CHAPTER 10

Free Expression Versus Reputation

The Supreme Court's Weighing of Interests

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The Supreme Court of Pennsylvania has consistently touted the protections provided by the Commonwealth for freedoms of speech and press. As the Court explained in *Pap's A.M. v. City of Erie*, "Freedom of expression has a robust constitutional history and place in Pennsylvania. The very first Article of the Pennsylvania Constitution consists of the Pennsylvania Declaration of Rights, and the first section of that Article affirms, among other things, that all citizens 'have certain inherent and indefeasible rights.' Among those inherent rights are those delineated in § 7, which address 'Freedom of Press and Speech; Libels.'"[1]

The Court observed that Article I, Section 7 is broader than the federal Constitution's First Amendment in that it "affirms the 'invaluable right' to the 'free communication of thoughts and opinions,' and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused."[2] In the long history of the Commonwealth, however, the Court has struggled to match this broad expression of freedom with concerns about its "abuse." That tension is most clearly reflected in the Court's decisions on the law of defamation.

I. THE FOUNDATIONAL PERIOD

The Commonwealth's solicitude for freedom of expression has been traced to its founder, William Penn, and his prosecution in 1670 "for the 'crime' of preaching to an unlawful assembly."[3] As set forth in the preceding chapter, Penn's *Frame of Government of Pennsylvania* guaranteed freedom of conscience and religious worship.[4] While other forms of free

expression were not formally guaranteed, the colony's Quaker-based tolerance influenced some early legal decisions. For example, when William Bradford, the first American printer south of Boston, was tried in 1682 for seditious libel because he criticized Pennsylvania officials for straying from Quaker values, he was allowed to defend himself by arguing that his statements were true and, therefore, not seditious—a startling break from the contemporary view that truth was irrelevant to the crime of libel.[5]

Four decades later, when Philadelphia lawyer Andrew Hamilton went to New York to defend a former Bradford apprentice, John Peter Zenger, in another libel prosecution, Hamilton echoed Bradford's argument and obtained an acquittal by the jury, despite the New York court's refusal to allow truth as a justification. Hamilton's ringing defense of the freedom to tell the truth was published throughout the colonies—particularly through Benjamin Franklin's widely read *Pennsylvania Gazette*—and helped shape a new public view of freedom of expression that again has been recognized by the Supreme Court as a foundational basis for Pennsylvania press freedoms.[6] Against this background, Pennsylvania in 1776 became the first state to protect "freedom of speech, and of writing, and publishing,"[7] making it "the flagship of free expression in the early Republic."[8]

The freedom was not unbounded, however, and scholars have contended that freedom of speech often did not extend to the views of those out of power.[9] The Supreme Court's 1788 decision in *Respublica v. Oswald*[10] illustrates the problem. Oswald, while on bail after being charged with libel, published an article accusing members of the Court of bias because of their political views. The Court cited Oswald for contempt because his article might prejudice the public and corrupt justice. Oswald argued that the Constitution gave him the freedom to speak freely and without restraint, but the Court, in an opinion by Chief Justice McKean, rejected that view, explaining, "The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and to defame."[11] The Constitution was not intended to make libel "sacred," and "good government" could punish abuse of the liberty of speech.[12]

Two years later, Chief Justice McKean chaired a committee of the whole during the framing of a new state Constitution.[13] The free speech provisions were redrafted to state that "no law shall ever be made to restrain the rights" of a free press, truth "may be given in evidence" in prosecutions for publications about public officials or conduct, "[t]he free communication of thoughts and opinions is one of the invaluable rights of man," and "every citizen may freely speak, write, and print on any subject"—but that those who do so are "responsible for the abuse of that liberty."[14] The new Constitution also recognized a right of "acquiring, possessing, and protecting property and reputation."[15]

In the years after the adoption of Pennsylvania's 1790 Constitution, the Supreme Court reiterated the view that libels are so destructive of society that they can readily be

punished, both criminally and civilly.[16] In *Runkle v. Meyer*,[17] the Court considered whether the publisher of a third person's defamatory article could be sued for libel without violating press freedoms, and the Court had no hesitancy in answering affirmatively, comparing the publisher to one who "bespatters another's clothes with filth, as he passes the street, though at the instigation of a third person."[18]

Meanwhile, the turn of the nineteenth century found the Commonwealth embroiled in the heated political debates that accompanied the dawn of political parties at and following the end of President Washington's administration. Much of the controversy swirled around the caustic attacks made on President Adams and his fellow Federalists by a Philadelphia newspaper, the *Aurora*, which was published by Benjamin Franklin Bache (grandson of the famed publisher of the *Pennsylvania Gazette*) and his successor, William Duane. The attacks led to enactment of the federal Sedition Act of 1798,[19] which punished speech critical of the government. Duane was prosecuted under the act, but the statute expired after the election of the Federalists' opponents, led by Thomas Jefferson, and Duane was not tried.[20] Meanwhile, popular opposition to heavy-handed enforcement of the Sedition Act gave rise to the modern American theory that criticism of government actors is a fundamental aspect of the right of free expression.[21]

Although Pennsylvania played a major role in this critical evolution of the theory of free expression, its Supreme Court did not. As late as 1805, the Court continued to espouse a theory of seditious libel that was more in tune with the Sedition Act than its repeal. Thus in *Respublica v. Dennie*,[22] the Court addressed an action to punish Joseph Dennie, the editor of the Jeffersonian journal the *Port Folio*, for publishing views critical of certain forms of democracy. The Court held that the Constitution did not forbid prosecution of Dennie for seditious libel because his comments could be considered an "abuse" of the privilege of free speech. There is a difference, the Court explained, between publishing "temperate investigations of the nature and forms of government" and "those which are plainly accompanied with a *criminal intent*, deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens and to produce popular discontent with the exercise of power."[23] The Court left it to the jury to determine whether Dennie had abused his privilege. The jury acquitted.[24]

II. THE NINETEENTH AND EARLY TWENTIETH CENTURIES

Throughout the rest of the nineteenth century and much of the twentieth, the right of free expression under the Pennsylvania Constitution played little role in Pennsylvania legal development in general and in the formulation of defamation law in particular. Scholars have observed that this generally was a period of state constitutional dormancy with respect to individual rights; indeed, when courts began to focus on constitutional rights in the twentieth century, they did so mainly with respect to the federal rights applicable

to the states under the Fourteenth Amendment to the US Constitution, which was added in 1868.[25]

Rather than viewing defamation as an exception to the right of free speech that should be closely circumscribed, the Supreme Court focused mainly on protecting reputation interests and kept speech-based defenses relatively narrow. In 1984, the Court summarized this historical perspective in *Hepps v. Philadelphia Newspapers, Inc.*:[26]

> The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words.[27]

Though the Court recognized that truth ("justification") was a complete defense,[28] it made clear that the mere fact that a defendant reasonably believed a statement to be true would not save him from liability.[29] Nor was proof of substantial truth sufficient. If the proof were to "extend not so broad as the allegation, or go beside it, or fall short of it, the defense will be held insufficient."[30] The burden of establishing that a statement was justified was placed squarely on the defendant as a matter of affirmative defense and, indeed, as late as 1971, the Court still authoritatively declared, "[A]lthough ordinarily in order to be actionable words must be false, falsity is not an element of a cause of action for libel in Pennsylvania."[31]

One area where the Court suggested a less restrictive attitude was its injection of the elusive concept of "malice" as a requirement for a defamatory statement to be actionable. An early leading case from 1806 is *M'Millan v. Birch*, which declared malice to be "an essential ingredient in slander."[32] Although the Court said malice would be implied, a defendant should be free to show that "there was no malice in my heart."[33] The Court held that the defendant's evidence that the speech at issue was made in a church presbytery while pleading a cause could rebut the presumption of malice and absolve him of liability. In *Sharff v. Commonwealth*,[34] the Court held that in a criminal prosecution for libel, malice had to be found by a jury.

Over time, however, the concept of "malice in my heart" blurred. Malice was implied, and little had to be shown to support the implication. As the Court explained in *Neeb v. Hope*, "Malice is said to be essential to an action for libel, but it is malice in a special and technical sense, which exists in the absence of lawful excuse, and where there may be no spite or ill will, or disposition to injure others. Every publication having the other qualities

of a libel, if wilful and unprivileged, is in law malicious."[35] In *Summit Hotel Co. v. National Broadcasting Co.*,[36] the Court refused to call the resulting regime one of strict liability, but its distinction was narrow: "[O]ur rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter," in which "[t]he fact of defamatory publication is evidentiary of such lack of due care." Several decades later, the Court explicitly acknowledged that this was a strict-liability regime.[37]

One brighter spot in this tapestry was the Court's development of the law of privilege, an issue in which the Court did recognize the importance of freedom of expression. In *Case of Austin*,[38] the Court recognized the privilege of a lawyer to make statements critical of a judge, explaining, "[C]onduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen." The Court reached a similar result in *Ex parte Steinman*,[39] relying in part on an 1874 amendment to Section 7 of the Declaration of Rights providing that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury."

In *Briggs v. Garrett*,[40] the chair of a local civic committee read a letter by a city official that charged a judge seeking reelection with responsibility for a public works scandal. The Court held that there was a privilege to read the letter informing voters about the city official's charge because such an accusation against a candidate is "a matter for public information" and there was no "abuse" of free speech rights in disseminating it, even though the person reading the letter did not know whether the accusation was true: "If the voters may not speak, write or print anything but such facts as they can establish with judicial certainty, the right [of free speech] does not exist, unless in such form that a prudent man would be hesitant to exercise it."[41] Two years later, the Court held that this privilege to inform the public extended to press organizations.[42]

The theory of these cases ultimately evolved into a privilege of "fair report," under which a publisher could report defamatory information contained in government proceedings so long as the account was "fair, accurate and complete, and not published solely for the purpose of causing harm to the person defamed."[43] But the privilege was far from absolute. As the Court cautioned in *Conroy v. Pittsburgh Times*,[44] "The law, in cases of privilege, has been lenient to the claim, but it must not be allowed to become lax" and so must take care to reject such claims if a defendant could not prove the challenged statement to have been made on a proper occasion, from a proper motive, in a proper manner, and based on reasonable and proper cause.