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George Palmer Garrett

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“FREE TRADE IN IDEAS”

GEORGE PALMER GARRETT¹

A parallel from the past in history with the present is always instructive. When we can find an analogy for the present in the tomes and tombs of the past, we can project our future with a greater certainty.

In the events of the present day in this country there is much that is a reminder of the conditions created in thirteen states of the new American Union by the occurrence of the French Revolution at the end of the eighteenth and the beginning of the nineteenth centuries. Then, as now, democratic principles had been seized upon by revolutionary radicals in a foreign country to justify the inauguration of a Reign of Terror. Then, as now, the doctrines and propaganda of dangerous political expedients and innovations were preached and published in the United States. Then, as now, the agitation arouses sympathy among the iconoclasts within our borders. Then, as now, the conservatives retaliated upon the protagonists of violent disruption by measures of violent repression.

Then Citizen Genet was deported and the Sedition Law of 1798 was enacted. Now we have our soviet ark and our peace-time sedition bills.

Yesterday it was an uprising of the Fourth Estate, a collapse of monarchic and currency systems, a time of general war and disturbance, an inculcation into the mind of the populace of new and untried theories and an effort to practice them, that created the untoward conditions. Today it is the same. The governments of Russia, Germany and Austria have fallen, and lie prone. Out from the ruins scurry the frightened and bewildered subjects. Production, transportation, currency and exchange, and the police power that were formerly the beams and studding and rafters, upon which the walls and floors and roof of the old economic structure depended are dismantled and displaced. The new builders are without knowledge of construction. They know only that what they want is different from what has been. So while the rains of misery and malady descend upon them and the floods of death and darkness come to meet them, and the winds of circumstance blow in their ears, they talk and plan

¹Member of the Bar, Kissimmee, Fla.

of the warm hearths and ample mansions they will build for themselves.

This Bolshevik epidemic that has overrun Europe infects our country through the cables and the ports. Already sporadic cases have been reported here and there, and the health doctors (Congress) are developing strict quarantine and preventive regulations to cope with the spread of the disease.

Thus surely exists an analogue between the post-revolutionary era and our own. What followed the enforcement of the restriction of speech in the former historic instance? We learn that the prosecutions under the Sedition Law were vigorously and vehemently pushed. We discover that the laws were resented, flouted and finally annulled by the plain people acting through pressure of public opinion. Some very notable trials occurred during the regime of statutory restraint of speech referred to. What matters of opinion and expression were considered seditious may have some amusement for us at this far-off time.

For example there is the case of *Respub v. Dennie*, 4 Yeates (Penna.) 267. Dennie was indicted as a factitious and seditious person of wicked mind maliciously and wickedly intending to bring into contempt and hatred the independence of the United States and the constitution of Pennsylvania and of the United States in that he published a libel, to-wit:

"a democracy is scarcely tolerable at any period of national history. Its omens are always sinister and its powers are unpropitious; it was weak and wicked at Athens, it was bad in Sparta and worse in Rome. . . . It was tried in England and rejected with the utmost loathing and abhorrence. It is on trial here and its issue will be civil war, desolation and anarchy. . . . No honest man but proclaims its fraud, and no brave man but draws his sword against its force," etc.

He was acquitted.

Chief among the prosecutions for violations of the Sedition Act of 1798 were Lyon's Case; Wharton's State Trials; 333 Haswell's Case, Id. 684; Cooper's Case, Id. 659; Callender's Case, Id. 688.

The defendant in the Lyon case was Matthew Lyon, a Vermont representative in Congress. Referring to President Adams, he complained of this official's "continual grasp for power . . . an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice," and, in a letter from him that he allowed to be published, were contained allusions to "the bullying speech of our President" and "the stupid answer of your Senate" and wonder "that the answer of both houses

had not been an order to send him (Adams) to the mad house." He was convicted.

Haswell was an editor of a Vermont paper that published an advertisement addressed "to the enemies of political persecutions in the western district of Vermont." The advertisement was of a lottery for the purpose of raising money in order to pay Lyon's fine, and set out that Lyon

"is holden by the oppressive hand of usurped power in a loathesome prison, deprived almost of the right of reason, and suffering all the indignities, which can be heaped upon him by a hard-hearted savage (the United States Marshall), who has, to the disgrace of Federalism, been elevated to a station where he can satiate his barbarity on the misery of his victims."

A quotation from another paper to the effect that "the administration publicly notified that Tories . . . were worthy of the confidence of the government," also appeared in this Journal. Haswell was convicted.

Cooper's offense was to print in his newspaper a statement that at the beginning of his term, President Adams

"was hardly in the infancy of political mistake; even those who doubted his capacity thought well of his intentions. . . . Nor were we yet saddled with the expense of a permanent navy, or threatened . . . with the existence of a standing army. . . . Mr. Adams . . . had not yet interfered . . . to influence the decisions of a court of justice."

Cooper was convicted.

An article entitled "The Prospect Before Us," written by Callender, in which he said of President Adams that his administration had been "a tempest of malignant passions;" his system had been "a French war, an American navy, a large standing army, an additional load of taxes," and that he "was a professed aristocrat and he had proved faithful and serviceable to the British interest" and remarked of his speech to Congress, "this hoary-headed incendiary . . . bawls to arms, then to arms," brought Callender before the courts. Callender was convicted.

The foregoing resume of the Sedition Law cases follows the lines of fact given in Beveridge's *Life of John Marshall*, Volume 3, Chap. 1.

Judge Cooley in his standard work on *Constitutional Limitations*, p. 631, remarks, with reference to this law:

"Its constitutionality was always disputed by a large party, and its impolicy was beyond question. It had a direct tendency to produce the very state of things it sought to repress . . . it is impossible to conceive, at the present time, of any such state of things as would be likely to bring about its re-enactment, or the passage of any similar repressive statute."

Further, on p. 614, he says:

“Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness.”

Judge Cooley is a known and venerated exponent of the constitutional law of the United States. His position above stated derives its force as an admission against interest. To him the Constitution is a sacred and inviolable charter. He could have no sympathy with opponents and traducers of its theory of government; he could have only detestation of them. Yet, breathing that spirit of liberty that is the soul of the parchment to which he pays homage, he acknowledges the right to live of any government created thereby, only so long as it can stand in the open air buffeted by the winds of free discussion.

It is as a Conservative Constitutionalist that we write, and it is to Judge Cooley as a fellow conservative that we refer.

Have circumstances and exigencies altered the position of conservative constitutionalists? Is this now a time when such grave dangers threaten that the graver danger of censorship can be tolerated? Harken to no less a man than Mr. Justice Holmes, speaking in his great dissenting opinion in the case of *Abrams v. United States*, 64 U. S. Supreme Court Reports (Law Edition), p. 10, decided November 10, A. D. 1919:

“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct—that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinion that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree

with the argument of the government that the First Amendment left the common law as to seditious libel in force. History seems to be against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of July 14, 1798 (1 Stat. at L. 596, chap. 74), by repaying fines that is imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'"

Again we find the following in the daily prints :

"Nothing in my judgment is a more serious mistake at this critical time than to deprive Socialists or radicals of their opportunities for peaceful discussion and thus to convince them that the "Reds" are right and that violence and revolution are the only available means at their command. I have sufficient confidence in our institutions to believe that they will survive all the onslaughts of discussion and political controversy. But democracy cannot be preserved if representation is denied. Apart from that matter of principle, the procedure is futile. To shut out the duly elected representatives of the Socialists is merely to multiply Socialists by the thousand. Instead of protecting us from revolution, it will do more to encourage the spirit of revolution and to strengthen the advocates of violence than any conceivable propaganda could accomplish.

"I remain with high respect, very sincerely yours,

"CHARLES E. HUGHES."

Cooley, Holmes and Hughes—none of these men are Bolsheviks. The first ranks with John Marshall, Joseph Story, and Lemuel Shaw, as an ever living exception among the "many ghostly figures in the shadowy procession of our judicial history" of whom Beveridge speaks. Holmes is probably as learned and thoughtful a judge as our Supreme Bench now holds, and, while he is known as a liberal, can hardly be regarded as a radical or proleterian. Hughes has stood before the country as the nominee of the Republican party, which claims to be the champion of "Safety and Sanity." Yet all three are willing to trust the Constitution and the government it has fathered to the "tender mercies" of untrammelled opinion and unharnessed discussion.

"A free state—a state with liberty—means a state, call it a republic or call it monarchy, in which the sovereign power is divided between many persons, and in which there is discussion among those persons." So reasons Bagehot, in *Physics and Politics*, and proceeds to demonstrate that only those nations which granted to their subjects this liberty of discussion found the road to progress.

Thus we are proceeding to stifle discussion, although ours is a government of discussion, although at its very origin it subscribed to "a decent respect for the opinions of mankind." Surely to frown

upon even irrational debate is not in consonance with that theory of our Constitution which Mr. Justice Holmes has described as a "fighting faith" in a "free trade of ideas."

The war, our great war, is over. While it was on, we all remembered with especial solicitude that "the safety of the state is the supreme law." We felt that we could not tolerate the "enemy within our gates," and whenever and wherever we found him, we scotched him. In the belief that the whole truth was not good for us, we accepted a censorship. It is questionable whether there was wisdom in this. Probably if we had known all, we could have borne all, and our solidarity would have been firmer and our spirit of victory at all costs more insuperable. Certainly, our Selective Service Law, our Liberty Loans, and our sacrifices of all sorts were possible rather in spite of the censorship than because of it. But that is past, the censorship was imposed and endured. Attendant upon the censorship went propaganda, and a sequel to propaganda was the Espionage Act. It was in passing upon a record showing conviction under the Espionage Act that Mr. Justice Holmes was moved to the dissertation copied above.

The war is over. Controversies as to the legal moment of the advent of peace are of no interest to us. "It is a condition, not a theory that confronts us," and that condition is peace. All about us men are beating their swords into ploughshares. There may yet be seventeen little wars in Europe, but the American citizen is done with Europe, his attention is absorbed at home. There is enough here to shake his tranquillity, what with the railroad muddle, the labor question, the cost of food and clothing, the depreciation of currency, the stoppages of production, and the hectic rage of politics in a presidential year.

The chain of causation is too long for the average man to care to follow all these elements of disquiet back to their source and to find that that source is—Europe! If Europe were producing, if its transportation systems were workable, if its imports were normal, our markets would be narrowed, exchange would be steady, labor would not be at a premium, commodities would be cheaper. With or without a League of Nations, we are doing business abroad. We are loaning money, selling goods, opening up enterprises. We are proceeding, as we must proceed, on the old, old corner grocery store line of advancing credit to an impoverished debtor—Europe—so that that debtor may find its feet again, and pay the whole account. Economic necessity forces these international relations upon us.

In acting as quartermaster for Europe, we reduce the quantity of supplies, whether they be food, clothes, labor or money, available for ourselves. Yet our own needs are as great, or greater, than they were before the war. Consequently, the price of food, clothes, labor and money goes up. The rise in prices poses our problems. Out of it come the increased troubles of the railroads, the acute crisis in the relations of capital and labor, the profiteering, and the real issues of our coming national political campaign.

Common sense advises us that the difficulties we are meeting are temporary. Production must be increased, extravagance eliminated, and Europe must become self-supporting. With more goods and less demand for them, the tendency to right the equilibrium will be irresistible.

Meanwhile we are at our wit's end. We know that not everything is right. We travel a strange road, in a gloom of ignorance. Strange sounds appal us, strange voices whisper in our ears, strange hands seize ours to guide us, and our feet stumble on a rough, new trail. Yonder in Russia the fire of conflagration lights the dark sky, and we hear the crackling flames and the saturnalian shouts of revelry and see the silhouettes of dancing figures against the reddened horizon. Our way is forward. Does it lead within the close circle of that awful spectacle? Our fears oppress us.

We are in panic, and being in panic crowd psychology controls. As Gustave LeBon has explained, we lose our full individuality when we merge into a crowd. A new, a combined, but single, person comes into being. This being thinks, speaks and acts—but not as any individual unit of the crowd severally would do. It responds less to reason and more to instinct, it answers more readily to the summons of passion and prejudice.

As of old, Aladdin could, by rubbing upon his lamp, create a genie, huge, black, unthinking, terrible, to do his will, so today man may, by invoking the spirit of the mob, raise up a sullen slave that can accomplish the miraculous. The daily newspaper has today practically invoked a crowd spirit in this nation. It has created that atmosphere of coherence and cohesion, of rubbed elbows, that starts in the mind the hypnotic suggestion and suggestiveness of the crowd. We all know the same things, at the same time, and from the same point of view. We have become as one with each other; through the agency of the press, and yet we feel our impotence as individuals apart from the body of the crowd. We are a crowd. When, therefore,

panic catches at the fringes of our crowd, the tremor is communicated and we shiver and shake in unison.

Such a panic has us now in its clutches. As in the dreams of the Brushwood Boy, he shuddered at the thought of "They," and yet knew not who "They" were, so we also shudder for fear of "Them." We call them Bolshevists, but we do not really know what that vague term connotes. So anyone who preaches what our unbalanced crowd imagination can assume to be out of the ordinary stands condemned by the crowd, without hearing. Aware as we are of the fierce cruelty of mob violence, how well we can recognize the present danger of new doctrine to him who publishes it.

We have forgotten momentarily that we are a prosperous nation, that we all own property in greater or less extent, that there are opportunities enough open here for all. We have forgotten that our institutions have a history that illustrate their foundation and continuance in the "consent of the governed." Many times in the past our Union would have been wracked apart and dissipated, if, in its given form, it had not satisfactorily expressed the political voice of the whole people. We forget that, as certainly as the tide goes out, just so certainly will it come in. We forget that if our economic ship is rolling to the gunwales in one direction now, it will presently roll back. So, forgetting these considerations, we conjure up a terrible power for the spoken or written word, where the word is not our own. "Out upon the iconoclast," we cry, and we raise our legislative arms to crush them.

Yet the poor creature must borrow our support before he can be dangerous. He can only conquer in *our* strength.

Apart from our experience with the Sedition Act, and apart from any reflections upon the principles of the Constitution, there are good psychological reasons for permitting the day of full discussion and criticism directed to governmental matters. One of these touches upon this subject of crowds. If we are a crowd, in this day of the newspaper dispensation, it is well to "check and balance" the possibilities of hasty crowd action. So long as the crowd is heterogeneous of opinion, this is possible. Once it has become homogeneous of opinion, it is extremely hard to do. The crowd, our crowd, will remain heterogeneous of opinion only if the different elements within it are allowed to clash in free discussion. Difference of opinion, disputation, disagreement spares us from the hypnotic spell of the multitudes. Let the newspapers and organs of opinion freely wrangle, freely take up cudgels for every cause, popular or unpopular, that obtrudes

itself, and there is not likely to be that tremendous singleness of mind that destroys non-conformity. The non-conformity of a minority, an active fighting minority, is an essential to the nation's health. Supposing it was possible to smother discontent, to deport it, we must inevitably find that we have cast out one devil that he and seven more may enter in. In the fertile field of a tilled and cultivated public opinion, propaganda grows rank and rife. Propaganda is manipulated news. It is false news, or true news with a false, or over-emphasized deduction. As Walter Lippman has shown, the first requisite of true reasoning, is the truth of the facts from which we reason, and, as propaganda poisons the sources of news, by contorting or distorting the facts, it is antithetical to our notion of liberty. For liberty is a freedom of action based upon truth. As a forerunner of propaganda, propaganda used in the interests of classes, of political parties, of intolerant majorities, and of popular causes, restriction of speech is a precursor of the death of democracy. For democracy is dedicated to the preservation of the minority. And, among the choking thorns of organized propaganda, minorities perish.

Psychology sustains free speech from another angle. Mr. Harvey O'Higgins has written a series of articles explaining the views of a nerve specialist as formed from his practice. This doctor has adopted and used the Freudian idea of complexes in much of his work and gives cases that have come under his treatment as illustrations, and his general conclusions therefrom. The point that he makes, to which we must refer, is not new in this field—viz.: that repressed feelings, ideas, and thoughts if not allowed an ordinary channel or discharge will find an outlet somehow, and in doing so may cause some very serious and unexpected pathological conditions. Thus, he explains, shell-shock is an ailment of a brave man. Were the man a coward, he would run under fire and his fear, passing out through his flying feet, would disappear, leaving him whole "to fight again another day." Being brave, however, the man, shocked by the tremendous experience of battle, sticks and "carries on." He does so, nevertheless, by virtue of an heroic repression of fear. Outwardly the fear does not exhibit itself; the man may even accomplish exploits that earn him splendid recognition for courage. Inwardly, however, the repressed fear has worked havoc, for the hero has fallen victim to shell-shock. This sort of thing transpires in many ways and is initiated by many causes.

The law seems to be that repression simply changes the direction of discharge, but does not prevent this discharge.

Now we come back to our proposition of the muzzling of free

speech. To some extent this may be made effective. It may, by rigorous enforcement, close the mouth of the faultfinder. We question whether it will attain to that success. In any case, the discharge of irritated matter will occur. The evils of the day, if they be evils, will be exposed. Quite possibly, it will eventuate that the discharge will break through some new channel that will work disaster to the body politic.

Science only reinforces the precepts of history and the tenets of Americanism. We have long ago tried a Sedition Law, and expiated it through long years of contrition and repentance. We have since survived fearful storms of conflicting opinion without reviving that law. We have built our temple to house our ark, and now it seems we must (it is alleged) destroy our ark to preserve our temple. This is mere panic. If we will but walk out into our fields at eventide, and climb the first green hill we come to and watch the sunset "spill its fresh and sanguine sacrifice" over the fair and lovely prospect that opens before us, knowledge will come to us that the exotic dogmas of jaundiced doctrinaires cannot lay hold upon our land. Our "fighting faith" in a "free trade of ideas" will spring anew within us.