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A Distant Heritage: The Growth of Free Speech in Early America

Jim Greiner

University of Michigan Law School

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A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA. By *Larry D. Eldridge*. New York: New York University Press. 1994. Pp. xv, 198. \$37.50.

To state the obvious, the right to free expression occupies an important place in modern U.S. law. The extraordinary significance of this right leads naturally to scholarly attempts to find its origin in U.S. history, out of both a sense of curiosity and a desire to learn from the past. In *A Distant Heritage*, Larry Eldridge¹ looks for the origin of the right to free expression in the formative days of our republic, specifically in the laws and legal practices of the seventeenth-century colonies.

Eldridge's explicit purpose is to rebut the "resilient orthodoxy," an orthodoxy that he attributes to Leonard Levy,² that "no political free speech existed in seventeenth-century America" (p. 1). Eldridge claims to have made the startling discovery that American colonists in the 1600s "experienced a dramatic expansion of their freedom to criticize government and its officials across the seventeenth century" (p. 3). This expansion was grounded in a "foundation laid deep and firm in colonial experience" (p. 142). Indeed, for later colonists who led the revolt against Britain, American colonial practices in the 1600s constituted nothing less than "a tradition of freedom passed down from the time of their parents' grandparents" (p. 142).

These are broad claims — claims too ambitious for even Eldridge's truly impressive historical research to substantiate. Readers expecting to find in Eldridge's book an explanation of the early colonial origins of the First Amendment's protection of free expression will be disappointed.

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Eldridge begins *A Distant Heritage* with a brief examination of colonial controls on the broad range of activities that modern authorities would now consider exercises of the right to free expression. Seventeenth-century colonial authorities placed sharp limits on citizens' sexual activities, dress, treatment of citizens belonging to higher social

1. Assistant Professor of History, Widener University.

2. See p. 1 (citing LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 20-28 (1985)). In my view, Eldridge slightly misinterprets Levy. Levy does not state that there was no political free speech in the colonies in the 1600s; rather, he claims that "liberty of *expression* barely existed in principle or practice in the American colonies during the seventeenth century." LEVY, *supra*, at 28 (emphasis added). *Expression* covers a much broader range of activity than does *speech*, especially if one follows Eldridge in understanding the word *speech* to be limited in this context to spoken words, as opposed to expressive actions, printed words, and religious practices. See p. 2. Levy sought to capture the mood of colonial law on all aspects of freedom of expression. Eldridge's book, in contrast, focuses on the comparatively narrow issue of freedom to criticize the government orally on political issues.

classes, and attitudes toward members of the opposite sex (pp. 5-7). By reviewing colonial controls on this wide range of activities, Eldridge illustrates that seditious speech laws were merely one part of a broader colonial attempt to regulate citizen behavior in order "to maintain a moral society" (p. 5).

Eldridge then proceeds to narrow his focus to seditious speech. He distinguishes three types of seditious speech the utterance of which colonial authorities punished: *scandalum magnatum*, government criticism, and false news.³ According to Eldridge, *scandalum magnatum* was the "slandering or scandalizing [of] great men in the realm" (p. 10). Later discussion makes clear that *scandalum magnatum* included at least two different types of offenses: personal insults against particular citizens of great social or governmental stature (p. 43), and "misprision charges," or allegations of official incompetence, unfairness, or disloyalty (p. 45). The broad category of government criticism included harsh words about the government generally (pp. 28, 53-54), its statutes (pp. 28, 52), and specific exercises of its power (p. 28). Rules against false news covered untrue words about individual government officers as well as inaccurate reporting of events.⁴

Within this discussion of the three types of seditious speech, Eldridge pauses to note two interesting historical legal facts. First, in a world ruled primarily by judge-made common law, many colonies chose to regulate seditious speech by statute (pp. 23-31). Second, despite their diverse religious and legal foundations, the various British colonies "used strikingly similar statutes and methods to enforce [rules against seditious speech]" and "demonstrated a notable consistency in the types of punishments authorized against [such speech]" (p. 34). Both results are surprising given that most law before the twentieth century was common law and that states in this century have shown a wide diversity in their treatment of seditious speech.⁵

After reviewing the colonial categories of seditious speech, Eldridge briefly examines the nature of the colonial judicial process from the point of view of an accused (pp. 67-91) before moving on to the bulk of his interpretative analysis: a discussion of what he views as a general trend during the seventeenth century among colonial authorities toward treating seditious speech cases more leniently (p. 114). El-

3. P. 10. Eldridge makes clear that these categories are to some extent his own classifications and that colonial authorities, while aware of some of the distinctions Eldridge identifies, often lumped all or part of one category together with all or part of another in a single statute. See pp. 28, 145 n.12.

4. P. 58. Eldridge claims that colonial false news prosecutions tended to focus on inaccurate reporting of events as opposed to false statements about government officials. P. 65.

5. See, e.g., THE STATES AND SUBVERSION apps. A & B (Walter Gellhorn ed., 1952) (detailing the variety of state laws against "subversive activities," including seditious speech, during the McCarthy-Korean War era).

dridge devotes one half of this analysis to the issue of punishment (pp. 91-113). The thesis of this section is that "colonial officials increasingly abandoned a variety of harsher sanctions in punishing seditious words, adopting in the process milder penalties as replacements" (p. 114). To prove his point, Eldridge divides punishments into six primary categories. The first, "bodily correction," consisted of physical violence against the speaker and included ear cropping, breaking arms and legs, tongue boring, and whipping (p. 91). The second category, "humiliation punishments," included forcing a speaker to recant or ask forgiveness, as well as imposing the pillory, the stocks, or the wooden horse upon the defendant (p. 98). "Exclusion penalties," the third punishment type, constituted banishing a convicted citizen or barring such a person from voting or from holding public office (p. 104). Eldridge's fourth and fifth categories, incarceration and fines, are self-explanatory. The sixth category included imposition of bonds and sureties subject to forfeiture if the perpetrator misbehaved again (p. 117).

Eldridge uses statistical analysis to demonstrate his contention that the 1600s saw growing leniency in seditious speech cases. For the categories of bodily correction, humiliation punishments, exclusion penalties, and imprisonment, Eldridge charts over time the number of cases in which colonial authorities imposed each type of punishment as a percentage of all seditious speech convictions for which the punishment is recorded (pp. 97, 103, 107, 112). Each of these charts shows that colonial authorities relied upon these four types of punishment with decreasing frequency as the seventeenth century progressed. Eldridge charts a similar pattern of decline in the colonial imposition of fines exceeding five pounds sterling as punishment for seditious speech (p. 117). In addition, without a chart, Eldridge asserts that use of the milder punishment of requiring offenders to post bonds or sureties grew throughout the seventeenth century and that colonial authorities allowed offenders to guarantee smaller amounts over time (p. 122).

Eldridge points to three other developments to support his claim that colonial treatment of seditious speech cases grew increasingly lenient during the 1600s. First, the author uses another statistical analysis to show that the colonies less frequently imposed multiple sanctions upon a single defendant as the seventeenth century progressed (p. 123). Although Eldridge provides no chart, he asserts that the number of seditious speech cases resulting in multiple punishment constituted a diminishing percentage of the total number of seditious speech cases, a fall from approximately sixty-five percent to about twenty percent from the 1630s to the 1690s (p. 123). Second, Eldridge claims that colonial authorities showed an increasing tendency to remit, pardon, suspend, or decrease sentences for violations of seditious speech laws over the seventeenth century (p. 124). El-

dridge again supports his point with an analysis of the relevant percentages across time (p. 126). Third, the author states that colonial authorities "revealed a growing inclination not to prosecute seditious words fully as the century progressed" (p. 126). To support this final contention, Eldridge provides a number of sample cases in which colonial authorities dropped seditious speech prosecutions at various stages of the legal proceedings and concludes that the vast majority of such cases occurred after 1660 (pp. 126-31).

A Distant Heritage finishes with a short chapter speculating on the forces that led to growing leniency in the treatment of violations of seditious speech laws. Eldridge attributes the change in the seventeenth century to a peculiar evolution of the colonial understanding of the purposes behind seditious speech law. The author argues that colonial authorities gradually abandoned the traditional concern for the honor and dignity of nobles and great persons in favor of a focus on "dangerous contexts" (pp. 133-34). Eldridge does not define the term *dangerous context*, but his emphasis on rebellion and disturbance of the peace seems to suggest that the phrase refers to a situation's potential to produce physical violence.⁶ In Eldridge's view, this evolution constituted a colonial concern for "actual," as opposed to "theoretical," danger (p. 137).

Eldridge concludes his final chapter with an examination of the historical trends that might have led to the change in colonial understanding of the purposes of seditious speech law. The author points to a "fascinating confluence of historical developments" (pp. 3-4) that undermined traditional respect for political and social authority figures including colonial governments, religious figures, extended family members, and local officials (pp. 138-42). Specifically, Eldridge credits this trend to infighting between colonial legislatures and governors, a growing sense of religious toleration brought about by the presence of different religious faiths in the same community, the ready availability of land, and economic dependence upon exports (pp. 138-42).

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In *A Distant Heritage*, Eldridge seeks to produce a "systematic analysis of early colonial freedom of expression" focusing primarily on seditious speech cases (p. 3). To this end, Eldridge examines a wide variety of historical sources, including records of county, provincial, and town courts in fifteen different jurisdictions, minutes of councils and assemblies, and journals, diaries, and letters of state officials (p. 3). The result is a book rich in examples and anecdotal evidence that provides an intriguing snapshot of various characteristics of colonial society, from its tendency to keep only summary records to its

6. See pp. 134-35.

extraordinary emphasis on religion and social class. These examples, together with Eldridge's dry wit and appreciation for the bizarre,⁷ make the book humorous and readable.

The persistent problem with *A Distant Heritage* is that the evidence upon which Eldridge relies does not support his conclusions to the exclusion of other plausible explanations. This difficulty infects nearly all of the conclusions of *A Distant Heritage*. The result is that Eldridge's truly impressive historical research leads to no certainty at all about whether in fact colonists in the seventeenth century experienced an expansion of their right to criticize the government.

In his discussion of punishments, for example, Eldridge relies upon a statistical analysis to show that extremely harsh types of punishment fell into disuse in seditious speech cases as the seventeenth century progressed. As a preliminary matter, one might question Eldridge's choice to rely upon statistical analysis. Eldridge himself recognizes that "court records are notoriously incomplete" and that "[m]any relevant records have been lost or destroyed, and even in their original state they omitted much important information" (p. 2). In addition, given the different types of sources upon which Eldridge relies,⁸ one can question whether the "records" of the seditious speech cases contained within these sources can be meaningfully compared. Finally, Eldridge does not subject his numbers to any sort of test for statistical relevance, and thus one can question whether the evidence shows a statistically significant trend.

Nevertheless, even if one disregards these preliminary difficulties with Eldridge's statistics regarding punishment and accepts Eldridge's assertion that colonial authorities tended to impose harsh punishments with less frequency in seditious speech cases throughout the 1600s, these numbers do not prove that colonial authorities acted leniently in *seditious speech* cases. Eldridge's data is equally consistent with the conclusion that colonial authorities imposed these harsh penalties less often in *all types* of cases as the 1600s progressed. Eldridge might be perceiving the roots of the Eighth Amendment, not the First. The author's conclusions might ultimately be correct, but without comparing punishment in seditious speech cases to punishment in all types of cases, one cannot say conclusively that his statistics prove a trend toward colonial leniency in seditious speech cases.

The argument regarding the exclusion of other possible explanations applies equally to Eldridge's reliance upon decreasing colonial tendencies toward imposing multiple punishments in seditious speech

7. In one instance, for example, Eldridge quotes a colonial record recounting that one Thomas Graunger was ordered hanged "for buggery with a mare, a cow, two goats, diverse sheep, two calves, and a turkey." P. 5 (quoting PLYMOUTH COLONY RECORDS 2:449 (1642)). Eldridge comments, "Graunger's creativity, it would seem, matched his energy." P. 5.

8. See p. 3.

cases and remitting those sentences that were imposed. This argument does not apply with any real force, however, to Eldridge's assertion that colonial authorities tended not to prosecute violations of seditious speech laws. Here, on the other hand, the statistical problems noted earlier become especially severe, for Eldridge apparently relies on a mere twenty-six dropped prosecutions to prove his point. These twenty-six prosecutions provide questionable evidence of a trend supposedly occurring in over thirteen different jurisdictions during a one-hundred-year period.⁹

Eldridge's conclusions do not fit his data well in other ways. For instance, Eldridge points to several historical trends leading to a general decrease in citizen respect for authority to explain the trend toward colonial leniency in seditious speech cases (pp. 138-42). However, the idea that authorities might react to increasing citizen defiance with growing leniency is somewhat counterintuitive; it certainly seems contrary to modern experience. In addition, Eldridge does not explain why the increasing leniency took the form of lighter punishments, as opposed to a change in the substantive law of seditious speech. Again, Eldridge might be correct in his assertions, but he does not fully explain how his evidence leads to his conclusions.

Given the incomplete state of the historical records and the resulting difficulty in collecting enough data on any particular type of case to support real empirical analysis, one might wonder whether a statistical approach is a particularly effective way of considering free speech law in the 1600s. The most convincing parts of *A Distant Heritage* are not its statistics but its discussions of the change in the substantive law of seditious speech that occurred during the seventeenth century. For instance, Eldridge shows convincingly that colonial false news prosecutions tended to focus on the false reporting of events as opposed to false stories about important persons and that colonial authorities changed their response to violations of these laws from searching for the original perpetrator to issuing official proclamations of the truth (pp. 58-65). Eldridge recounts another similar development when he shows how colonial authorities changed their reaction to allegations of wrongdoing or unfairness in office from immediate prosecution of the speaker to investigation into the truth of the allegations (p. 65). The importance of these revelations does not depend on statistics showing trends; rather, these examples from history are valuable because they demonstrate explicitly how colonial authorities adapted the substantive law of seditious speech to changing circumstances. This kind of historical analysis — based on concrete examples of categorical

9. Perhaps Eldridge in fact relies upon a more complete statistical analysis to support this point. The difficulty is that Eldridge does not reproduce any of his raw data to allow the reader to check his conclusions, nor does he clearly describe his criteria for analyzing and classifying his data. Given the incomplete state of colonial records, these omissions alone are enough to make one doubt many of Eldridge's conclusions.

change in the law — allows a historian to draw more reliable conclusions from meager or incomplete records than does the use of statistics.

A Distant Heritage thus ultimately does not prove what it intends to prove — that the 1600s saw a relaxation of seditious speech law in the colonies. Nevertheless, future researchers will find fruitful avenues of research in the book, and students of the history of the freedom of expression will find *A Distant Heritage* worth reading.

— *Jim Greiner*