Restrictions on a Free Press

Robert H. Wettach

RESTRICTIONS ON A FREE PRESS*

ROBERT H. WETTACH
ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA

"The press, and particularly the newspaper press, stands by common consent first among the organs of opinion. The more completely popular sovereignty prevails in a country, so much the more important is it that the organs of opinion should be adequate to its expression."[1]

That the American press shall adequately express public opinion, the United States Constitution provided that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[2] and the North Carolina Constitution provided that "The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same."[3] In commenting on this section, the North Carolina Supreme Court said, "In its broadest sense, 'freedom of the press' includes, not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion."[4] This is worth keeping in mind in view of the restrictions on the press which will be mentioned.

Mr. William Reynolds Vance, in the Minnesota Law Review,[5] has attempted to answer the question of how far the government may go in restricting the freedom of discussion in order to protect the public welfare. Such a difficult question will be without solution so far as the present discussion is concerned, the purpose of which is just to indicate certain things that exist as limitations on the freedom of the press.

* This article was read, under the title of "Law and the Press," at a meeting of the Newspaper Institute in Chapel Hill, N. C., on January 14, 1926. The Newspaper Institute was held under the auspices of the North Carolina Press Association and the University Extension Division, Department of Journalism and News Bureau.

[1] Bryce, *American Commonwealth* (New and Revised Ed.) 274-5.

[2] U. S. Const., 1st. Amendment.

[3] N. C. Const., Art. I, sec. 20.

[4] *Cowan* v. *Fairbrother* (1896) 118 N. C. 406, 418, 24 S. E. 212, 32 L. R. A. 829.

[5] Vance, *Freedom of Speech and of the Press,* 2 Minn. L. Rev. 239.

For the purpose of avoiding confusion, Mr. Vance points out two very simple propositions. In the first place, "these constitutional guaranties protect the citizen only from suffering legal consequences at the hands of the government authorities acting in the alleged enforcement of law. They do not and cannot protect the citizen against the social consequences of exercising his legal privilege of saying what he pleases." Thus a college professor who should say to his class that all governments are bad and ought to be abolished, or that the earth is flat, or that the University fails to give its students the proper training, might well be within his constitutional rights, but he couldn't expect long to be within his classroom. In the second place, the constitutional guaranties do "not create the right of freedom of the press, but merely protect an existing right from abridgment or interference."[6]

Therefore it might be worth a few minutes to see what this right was at the time the federal constitution was adopted or at the time of the adoption of the first North Carolina Constitution in 1776. In Cooley's *Constitutional Limitations,* the following answer is given:

"We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."[7]

In a well known New York case,[8] Vann J. said:

"The Constitution places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the State of the primary right of self preservation."

"There is a very general impression, even among lawyers, that the right of free discussion is one of the fundamental rights of Englishmen and somehow is part of the English Constitution. But such is not the case."[9] There is no mention of it in the Petition of Right (1628) or the Bill of Rights (1689). In fact, until comparatively recent times, the right of public discussion was very nar-

[6] 2 Minn. L. Rev. 241-2.
[7] Cooley, *Constitutional Limitations,* 518.
[8] *People* v. *Most,* (1902) 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.
[9] 2 Minn. L. Rev. 243.

rowly restricted. When the printing press was introduced into England, it seems to have been taken for granted that the press could only be used by license of the King. During the reign of James I, the Star Chamber took over the regulation of the press, and Parliament followed the Star Chamber in 1641 as the censor of all publications. Thus the Englishman was not free to print without previous license until the beginning of the eighteenth century. But even after the Englishman was free to print just as he might speak, he remained fully liable either in civil action or criminal prosecution for any wrong committed in the exercise of his freedom. Truth was not a defense until the passage of Fox's Libel Act in 1792. The maxim was "The greater the truth, the greater the libel."

The colonists brought with them the prevailing English views as to restrictions upon the freedom of public discussion. In 1671, Governor Berkeley of Virginia thanked God "there are no free schools or printing; and I hope we shall not have these hundred years; for learning has brought disobedience and heresy and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both." Printing was prohibited except by license. The laws of Virginia were first published in 1682 and the unlicensed printer of these laws was arrested. But by 1776, this had changed, and we find constitutional recognition of the right of free speech and free press.[10]

What was intended by these Constitutional provisions seems to be that there should be no previous restraints upon publication, that is, no form of censorship, but these provisions do not prevent the subsequent punishment of such publications as may be deemed contrary to the public welfare.

Three restrictions on a free press which will be discussed briefly, are, (1) the law of libel, (2) the law of contempt and (3) exclusion from the second class mailing privilege.

I. A libel has been defined as "a malicious defamation, expressed either in writing or printing, and tending either to blacken the memory of one who is dead or the reputation of one who is alive and expose him to public hatred, contempt or ridicule."[11] Libels have been classified according to their objects: (1) libels which

[10] This brief historical statement is taken from a fuller account in Vance, *Freedom of Speech and of the Press*, 2 Minn. L. Rev. 239 and from Hale, *Law of the Press*, which is the leading text book on the subject.

[11] 2 Bouvier Law Dictionary, p, 1951.

impute to a person the commission of a crime; (2) libels which have a tendency to injure him in his office, profession, calling or trade; (3) libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of general society and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man.[12] Thus it is a libel to charge a man with being a thief, to charge an attorney with "sharp practise,"[13] to charge a candidate for Congress with being a "pettifogging shyster,"[14] to charge an official with graft, to charge a woman with incontinency, etc. On the other hand, it would not be a libel to charge a candidate for office with impoliteness and lack of party principles[15] or to advertise some patent medicine or beverage by printing a portrait of a person and saying that he personally used and recommended the same.[16] However this last situation has given rise to much discussion under the so-called right of privacy.[17] The Georgia court has allowed the recovery of damages in a similar case, but the majority of courts hold otherwise.[18]

In North Carolina, there are a number of statutes concerning the law of libel. It is made a misdemeanor for any person to transmit by any means whatever to any newspaper or periodical for publication therein, any false and libelous statement concerning any person or corporation and thereby secure the publication of the same.[19] This statute punishes criminally the person who communicates libelous matter to newspapers, but that does not excuse the newspaper for publishing such libels, and the newspaper is responsible in damages for the injury done by the publication. Newspaper men are not so apt to be prosecuted criminally for libel unless the publication at-

[12] Newell, *Slander and Libel*, 67. See *Paul* v. *Auction Co.* (1921) 181 N. C. 1, 105 S. E. 881. Hoke J. in this case, at p. 4-5, said, "To constitute a libel it is not necessary that the publication should impute the commission of crime, infamous or otherwise, but the charge is established when a false publication is made, holding one up to public hatred, obloquy, contempt, or ridicule; and further, and without averment of special damages, such a charge may be sustained by a false publication calculated to injure one in his trade, business, or profession by imputing to him fraud, indirect dealing or incapacity in reference to the same."

[13] 4 Mees. and W. 446.

[14] *Bailey* v. *Publishing Co.*, 40 Mich., 251.

[15] *Duffy* v. *Evening Post Co.*, 109 App. Div. 471, 96 N. Y. Supp. 629.

[16] *Peck* v. *Tribune Co.* (1907) 154 Fed. 330, 83 C. C. A. 202.

[17] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193.

[18] *Pavesick* v. *New Eng. Life Ins. Co.* (1905) 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, and cases and references cited therein.

[19] N. C. Consolidated Statutes (hereafter abbreviated as C. S.) sec. 4229.

tempts to destroy the reputation of an innocent woman by words which amount to a charge of incontinency,[20] or unless there is a willfull derogatory statement about the financial condition of a bank.[21] These are specifically provided for by statute. In criminal cases, the truth of the facts alleged is a good defense and entitles the defendant to an acquittal.[22]

When an action of libel is brought in this state for a publication in a newspaper or periodical, the statute provides that the plaintiff or prosecutor must serve notice in writing on the defendant at least five days before instituting the action, specifying the article and the statements alleged to be false and defamatory.[23] The following section provides:

"If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if in a criminal proceedings, a verdict of guilty is rendered on such a state of facts, the defendant shall be fined a penny and costs and no more."[24]

Such a statute as this, providing that if there is a proper retraction of the libelous publication, the plaintiff shall recover only actual damages, has been held unconstitutional in Kansas and Michigan, on the ground that actual damages were limited to direct pecuniary loss, which would not compensate for the real injury, that is, the injury to reputation.[25] But the North Carolina Supreme Court upheld our statute in *Osborn* v. *Leach*[26] on the ground that "actual damages" means compensatory damages and includes the following: (1) pecuniary loss, direct and indirect, or special damages, (2) damages for physical pain and inconvenience, (3) damages for mental

[20] C. S., sec. 4230.
[21] C. S., sec. 4231.
[22] C. S., sec. 4638.
[23] C. S., sec. 2429.
[24] C. S., sec. 2430.
[25] *Hanson* v. *Krehbiel* (1904) 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790; *Park* v. *Free Press* (1888) 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599.
[26] *Osborn* v. *Leach* (1904) 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

suffering and (4) damages for injury to reputation. Therefore all that the statute did was to deprive the plaintiff of punitive or exemplary damages, and the plaintiff could still recover for all the real harm to himself. The right to compensatory damages is a property right and protected by the due process clause of the Fourteenth Amendment, but there is no right to punitive damages, which are only given as punishment to the wrongdoer. In case of retraction, as provided by statute, there seems to be no place for punitive damages anyhow.

Douglas, J., concurring in the result, expressed the opinion that the statute discriminated in favor of newspaper editors as against the ordinary citizen. He said, "If I write a letter libeling an editor, that perhaps, at most, ten people may see, and he libels me by printing identical charges againse me that ten thousand people may see, I am subject to pains and penalties from which he is exempted by operation of the statute . . . such discrimination cannot be sustained."[27]

A statute also provides that in any case of libel, the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.[28]

The proprietor of a newspaper is responsible for a libel therein, although inserted without his knowledge, or even against his instructions. The ordinary rules of agency apply. It is thus well established that the publisher is civilly liable for all that appears in his paper. Of course, the person who writes the libel is responsible, both civilly and criminally. He cannot hide behind the publisher.[29] The liability of an editor for a libel inserted without his knowledge has given rise to some trouble, but the courts are pretty well agreed that if the editor is on duty, he would be liable just as the proprietor.[30] But if the editor is away on a trip or vacation, he is not liable for a libel which a subordinate inserts during his absence and without his knowledge.[31] Where the newspaper is published by a corporation, a suit is almost certain to be brought against the corporation

[27] 135 N. C. 628, 641.

[28] C. S., sec. 542.

[29] Hale, *Law of the Press,* 231.

[30] *Smith* v. *Utley* (1896) 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620.

[31] *Folwell* v. *Miller* (1906) 145 Fed. 495, 75 C. C. A. 489, 10 L. R. A. (N. S.) 332.

for the reason that the plaintiff usually sues the person with the deepest pocket.

Reports of legislative, judicial and other public proceedings are said to be conditionally privileged. But this must be a fair and true report. Freedom of the press does not mean license. The privilege arises because, as Mr. Justice Holmes has said in reference to judicial proceedings, "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[32]

Comment must be distinguished from reports of judicial proceedings, since comment is not privileged.[33] Moreover comment may be contempt of court and this is the second limitation on a free press which will be mentioned.

II. As to contempt of court, the North Carolina statute provides that a person may be punished for contempt who is guilty of "the publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter *pending* before said court, made with intent to misrepresent or to bring into contempt the said court; but no persons can be punished as for a contempt in publishing a true, full and fair *report* (not comment) of any trial, argument or proceeding had in court."[34]

In 1895, Frank E. Robinson, Editor of the Asheville *Citizen,* published an editorial on the removal of a case from Buncombe to Henderson County, in which he criticized the action of the judge in giving this change of venue. Part of the editorial follows:

"The reasons that Judge Ewart gave for the removal were founded on an unintentional error, corrected by the context, which the Citizen made in reporting the testimony of J. S. and the affidavits of men stating that in their opinion J. S. could not obtain an impartial trial in Buncombe. The error was corrected the next day, but if it had gone uncorrected it could have misled no man who had sufficient intelligence to read and comprehend the report of the testimony; the mistake is too shallow and too flimsy to deserve the consideration Judge Ewart seems to have given it."

[32] *Cowley* v. *Pulsifer* (1884) 137 Mass. 392, 50 Am. Rep. 318.

[33] *Brown* v. *Providence Telegram Publishing Co.* (1903) 25 R. I. 117, 54 Atl. 1061.

[34] C. S., sec. 978, sub. sec. 7 (italics and parenthesis by author).

The court held that Mr. Robinson was not guilty of contempt of court for the reason that the publication was not calculated to produce disrespect and contempt of court, neither was it grossly inaccurate.[35]

In 1914, there appeared in the Goldsboro *Record* an editorial severely reflecting on the conduct of a judge, saying that he frequently fell asleep on the bench and woke up suddenly and played hell, that he played set-back or pitch at night, and while playing took a drink every ten minutes and got very drunk and that he was unfit to be a Superior Court judge. This editorial appeared after court had adjourned, but the judge cited the publishers for contempt. The Supreme Court held that there could be no summary punishment for contempt in such a case as this, since the publication had no reference to a pending case or proceedings. Since the Court had adjourned, the only redress left to the judge was the bringing of a personal action of libel.[36]

III. A third limitation on the constitutional guaranty of freedom of the press is found in an increasing number of laws which attempt to regulate conduct of various sorts and incidentally prohibit the publication of everything which the statute declares to be illegal. One of the best known examples of such regulation is found in the lottery laws. In North Carolina, the statute provides that "if any one . . . advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor."[37] The federal statute provides that "no newspaper or publication of any kind containing any advertisement of any lottery, gift enterprize or scheme of any kind offering prizes dependent in whole or in part upon lot or chance or containing any list of the prizes drawn or awarded by any such lottery, shall be deposited in the United States mails or be delivered by any postmaster or letter carrier."[38]

Under these statutes, the publication of any advertisement or account of a lottery not only subjects the publishers to a criminal prosecution, but it makes the newspaper containing such an adver-

[35] *In re Frank E. Robinson* (1895) 117 N. C. 533, 23 S. E. 453.
[36] *In re Charles A. Brown* (1915) 168 N. C. 417, 84 S. E. 690.
[37] C. S., sec. 4427.
[38] U. S. Comp. Stat. (1918) sec. 10383.

tisement non-mailable. It may be worth our while to find out what is included in the word "lottery." Judge Walker has defined a lottery as a "scheme for distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value or nothing, as some formula or chance may determine."[39]

Various trade extension campaigns, selling schemes, advertising campaigns, etc., come within the scope of the lottery laws. Ten years ago, our Supreme Court held the following arrangement to be in violation of our lottery law.[40] The plaintiff agreed for a consideration to increase the defendant's business by twenty per cent. The defendants furnished the names of one hundred fifty women who were to be contestants for the prizes offered. The first sixty accepting were awarded a silver spoon. Each of the one hundred fifty were given a coupon free to the value of ten dollars in regular coupons. The contestants were expected to drum up trade for the defendants and coupons were issued by the defendants with each sale, the purchaser giving the coupons to his or her favorite contestant. Each week a piece of silver was given the contestant having the largest number of coupons deposited. Each month a watch was given and at the end of six months, when the trade extension campaign came to an end, a grand prize was given.

Chief Justice Clark dissented, saying, "The scheme presented by this appeal is almost identical with the well-known method heretofore adopted by many newspapers of the State in order to increase their circulation and without objection up to this time. The courts have laid down the rule that to constitute a lottery there must be an element of chance in winning a greater prize or winning nothing and losing the purchase price of the chance; also that there must be a consideration paid for the chance to participate in the distribution of the prizes. Here there was no chance or fee for participating in the contest. The contestant who works hardest and sends most business to the defendant's store wins the prize. It is a question of hard work, exercise of influence and possession of the largest degree of skill and has nothing to do with chance."[41]

But the majority of the court looked at the scheme as a way to get something for nothing and a violation of the spirit of the lottery

[39] *St.* v. *Lowe* (1919) 178 N. C. 770, 772, 101 S. E. 385.
[40] *Brenard Mfg. Co.* v. *Benjamin and Sons* (1916) 172 N. C. 53, 89 S. E. 797.
[41] 172 N. C. 53, 57-8.

statutes which aim to protect the public from designing persons. The opinion of the court quoted Justice McKenna of the United States Supreme Court as follows:

"Advertising is merely identification and description apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficied for their success. The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price and hence it may be thought that thus by an appeal to cupidity to lure to improvidence. This may not be called in an exact sense a lottery or gaming; it may, however, be considered as having the seduction and evil of such."[42]

Therefore if a newspaper carries advertising of a selling scheme, advertising campaign or a trade extension campaign which violates the lottery laws, it would be unable to recover the price of the advertising by a suit, besides rendering the publishers subject to criminal prosecution and giving the Post Office Department a chance to exclude the paper from the mails.

Of a like nature are the statutes dealing with obscene literature The North Carolina statute[43] makes the publishing or selling of any obscene literature a misdemeanor and the United States statute[44] declares that such matter is non-mailable. It has been sugegsted that the test of immorality is whether the literature "has a tendency to shock the moral sense of the average, normal head of a family." If such a test would prevent the publication of writings of an educational value on sex hygiene, commercialized vice and the like, the remedy would be a matter for the legislature, since the Constitution only prevents restrictions upon, and not enlargement of, the right to publish.[45]

The Volstead Act[46] and its counterpart in North Carolina, the Turlington Act,[47] make it unlawful to advertise in any way liquor or

[42] *Rast* v. *Van Deman* (1915) 240 U. S. 342, 365.

[43] C. S., sec. 4348.

[44] U. S. Comp. Stat. (1918) sec. 10381.

[45] Schofield, 9 Soc. Publications 82. See Hale, *Law of the Press*, p. 293.

[46] Act of Oct. 28, 1919 (known as the National Prohibition Act), 41 Stat. 305, U. S. Comp. Stat. (1923) sec. 10138½.

[47] N. C. Pub. Laws 1923, ch. 1.

the manufacture, sale or furnishing of the same, or how it may be obtained.[48] It also makes it unlawful to advertise any utensil, preparation, substance, formula, direction or recipes designed or intended for use in the unlawful manufacture of intoxicating liquor.[49]

Then there is a statute in this State which makes it unlawful for any person to publish any advertisement of any patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found or any mechanical device for the treatment of disease when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease.[50] This curious statute puts too heavy a burden on the advertising manager, for who is to say whether there is a cure for a disease or whether a device is of value in the treatment of disease.

It is also made unlawful by the Securities Act of 1925 to circulate or publish any newspaper in which an advertisement appears for the purpose of inducing or securing any subscription to or sale of any security, which is not exempted by the provisions of the Securities Law or until the requirements of that Law have been fully complied with.[51] The aim of this statute is to prevent the advertising of "blue sky" stocks or bonds.

The statute as to fraudulent and deceptive advertising makes it unlawful for any person, firm or corporation to publish an advertisement of any sort regarding merchandise, securities, service or any other thing offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, provided such advertising is done willfully and with intent to mislead.[52] This statute seems to be aimed at the person who puts the advertisement in the paper and does not appear to affect the paper, unless someone connected with the paper is a party to the deception. The publication of such an advertisement in good faith would be a valid excuse under the statute.

[48] U. S. Comp. Stat. (1923) sec. 10138½ hh; N. C. Pub. Laws 1923, ch. 1, sec. 3.

[49] U. S. Comp. Stat. (1923) sec. 10138½ i; N. C. Pub. Laws 1923, ch. 1, sec. 4.

[50] C. S., sec. 6684.

[51] N. C. Pub. Laws 1925, ch. 190, sec. 7. See comment on the Securities Act in 3 N. C. L. Rev. 150 (December, 1925) under discussion of recent statutory changes in North Carolina.

[52] C. S., sec. 4290.

In 1924, the legislature passed the following statute, which seems to play directly into the hands of the Postmaster General should he decide to exclude any publication from the mails:

"It shall be unlawful for any news agent, news dealer, bookseller, or any other person, firm or corporation to offer for sale, sell or cause to be circulated within the State any magazine, periodical or other publication which is now or may hereafter be excluded from the United States mails.

"This section shall not be construed to in any way conflict with or abridge the freedom of the press and shall in no way affect any publication which is permitted to be sent through the mails."[53]

I can find no record of violations of any of these statutes by newspapers in North Carolina, where the case has gone to the Supreme Court. Perhaps the newspapers keep within the law or perhaps these laws are of the unenforceable variety. But as they stand, they constitute a considerable limitation on the freedom of our press.

Perhaps the most significant statute of this type in recent years was the Espionage Act,[54] which not only provided for the punishment of acts which interfered with the operation of the military and naval forces or obstructed recruiting or enlistment or the sale of liberty bonds, but also provided for the punishment of any person who, when the United States is at war, shall willfully utter, print, or publish any disloyal, profane, scurrilous or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces, or the flag, or the uniform of the army or navy, or any language intended to bring the above into contempt, scorn, contumely or disrepute.[55] Another section of the act declared that any writing forbidden by the act was non-mailable[56] and the use of the mails for transmitting such matter is punishable criminally.[57]

Whether the act ignores the right of citizens under a constitutional and democratic government freely to discuss and criticize the form of government, the laws and the conduct of those in authority is a question which I cannot answer. It may suffice to say that a large number of influential persons ascribed that effect to the sections of

[53] N. C. Pub. Laws (Extra Session, 1924) ch. 45.

[54] Act of June 15, 1917, 40 Stat. 217, as amended by Act of May 16, 1918, ch. 75, sec. 1.

[55] U. S. Comp. Stat. (1918) sec. 10212 c.

[56] U. S. Comp. Stat. (1918) sec. 10401 a, b.

[57] U. S. Comp. Stat. (1918) sec. 10401 c.

the Espionage Act which have been subject to the greatest criticism, and two justices of the United States Supreme Court are on record to that effect.[58]

What we are more interested in is the power of the Postmaster General to exclude publications from the second class mailing privilege. This power has never been given to the Postmaster General specifically. But he has exercised such a power from time to time until there is no longer any dispute about it. An interesting case is *Smith* v. *Hitchcock*[59] (who was then Postmaster General) involving the exclusion of certain dime novels, *Work and Win* and the *Tip Top Weekly,* from the second class mailing privilege. This was done on the ground that the weekly issues were not magazines but were books. Each issue contained a story, complete in itself, but the same character is carried through the series. Notice some of the titles: *Frank Merriwell in Arizona, or the Mysteries of the Mine; Frank Merriwell's Friend, or Muriel the Moonshiner; Frank Merriwell's Double, or Fighting for Life; Frank Merriwell in London, or the Grip of Doom.* The Supreme Court upheld the action of the Postmaster General on the ground that the court would not interfere with the decision of the Postmaster General unless they were clearly of opinion that he was wrong.

One of the first cases under the Espionage Act was that of the *Masses Publishing Company* v. *Patten*[60] (Postmaster of New York), who had advised the company that the August issue of *The Masses* would be excluded from the mails. The company professed willingness to excerpt from the number any particular matter which was objectionable, but received no reply, and then applied for an injunction which was granted by Judge Learned Hand in the Federal district court,[61] but his action was subsequently reversed, and the action of the Postmaster in denying the second class privilege to *The Masses* was upheld. While Judge Hand admitted that the decision of the Postmaster General was final if there was any dispute of fact upon which his decision may rest, yet the courts may review such a decision if it is outside the scope of the authority conferred upon the Postmaster. Judge Hand held that the statements and cartoons in

[58] *Abrams* v. *U. S.* (1919) 250 U. S. 616, 624, Holmes and Brandeis dissenting. See Chafee, *Freedom of Speech,* for excellent discussion of the Espionage Act and other war-time legislation.

[59] *Smith* v. *Hitchcock* (1912) 226 U. S. 53.

[60] *Masses Pub. Co.* v. *Patten* (1917) 246 Fed. 24, reversing 244 Fed. 535.

[61] 244 Fed. 535.

question were within the range of opinion and criticism, within the scope of that right to criticise which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The Circuit Court of Appeals, in reversing Judge Hand, was clearly of opinion that the publication in question was intended to embarrass and defeat the government in the successful prosecution of the war.[62]

After Mr. Burleson suppressed the August number of *The Masses,* he refused to admit the September or any future issues to the second class privilege, even if absolutely free from objectionable passages, on the ground that the magazine had skipped a number and so was no longer a periodical, since not regularly issued.[63]

The only case which went to the United States Supreme Court[64] involved a similar action of Postmaster Burleson in depriving of the second class privilege Congressman Berger's *Milwaukee Leader.* The order was made upon the charge that articles were constantly appearing in the paper which violated the Espionage Act. The Supreme Court upheld the constitutionality of this section of the Espionage Act and upheld the administrative action of the Postmaster General in revoking the second class mailing privilege. They held that the decision of the Postmaster would not be disturbed unless they were clearly of opinion that it was wrong—which, as Mr. Chafee suggests, probably means never[65]—and in this case they found substantial evidence to support the decision.

Justices Brandeis and Holmes dissented, principally on the ground that there was no authorization to the Postmaster to deny second class privileges with regard to future numbers of a paper because previous issues contained non-mailable matter. Justice Brandeis said:

"This case arose during the World War, but it presents no legal question peculiar to war. It is important because what we decide may determine in large measure whether in times of peace our press shall be free. The denial to a newspaper of entry as second class mail does not deny to the paper admission to the mail; it merely deprives it of a very low postal rate. The scope of the Postmaster's alleged authority is confessedly the same whether the reason for the non-mailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright law, or that it is a part of a scheme to defraud, or concerns lotteries, or is indecent or is in

[62] 246 Fed. 24.
[63] Chafee, *Freedom of Speech,* 107.
[64] *Milwaukee Social Democrat Pub. Co.* v. *Burleson* (1920) 255 U. S. 407.
[65] Chafee, *Freedom of Speech,* 107.

any other respect matter which Congress has declared shall not be admitted to the mails."[66]

In this case, the *Milwaukee Leader* built up a large circulation, of which nine thousand copies were distributed daily through the second class mail. To deprive it of the second class privilege would practically put it out of business, which is true of many newspapers in this State today. While it is clear that the Postmaster has authority to exclude from the mails any individual issue of a newspaper or periodical which contains non-mailable matter, it is doubtful whether his authority should extend to the exclusion of future issues of a paper for the sins of the past. There is no authority to exclude a paper which contains no objectionable matter, and the future issues may be completely unobjectionable.

But the majority of the court in the *Milwaukee Leader* case said that government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible to maintain a reader in every newspaper office in the country to approve in advance of the issue before allowing it the privilege of the mails, and when a paper has contained non-mailable matter for a considerable time, it is reasonable to conclude that it will continue.

So while censorship seems to be prohibited under our constitutional guaranties of freedom of the press, yet indirectly we have made the Postmaster General a virtual censor by putting in his hands the power to exclude publications from the mails, on the ground that they contain material which is non-mailable under some statute. To take away from a newspaper or periodical, the second class mailing privilege, or the use of the mails altogether, is to take away the only effective means of publication and put the paper out of business. Such power as this should not be placed in the hands of any one official, and, if there is a place for it in a democratic state, it should be lodged in some impartial tribunal which would not be both judge and prosecuting attorney. For new statutes will be passed, creating other classes of non-mailable matter, perhaps in regard to evolution or what not. We may wake up some day to find that our boasted freedom of the press has given place to a form of censorship. Even as they now stand, the restrictions on a free press are worth serious consideration.

[66] *Milwaukee Pub. Co.* v. *Burleson* (1920) 255 U. S. 407, 417.