



The Rights and Wrongs of Latkes

Geoffrey R. Stone

IT IS MY THESIS, which I shall demonstrate with all the rigor of legal reasoning, that the latke has historically been the principal driving force behind the constitutional protection of free speech in the United States, whereas the hamantash has been a powerful force for censorship. Put simply, the latke is the Judah Maccabee of constitutional law; the hamantash, the Haman.

Consider, first, *Abrams v. United States*. During World War I, the United States sent a contingent of marines to Vladivostok. The defendants in *Abrams*, a group of Russian-Jewish immigrants who were self-proclaimed socialists and anarchists, perceived the expedition as an attempt by the United States to crush the Russian revolution. In protest, they threw several thousand copies of each of two leaflets, one in English, the other in Yiddish, from a rooftop in the Lower East Side of New York. The leaflets called for a general strike.

The defendants were promptly arrested by the military police. After a circus-like trial, the defendants were convicted of conspiring

to obstruct the war effort. The trial judge sentenced each of them to twenty years in prison.

The defendants appealed to the Supreme Court, claiming that the convictions violated their rights under the First Amendment. The Court disagreed. What is memorable about *Abrams*, however, is not the Court's decision, but the dissenting opinion of that great Chasidic scholar, Oliver Wendell Holmes, for it was in Holmes's dissenting opinion that our constitutional protection of free speech first found full articulation. Holmes wrote:

Persecution for the expression of opinion seems to me perfectly logical. ... 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. That, at any rate, is the theory of our Constitution.

Geoffrey Stone, the Harry Kalven, Jr., Distinguished Service Professor in the Law School and the College at the University of Chicago, was dean of the law school when he delivered this speech in 1993.

Now, you ask, what has *this* to do with latkes? I will tell you. But first, it is essential to understand that what Holmes *really* objected to in *Abrams* was not so much the fact of conviction itself, but the severity of the punishment. As he explained, and I quote:

In this case, sentences of twenty years imprisonment have been imposed for the publishing of two leaflets. ... Even if I am ... wrong [in concluding that no crime has been committed, it seems to me that] the most nominal punishment [is] all that possibly could be inflicted, unless the defendants are to be made to suffer, not for their pathetic attempt to call a strike, but for the creed they avow, a creed that no one has a right to consider in setting the penalty.

Thus, what inspired Holmes's dissent in *Abrams* was his *suspicion* that the defendants were being punished not for attempting to obstruct the war, but for the *offensiveness* of their ideas. How did he know this? Listen to the statement of the *trial* judge, just before sentencing the defendants. Again, I quote:

These defendants took the stand. They talked about capitalists and producers, and I tried to figure out what a capitalist and what a producer is as contemplated by them. After listening carefully to all they had to say, I came to the conclusion that a capitalist is a man with a decent set of clothes, a minimum of \$1.25 in his pocket, and a good character. And when I tried to find out what the prisoners had produced, I was unable to find out anything at all. So far as I can learn, not one of them ever produced so much as a single ... *potato*.

And there it is: a single *potato*! And what sort of potato are we speaking of here? Remember these were Russian-Jewish émigrés. Why would *they* raise a potato? To make vichyssoise? To make potatoes au gratin? Ri-

diculous. The *only* reason they would raise a potato is to make ... latkes! But if, as the trial judge declared, they "did not raise even a single potato," what does *this* tell us? It tells us that the defendants did not *like* latkes! And it was this that offended the trial judge; it was this "creed" of the defendants that led to the severity of their punishment; and it was thus latkes that ultimately led Holmes to write his eloquent defense of free speech, known ever since as the "marketplace of potatoes" theory of the First Amendment.

Now, as a blue-blood Chasidic scholar, Holmes was, of course, a committed devotee of the latke. Keeping in mind the defendants' creed of antilatkeism, it is thus understandable that during the course of his dissenting opinion Holmes described the defendants as "puny anonymities" and condemned their "creed" as "the creed of ignorance and immaturity." Indeed, at one point Holmes went so far as to attack the defendants' antilatkeism as, and I quote, a creed "we loathe and believe to be fraught with death." It is noteworthy that Holmes's deep personal contempt for the defendants' disdain for latkes makes even more impressive his willingness to protect their advocacy of their creed.

But the role of the latke in *Abrams* runs even deeper. For only one justice joined Justice Holmes's dissenting opinion – the first Jewish justice, Louis Brandeis. Brandeis, of course, earned his reputation before being appointed to the Court by fighting the infamous hamantashen trust in Boston. It was Brandeis who single-handedly crushed this cartel, which had conspired to corner, indeed, to tricorner, the hamantashen market. It was through this triumph that Brandeis earned his lifelong nickname, "Louis the Latke" Brandeis.

I would like now to move to another great decision in the evolution of our free speech tradition: *New York Times v. United States*

– the Pentagon Papers Case.

In June of 1971, a former Pentagon official, Daniel Ellsberg – like Abrams, another socially conscious Jewish kid – gave the *New York Times* and the *Washington Post* a top secret Defense Department study. Upon learning of this leak, the United States immediately sought to enjoin the *Times* and the *Post* from publishing this material. The government claimed that such publication would interfere with the national security, lead to the death of soldiers, undermine our alliances, and prolong the war in Vietnam.

Within days the case worked itself to the Supreme Court, which held that the First Amendment prohibits prior restraints. As Justice Black explained, “In the First Amendment, the Framers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors.”

Think how far the Court had come from 1917, when the defendants in *Abrams* received twenty-year sentences for distributing their “puny” leaflets, to 1971, when two major newspapers were held to have a constitutional right to publish excerpts from a stolen top secret report in the face of government claims that publication would seriously jeopardize the national interest.

What explains this extraordinary transformation? Latkes, of course! To understand this phenomenon, it is essential to note that the critical precedent for the Court’s highly speech-protective decision in the Pentagon Papers Case was its decision forty years earlier in *Near v. Minnesota*.

In *Near*, a state court issued an injunction prohibiting any further publication of a weekly magazine, the *Saturday Press*, because it had run a series of articles falsely asserting “that a Jewish gangster was in control of bootlegging in Minneapolis.” In reversing this state court injunction, the Supreme Court

held that such “prior restraints” on expression are unconstitutional. It was this principle, first stated in 1931 in *Near*, that provided the foundation for the Pentagon Papers decision some forty years later.

But note: the allegation that led to the litigation in *Near* was that the *Saturday Press* had falsely reported that a Jewish gangster was in control of bootlegging in Minneapolis. Now, I ask you: what does one use to make bootleg liquor? Potatoes, of course. But we know that the *Saturday Press*’s charge was false. So, the alleged gangster was not making illegal liquor. What, then, was he doing with all those potatoes?

The answer, of course, is clear – what would a Jew engaged in some form of manufacturing be doing with truckloads of potatoes? Making latkes, of course! And so it was that a humble latke manufacturer in Minnesota in 1931 managed to bring about the Pentagon Papers decision in 1971, which in turn led to the break-in of Daniel Ellsberg’s psychiatrist’s office, which in turn led to the discovery of the White House plumbers, which in turn led to Watergate, which in turn led to the resignation of Richard Nixon. The lowly latke – marching through time!

The third decision I would like to call to your attention is *New York Times v. Sullivan*, which arose out of the civil rights movement in the South. L.B. Sullivan, the sheriff of Montgomery, Alabama, widely known as the “town of a thousand hamantashen,” brought a libel action against four black clergymen and the *New York Times*. L.B. claimed that he’d been libeled by an advertisement that had been published by the clergymen in the *Times*.

Sullivan claimed that several statements in the advertisement were false. Specifically, he objected to the following passage, and I quote: “In Montgomery, Alabama, after students sang ‘My Country ‘Tis of Thee’ on

the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.”

L.B. claimed that this was false in three respects: First, the students had sung not “My Country, ‘Tis of Thee;” but the National Anthem. Second, the students had been expelled not for leading a demonstration at the Capitol, but for demanding service at a segregated lunch counter. And third, not the entire student body, but only most of it, had protested the expulsion.

Now, one might think that these errors border on the trivial, but an *Alabama* jury – containing not a single Jew – found in favor of L.B. Happily, the Supreme Court reversed. Noting that “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” the Court held the damage award unconstitutional and sent L.B. packing.

And so, you ask, what does *this* have to do with our symposium? Well, remember that a key issue in the dispute concerned the allegation that the expelled students had demanded service at a “segregated lunch counter.” This was at a time when such segregation was rampant in the South. I want you to close your eyes for a moment and imagine the scene. It is a hot summer day in Montgomery. Nine black students defiantly seat themselves at the segregated lunch counter. They place their orders. The proprietor

glares at them with hatred in his eyes. He points to the sign over the counter. It reads: “We do not serve ... latkes. Hamantashen only.” Oh, sure – they claimed it was separate, but equal. They *said* the students could get latkes down the street. But in the “town of a thousand hamantashen,” separate was *not* equal.

And consider the other allegation that was central to the case – the statement that truckloads of police ringed the campus when the students’ “dining hall was padlocked in an attempt to starve them into submission.”

Let me read you a full account of the incident, published the next day in the *Montgomery Daily Dredel*. I quote: “It was brutally hot on the campus of Alabama State College. Dust, tinged with the sweet aroma of tear gas, swirled in the air, as more than a hundred of Montgomery’s finest munched hamantashen while standing guard over campus property. The college had justly locked its Negro students out of the dining hall, and the students were hopping mad. At one point, a mob of Negro troublemakers crowded by the padlocked dining hall door and chanted: “Aleph, bet, gimmel, dalid; our faith in law is solid. Give us bagels, give us lox; give us latkes by the box. We are starving, we need noshin’; keep your lousy hamantashen.”

I rest my case. It all comes down to what the great legal realists of the early years of this century first recognized. If you want to understand the law, you need not look to principles or precedents, policies, or prescriptions. You don’t even have to know Latin. All you really have to know is what the judge ate before assuming the bench. And where the First Amendment is concerned, the lesson is clear ... the proof is in the pancake. *GB*