obscenity is not protected by the first amendment.\footnote{Roth v. United States, \textit{supra} note 127, at 497 (Harlan, J., dissenting).}

The historical beginnings and justifications for controlling obscenity are, however, merely two examples of the similarity between that control and the control of seditious libel. Further similarities are noted by examining specific methods of control.

B. \textit{The Stationers Company and Current Private Controls}

As discussed earlier, one of the primary methods of control of seditious libel in England was the use of the Stationers Company. This company was a private organization of printers who operated under the permission of the Crown to control their own craft. In the few areas in which government has sought to encourage or force private censorship in the United States, the courts have held it invalid. Without recognizing the historical relationship with the Stationers Company, the courts have realized that this form of censorship can be even more stringent than direct government action and it lacks procedural safeguards.

In \textit{Smith v. California},\footnote{361 U.S. 147 (1959).} the state sought to impose a duty on a bookshop owner to be responsible for every book in his store. The case was decided in favor of the defendant because of a lack of any knowledge that the book was obscene, but the Court noted the problems involved if this type of action were to be upheld.

The booksellers’ self-censorship, compelled "by the state, would be censorship affecting the whole public hardly less virulent for being privately administered."ootnote{Id. at 154.}

In \textit{Bantam Books, Inc. v. Sullivan},\footnote{372 U.S. 58 (1963).} the Supreme Court reviewed a similar form of private censorship. In that case the state of Rhode Island had set up a review board with no prosecutorial powers. After reviewing
material, the board would ask the publisher to remove it if they found it to be obscene and let the distributor decide whether he wanted to "co-operate." The Court held that this organizational review was invalid, realizing that it exercised broad censorship powers wholly outside the procedural protection of the judicial system.\footnote{136}

Possibly a more serious problem is in the area of radio and television since broadcasters who receive the privilege of a license from the government are unlikely to object to any restrictions or suggestions. The same broadcasters, in fact, frequently find it in their own best interest to restrict themselves in order to remain in good standing with the government.\footnote{137} This is the identical situation under which the Stationers Company operated during the reign of Queen Elizabeth. When an action was brought challenging this type of censorship, the courts held it invalid.

In 1976, the case of \textit{Writers Guild of America, West, Inc. v. Federal Communications Commission},\footnote{138} and the companion case of \textit{Tandem Productions, Inc. v. Columbia Broadcasting System},\footnote{139} raised these precise issues. In these cases, the Chairman of the Federal Communications Commission recognized that direct government regulation to force a reduction of sex and violence on television could violate the first amendment. Since the Chairman was unable to regulate obscenity directly and Congress was pressuring him to take action, he began a campaign to force the broadcasters to self-regulate.\footnote{140} This campaign included numerous meetings with industry executives, threats of future licensing problems, threats of government regulations, and speeches to the public.\footnote{141} As a result of these pressures, the whole television industry agreed to provide a family viewing period each evening with the National Association of Broadcasters having censorship power over that period. Although the court agreed that any station could have voluntarily chosen a family viewing period, forced adoption of this policy was invalid.\footnote{142} "Censorship by government or privately created review boards cannot be tolerated."\footnote{143} The court went on to state that "the independent decisionmaking by local licensees... is... the constitutional foundation of the broadcasting system."\footnote{144}

\footnote{136}{Id. at 58-72.}
\footnote{137}{\textit{Mass Media and the Law}, 13, 23 (D. Clark & E. Hutchinson ed. 1970).}
\footnote{138}{423 F. Supp. 1064 (C.D. Cal. 1976).}
\footnote{139}{Id.}
\footnote{140}{Id. at 1094.}
\footnote{141}{Id. at 1094-1128.}
\footnote{142}{Id. at 1157.}
\footnote{143}{Id. at 1133. The Court thereafter cited \textit{Bantam Books v. Sullivan}, 372 U.S. 58 (1963) as being a similar practice of government forced censorship. 423 F. Supp. at 1142-43.}
\footnote{144}{423 F. Supp. at 1133.}
The courts, therefore, seem unwilling to allow private censorship under government pressure to operate in the United States. The problem is that frequently there is no one to challenge these arrangements, and they can operate outside of judicial review.

C. *Modern Treatment of Obscenity*

1. Validity of Prior Restraints

Although prior restraint in the area of seditious libel was used during the monarchial period of England, put into disrepute by Parliament, and abandoned by the time of Blackstone, it has been resurrected and used as an effective measure of control of obscenity.\(^{145}\) In 1961, in the case of *Times Film Corp. v. City of Chicago*,\(^ {146}\) the Supreme Court upheld a Chicago review board for movies. After stating that this was obviously a prior restraint, the Court relied on *Near v. Minnesota*\(^ {147}\) to say that not all prior restraints were invalid. The Court then upheld the procedure saying that Chicago has a duty to protect its people.\(^ {148}\) In dissent, Chief Justice Warren stated that a reading of the *Near* case showed that all prior restraints were unlawful. Even without the *Near* case, he noted that the history of the United States also clearly showed that under the first amendment, at least, prior restraints were invalid. The Chief Justice then stated that this was the closest the United States had ever come to the seventeenth century English licensing system.\(^ {149}\)

In 1965, the Court issued the opinion of *Freedman v. Maryland*\(^ {150}\) where the defendant had been convicted for failing to submit a film to the licensing board prior to showing it. The Court noted that prior restraints were valid as long as procedural safeguards provided a brief time period for the censor to act and for judicial review.\(^ {151}\) Without explaining why, the Court stated that this was appropriate since films were different from other modes of expression.\(^ {152}\) Although this case had a dissent, neither that dissent nor the Court opinion sought to review the historical basis of prior restraint.

The only other case which has dealt with this issue is *Teitel Film Corp.*

\(^{145}\) *Mass Media and the Law*, supra note 137, at 11-12; *Commentaries on Obscenity*, supra note 104, at 113.


\(^{147}\) See text accompanying notes 55-65, *supra*.

\(^{148}\) 365 U.S. at 44-49.

\(^{149}\) Id. at 51-56 (Douglas, J., dissenting). In allowing prior restraint, the Court has, at least, been careful to require some procedural safeguards. A *Quantity of Books v. Kansas*, 378 U.S. 205 (1964).

\(^{150}\) 380 U.S. 51 (1965).

\(^{151}\) Id. at 57-59.

\(^{152}\) Id. at 61.
v. Cusack.\textsuperscript{153} In a per curiam opinion, the Court held that the delay time of 50 to 57 days was too long to meet the Freedman test of a brief period of review by the censor; the Freedman case had only involved thirty days.\textsuperscript{154}

In this area of the law, the development of freedom of the press in seditious libel has been ignored. The Court has adopted a manner of dealing with obscenity through prior restraints which stems from monarchial Crown sovereignty in the 1500's and has received no other support since the 1690's. Chief Justice Warren's comment that this practice is similar to seventeenth century England is not quite accurate because prior restraint disappeared in the seventeenth century. Prior licensing of materials is more closely related to sixteenth century England.

2. The Community Standard

The function of the jury in cases of seditious libel was a major issue during the early 1800's. At that time it was thought that the jury should be allowed to decide all questions of law as well as fact. Like other areas of the law, however, under modern standards the jury is now given specific and precise statements of the law of seditious libel and allowed to decide the facts.\textsuperscript{155} The control of obscenity, however, is being turned over to the jury totally. Although juries are given some basic instructions on obscenity, as the liberal view of the 1800's required, they are being allowed to resolve all details on their own.

In handing down the decision in Roth v. United States,\textsuperscript{156} the Court sought to declare a rule of law to enable lower courts to properly try obscenity cases. The suggested rule was "[w]hether the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to the prurient interest."\textsuperscript{157} After this case was decided, however, rather than further define the rule, the Court issued a series of per curiam reversals with no explanation of how the rule was being applied.\textsuperscript{158} In 1962, the Court sought to give some definition to the rule in Manual Enterprises, Inc. v. Day,\textsuperscript{159} and in reversing a decision

\textsuperscript{153} 390 U.S. 139 (1968).
\textsuperscript{154} Id. at 141.
\textsuperscript{155} The courts frequently review jury instructions to see that the jury was given a complete statement of the appropriate law. See generally Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1923); Sugarman v. United States, 249 U.S. 182 (1919). For a discussion of the changing role of the jury, see W. Nelson, Americanization of the Common Law 3, 8, 20-22, 165-171 (1975).
\textsuperscript{156} 354 U.S. 476 (1957).
\textsuperscript{157} Id. at 489.
\textsuperscript{159} 370 U.S. 478 (1962).
of the Postmaster, the Court ruled that the community standard to apply was a national standard.\textsuperscript{160} In \textit{Jacobellis v. Ohio},\textsuperscript{161} the Court again tried to give greater meaning to the \textit{Roth} test. In restating that the standard to be applied was a national standard, the Court explained the general rule that these questions cannot be merely left to the jury to decide, but involved issues of constitutional law.\textsuperscript{162}

In 1973, however, the Court began reversing this trend and returning the issue of community standard to the jury. In \textit{Miller v. California}, the Court changed the rule of community standard in two significant ways. First "patently offensive" and "prurient interest" were to be left to the jury to decide, and secondly, community standard did not require a national standard."\textsuperscript{163}

After the \textit{Miller} decision, the Court began leaving the above issues completely to jury discretion. In \textit{Paris Adult Theatre I v. Slaton},\textsuperscript{164} the Court ruled that expert testimony was not necessary to help the jury determine what material was obscene.\textsuperscript{165} In \textit{Hamling v. United States},\textsuperscript{166} it was held that it was not even necessary to try to determine a community standard. The jury could be allowed to decide what the area of the community included, and what standard that community would apply.\textsuperscript{167}

3. Redeeming Social Value

In the \textit{Roth} Case, one of the tests of obscenity was that the material had to be utterly without redeeming social value. This test was reaffirmed by the opinion in \textit{Memoirs v. Massachusetts}.\textsuperscript{168} In the \textit{Miller} case, however, the Court also reversed this rule, and held that material could be censored if it was without serious social value. As with the community standard after the \textit{Miller} case, the Court has allowed the jury discretion in determining this issue without further instruction and without testimony of what social value is.\textsuperscript{169}

It is therefore apparent that with the \textit{Roth} decision, the Court was seeking to establish a body of law from which adequate jury instructions

\textsuperscript{160} Id. at 488.
\textsuperscript{161} 378 U.S. 184 (1964).
\textsuperscript{162} Id. at 188.
\textsuperscript{163} 413 U.S. at 30-31.
\textsuperscript{164} 413 U.S. 49, 56 (1973).
\textsuperscript{166} Id.
\textsuperscript{167} Id. at 91-109; \textit{Jenkins v. Georgia}, 418 U.S. 153, 157 (1974).
\textsuperscript{168} 383 U.S. 413 (1966).
\textsuperscript{169} See \textit{Hamling v. United States}, \textit{supra} note 165 at 100; 418 U.S. 153; 413 U.S. 49.
could be derived. For approximately fifteen years, it sought to fashion detailed explanations of what that law entailed. With the Miller decision, however, the Court has virtually turned over all issues of obscenity to the jury with no real definition of what the law implies. Although a community standard applies, the jury does not have to be told what that standard is, or even what the community includes. The same rule applies with the defense of social value where the jury has the discretionary authority to decide virtually all issues. In comparing this to the law of seditious libel, it is revealed that in the nineteenth century, allowing the jury to decide all issues was the liberal view. But the jury no longer has such discretion in cases of seditious libel. The courts now give explicit instructions on the law of seditious libel and do not allow jury discretion.

The Supreme Court has indicated that it has recognized this problem but does not seem to know how to deal with it. In Jenkins v. Georgia, the defendant had been convicted for showing the movie “Carnal Knowledge.” The Court first expressed the opinion that the jury instructions on community standard had been proper, and it was not necessary to tell the jury what the standard was, or even what the community included. In reversing the conviction, however, the Court went on to say that it had viewed the film and it was just not obscene.

4. Redeeming Social Value as a Defense

One of the most interesting comparisons between the control of seditious libel and obscenity is a review of defenses comparing truth in the libel action to social value in the obscenity cases. It is not suggested that truth and social value are identical elements, but it is obvious that they have both been used as defenses, and have received surprisingly similar treatment.

Truth, as discussed earlier, was originally no defense at all. During the early 1800’s truth by some writers, specifically John Adams, was seen as a defense only if used for good purposes. At the present time under New York Times and Brandenburg, truth or falsity is irrelevant and a showing of either actual malice or a clear and present danger is still necessary.

In the area of obscenity, the issue of whether material has redeeming social value was not considered until the Roth case. In that case, the Court held that the reason obscenity could be controlled was that it was utterly without redeeming social value. The rule, therefore, stated that in order to declare material obscene, it must be utterly without redeeming social

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171 Id. at 157-61.
value.\textsuperscript{172} This test, as restated in \textit{Memoirs}, was the most absolute statement of the defense and required the prosecution to prove that there was no social value.

In the same year as the \textit{Memoirs} case, however, the Court virtually destroyed the social value defense in the case of \textit{Ginzburg v. United States}.\textsuperscript{173} There the Court ruled that they would not have to reach the issue of whether the material alone might have some value. It was even noted that the government agreed that the material in certain circumstances may have some social value.\textsuperscript{174} The defendant, however, was found to be engaged in "the sordid business of pandering" and was convicted for producing this material for an evil purpose.\textsuperscript{175}

In 1973, the Court further reduced the effectiveness of the social value defense. The \textit{Miller} case, which rejected the \textit{Roth} test that the material be utterly without redeeming social value, stated that the defendant must prove that the material has serious social value.\textsuperscript{176} It should be clear that the absolute test proposed in \textit{Roth} is the most similar to the rule being used for truth in seditious libel. By using the requirement of serious social value and even allowing convictions if material with social value has been used for the wrong purpose, the Court has returned to the thinking expressed by John Adams in the early nineteenth century.\textsuperscript{177}

IV. Conclusion

It should be apparent that the control of obscenity bears a close relationship to the control of seditious libel. The control of obscenity drew its jurisdictional concepts from seditious libel cases and, in fact, both lines of cases trace jurisdiction from \textit{de Libellis Famosis}. The techniques of control for the two types of press are also strikingly similar except that obscenity is still being controlled by methods which have passed from use in seditious libel. In order to bring the control of obscenity into a consistent, general theory of first amendment law, it would be necessary to adjust its control to match those of seditious libel. The control of libel has been a slow evolution of law which changed as the form of government within which it operated changed. The historical review of those changes shows that some techniques must fade when sovereignty changes; and the law now in existence is the result of 200 years of experience under a

\textsuperscript{172} 354 U.S. at 484.
\textsuperscript{173} 383 U.S. 463 (1966).
\textsuperscript{174} Id. at 472.
\textsuperscript{175} Id. at 467.
\textsuperscript{176} 413 U.S. at 24.
\textsuperscript{177} See notes 32-34, \textit{supra}. 
popular sovereignty. Obscenity control, however, continues to ignore the growth that libel experienced and maintains old controls.

The need to require that obscenity controls keep pace with the changes in sovereignty can be explained by different approaches. First it would be easy to take Leonard Levy's argument, discussed earlier, and mechanically apply it to show that since obscenity was not controlled in 1791 it should not be controlled now. That argument, however, has the same flaws it had in dealing with seditious libel and cannot be seriously used. A more rational argument is a consistent belief in open debate which goes beyond some idea of limiting that debate to "political speech." Early speech problems involving religion and even the First Continental Congress in their "Address to the Inhabitants of Quebec," seemed to sense that art and literature were obviously free with the only debate being over political speech. Obscenity during the 1700's was a moral problem for the church and it was not until the Victorian Age that the government declared a need to control it. In a dissenting opinion in Times Film Corp., Chief Justice Warren made it clear that restraining obscenity was no different than the restraint that had been overruled in the case of Cantwell v. Connecticut, by stating that, "I cannot perceive the distinction between this case and Cantwell. Chicago says that it faces a problem — obscene and incendious films. Connecticut faced the problem of fraudulent solicitation. Constitutionally, is there a difference?"

It has been, of course, the argument of this study that constitutionally, there is no difference. In a popular sovereignty, authority of the government comes from the consent of the governed and that government can only exercise its decision making responsibility if all relevant discussion is allowed to take place. Limiting the discussion to "political speech" overlooks the fact that decisions are frequently affected by all of the cultural forces in the society. Singling out one form of expression effectively locks government into one view of decision making for the area which would be affected by allowing discussion. This is a problem which is inconsistent with the theory that the people are sovereign and can adopt any view of decision making they desire.

In order to align obscenity with the general theory of the first amend-

179 310 U.S. 296 (1940).
180 Times Film Corp. v. City of Chicago, supra note 158 at 60 (Warren, C.J., dissenting).
181 Toward A General Theory of the First Amendment, supra note 119, at 9. It is not the purpose of this argument to suggest that some view of morality is better than presently held, but only that a requirement of maintaining the status quo is inconsistent with the Constitution.
ment, a few changes would be necessary. First, any use of prior restraint would have to be declared invalid and courts would have to remain vigilant to insure that government pressured private censorship did not occur. More importantly, however, the criminal sanctions for obscenity would need to be reviewed. The use of the community standard is obviously inconsistent with the first amendment because the purpose of free press is to insure that a minority opinion can be expressed. The community standard, on the other hand, requires that any expression be in agreement with the majority view. By allowing the jury to interpret the standard, the Court has guaranteed that the majority view is allowed to operate unconfused by instruction on the law. The use of the social value defense would not be needed if the proper test were operating. The existence of social value is difficult to prove, subject to drastic disagreement, and subject to change from year to year. Even when it is agreed that social value exists, a conviction may be obtained for using material for an improper purpose. By requiring proof of social value, the Court again insures that the material produced is that which the community finds acceptable.

The proper test to apply, therefore, is the one developed in the seditious libel cases. Under carefully reviewed jury instructions, all expression would be allowed as long as it did not present a clear and present danger of a substantive evil which a legislature has the power to prevent. This doctrine has evolved through a long history and presents the best theory of free press for a government controlled by a popular sovereignty. Any other requirements in the area of obscenity destroy the theory of first amendment free press which the Constitution demands.

182 Roth v. United States, supra note 127 at 511-12 (Douglas, J., dissenting).