

diately notes, however, that "this is no easy task."²⁸ Indeed, I'm not sure it is a coherent task. Given that we citizens have finite capacities for and interests in absorbing information and opinion, that there is no satisfactory way to define an item of news or opinion or to enumerate the possible positions about them, and that positions and accounts can be expressed through the media more or less cogently to audiences that possess more or less in the way of critical abilities, the aspiration to neutrality in the media appears to founder on the same shoals as the aspiration to neutrality in education.

All in all I believe the book will be of great value to American constitutional lawyers in understanding the theoretical dilemmas that underlie doctrinal issues, particularly with regard to those constitutional provisions, such as the speech and religion clauses, where liberalism as neutrality has had its greatest influence. Although the book offers no algorithms for resolving these dilemmas, it frames them well.²⁹

THE EDITOR, THE BLUENOSE, AND THE PROSTITUTE: H. L. MENCKEN'S HISTORY OF THE "HATRACK" CENSORSHIP CASE. Edited by Carl Bode. Niwot, Colorado: Roberts, Rinehart, Inc. 1988. Pp. 174. Cloth, \$29.95.

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H.L. Mencken, the celebrated journalist and social-literary critic, insisted that he "had a lot of fun" putting together this account of the 1926 effort, headquartered in Boston, to suppress an issue of his *American Mercury* magazine. Although Carl Bode, a Mencken biographer who compiled this version, claims that Mencken annotated the "'Hatrack' history more fully than anything else he ever wrote," it remained unpublished for more than fifty years. Mencken himself filed away the manuscript, intending that it be deposited, along with other papers, in the New York Public Library. Subsequently, however, it went to the Enoch Pratt Library in Mencken's beloved Baltimore, the repository for a lode of

28. *Id.* at 133.

29. I have omitted discussion of Hugh Ward's chapter, *The Neutrality of Science and Technology* (at 157-92), the focus of which is somewhat tangential to the main concerns of the book, and Goodin's and Reeve's chapter, *Do Neutral Institutions Add Up to a Neutral State?* (at 193-210), which primarily rehashes arguments made elsewhere in the book.

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unpublished Menckiana, including the infamous *Diary* that finally appeared in 1989.²

The "Hatrack" manuscript, ironically, becomes much more interesting when read in light of the *Diary*. If the latter tends to show the Mencken of the 1930s and 1940s as intolerant of ethnic minorities and out-of-touch with national and international issues, *The "Hatrack" Case*, at first glance at least, seems to picture Mencken as a champion of tolerance and even a crusader for cosmopolitan values during the 1920s. Certainly, it offers a first-person account of a grass-roots free-press fight: Mencken versus "the professional Comstocks"—Boston's New England Watch and Ward Society and Washington, D.C.'s Post Office of the United States.

Boston and the Post Office ranked somewhere near the top of Mencken's lengthy list of American "idiocies." In his view, Boston represented a center of both Comstockery, the organized legal movement to suppress "obscene" publications, and "Puritanism," an epithet that Mencken used to characterize a deep-seated American distaste for any cultural product that challenged a narrow, blue-nosed moralism. Under the leadership of J. Frank Chase, the New England Watch and Ward Society employed legal and extra-legal pressures to keep Boston free of such anti-Puritan literature as the novels of Theodore Dreiser, a writer whom Mencken had championed in earlier literary and free-speech battles. Mencken detested the "wowers" in the Post Office almost as much as those in Boston. Following the tradition of Anthony J. Comstock, who merged nineteenth-century "Puritanism" with the power of law, bureaucratic censors in Washington purged "offensive" publications from the mails. Mencken never forgave the Post Office for its performance during World War I, when it not only enforced Puritanism but also the pro-war orthodoxy of "the Arch-Angel Woodrow" Wilson, one of the political leaders whom Mencken most despised. The Hatrack affair of 1926 gave Mencken a chance to challenge both the Bostonian and Washingtonian variants of Comstockery.

The American Mercury was Mencken's favorite literary platform. By the early 1920s, he considered *The Smart Set*, the magazine with which he first made a national reputation, too narrowly literary. "We live not in a literary age," he wrote to a friend, "but a fiercely political age." Consequently, *The American Mercury* focused on "what may be called public psychology, i.e., the nature of

2. THE DIARY OF H.L. MENCKEN (C. Fecher ed. 1989). [Hereinafter, DIARY]. Because of the apparently strong ethnic and racial prejudices that Mencken routinely confided to his diary, this volume produced considerable commentary, opening Mencken's reputation as an opponent of bigotry to critical scrutiny.

the ideas that the larger masses of men hold and the process whereby they reach them.”³

The *Mercury* was not only political; it was fierce, especially in its attacks on “Puritanism.” The Hatrack article of April 1926 targeted the sins of Puritanism as represented by organized religion. Written by Herbert Asbury, a prolific social historian of the 1920s and 1930s, the article told the allegedly true story of a village prostitute who only turned tricks on the Sabbath. According to Asbury, “Hatrack” longed to be redeemed from sin, and she continually sought acceptance in both the Protestant and Catholic churches of Farmington, Missouri. While local pulpits regularly rang with denunciations of the “painted devils of Jezebel,” the town’s only real harlot, anxious to be saved, found herself scorned and ignored, Sunday after Sunday. Denied her dream of forgiveness, Hatrack supposedly spent the rest of the Lord’s day servicing clients from the town’s two major faiths—Protestants in the Catholic cemetery, and Catholics in Protestant burial grounds.⁴

Asbury’s piece, with the familiar Mencken theme of the hypocrisy of so-called reformers, represented only part of Mencken’s literary campaign against Boston’s censors. An earlier *Mercury* article, “Keeping the Puritans Pure,” had savaged the Watch Society and J. Frank Chase. Mencken already had Chase’s attention, and the Hatrack article moved Chase to pressure Boston’s book-sellers to remove all April editions of *The American Mercury* from their racks. Eager for another legal adventure, Mencken and his publisher, Alfred A. Knopf, consulted Arthur Garfield Hays, the prominent New York City attorney who had, a year earlier, helped to defend John Scopes in the famous “Monkey trial” in Dayton, Tennessee.

Mencken, whose reports of the Scopes trial were famous, saw Boston as his next Dayton and “Hatrack” as his next legal production. In Tennessee, Mencken had stayed in the wings, but Boston offered a starring role. With Hays providing both legal and staging advice, Mencken journeyed to Boston and personally sold a copy of the Hatrack issue to J. Frank Chase himself. Immediately arrested for peddling obscene literature, Mencken and his legal team squared off against Chase’s legal forces.

3. Quoted in D. STENERSON, H.L. MENCKEN: ICONOCLAST FROM BALTIMORE 222 (1971).

4. The article is included in Bode’s edition of the “Hatrack Case,” at 27-36. Since the “Hatrack piece” was taken from a book, UP FROM METHODISM, scheduled for publication by Alfred A. Knopf, who published Mencken’s own works and THE AMERICAN MERCURY, one suspects that the Hatrack case, at least in part, may have been designed to test Boston’s waters for the larger—and more expensive—book project and to drum up advance “publicity” for Asbury’s UP FROM METHODISM.

Chase, however, proved to be no pushover. Accurately sensing that the Watch Society might lose in Boston, especially after its attorney conceded that the case against Hatrack rested on its thematic content rather than its language, Chase turned to friends in the Post Office bureaucracy. Within hours of the dismissal of obscenity charges by a Boston judge, the Post Office ruled that the April issue of the *Mercury*, which had already passed through the mails, violated postal obscenity laws and was unmailable. Worse, Hays advised Mencken and Knopf that an article in the already-printed *American Mercury* for May, entitled "Sex and the Co-Ed," would likely trigger another mail ban. And worst of all, Hays warned, Chase's cohorts in Washington could, at that point, revoke the *Mercury's* second-class mailing permit under a regulation that empowered the department to deny second-class privileges to any publication that had missed two consecutive issues. Facing the possibility of financial ruin—the *Mercury* could not operate if it had to pay first-class mail rates—Mencken and company spent about \$8,000, a sum equal to all other expenses in the Hatrack proceedings, to print an entirely new run of the May edition, in which "On Learning to Play the Cello" replaced "Sex and the Co-ed."

Mencken's "Hatrack" manuscript concludes with a legalistic account of further legal confrontations. Mencken did ultimately escape the wowsers but gained a less than complete victory. While further litigation in Boston, including threats of libel suits, was successfully containing the Watch Society and Chase (who died during the course of the conflict), Mencken obtained an injunction that barred the Post Office from proceeding with its ban on the Hatrack issue of the *Mercury*. But the appellate court threw out the injunction. Because the Post Office's action had followed the actual mailing of the April issue, no copies really fell under its ban; and because Mencken intended no further mailing of that issue, no bureaucratic action remained to be enjoined. According to the court of appeal, the absence of any prospective harm eliminated any equitable basis, or first-amendment need, for an injunction.

Mencken saved his second-class mailing privileges, but he found his foray into the legal arena unsatisfying. Significantly, the Hatrack manuscript ends without any commentary about the significance of Mencken's legal efforts or about freedom of speech. Instead, Mencken complains that his legal battles had "played hob with my book," *Notes on Democracy*, and concludes with a nod toward his literary record of the 1930s.

Even the editor of this edition seems unsure what to make of Mencken's Hatrack history. Speculating briefly on the decision to

deposit, rather than to publish, the manuscript, Bode suggests that Mencken may have been "modest because he realized that his narrative was uneven," especially lacking the presence of a "perfect Puritan villain" against whom he could battle.

While certainly plausible, Bode's explanation ignores possible political-constitutional dimensions of Mencken's decision to forego publication. Although this history never mentions the fact, Mencken's battle hardly signaled the end of Comstockery in Boston. Indeed, according to Samuel Walker's recent history of the ACLU, the Hatrack case only encouraged the coalition of Protestant Brahmins and conservative Catholics who dominated the Watch Society. The result was a new Boston Massacre—an all-out war, led by the Society, against offensive books and plays. As a result of this onslaught, the ACLU launched a lengthy counterattack, spearheaded by Hays and Morris Ernst, against the censors.⁵

Mencken himself lacked the stomach for waging the kind of trench warfare that the ACLU was willing to conduct against censorship of literary-political works. His adventure in Boston proved costly, in both time and money, and Mencken soon realized that winning individual legal sieges did not guarantee ultimate victories in larger constitutional wars. Moreover, as Garry Wills has suggested in other contexts, Mencken's much-celebrated pugnaciousness may be overrated.⁶ For example, Mencken constantly complained, in print and to his private diary, that the combined power of Puritanism and Comstockery prevented him from publishing what he really thought. Yet, as early as 1918, the literary and political critic Randolph Bourne ridiculed Mencken's claims about an all-pervasive censorship as overblown (and self-defeating) rhetoric and even questioned his commitment to fighting the specific pressures toward conformity that undoubtedly did exist.⁷

When read against the backdrop of Mencken's many statements about the nature of public discourse, this particular manuscript, with its anti-climactic ending, suggests that Mencken was inhibited less by cowardice than by skepticism. Indeed, Mencken seems a curious first amendment champion: His skepticism extended every bit as much to free speech as to other liberal ideals

5. S. WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 82-84 (1990).

6. Wills suggests that, in the Scopes case, Mencken may have succumbed to threats that failed to move Hays or Clarence Darrow and skipped town before the final verdict. More important to Mencken's approach to speech issues, Wills further suggests that Mencken "saves for the diary the insults he would not speak to people's faces." Wills, *The Ugly American*, *The New Republic*, Feb. 19, 1990, at 34.

7. Bourne, *H.L. Mencken*, in *THE RADICAL WILL: RANDOLPH BOURNE: SELECTED WRITINGS, 1911-1981* 472-74 (O. Hanson ed. 1977).

such as democracy. As the Hatrack case dragged on, and after the *Mercury's* second-class mailing privileges were safe, he saw further conflict as uninteresting and unproductive.

Mencken recognized, if he sometimes overstated, the institutional and cultural barriers to translating ideals about free speech into public practice. His *Diary*, for example, complements his published essays by offering numerous, often insightful observations about various obstacles to the free flow of information, including the power of bureaucrats and the economic structure of the mass media.⁸ Beginning this history, one suspects, may have raised hopes of remembering better days when Mencken was a celebrated figure; the process of completing it, however, appears to have confirmed his fears about the marginal nature of his individual fight and his increasing isolation from the political and cultural spotlight. Isolated loners can spark free-speech firefights, but only organized legal armies, such as those formed by the ACLU, can generally hope to wage successful battles.

The *Diary* constantly underscores Mencken's contempt for liberal theories of free speech, especially during the time he was writing the Hatrack history. His opinion of the intelligence of the average American is, of course, well-known. If Americans are boobs, what good is freedom of speech? And by the late 1930s, when Mencken was reliving the Hatrack affair, he seems to have had little faith that individual free-speech battles might help to dissolve the fat that was inexorably narrowing the arteries of public discourse. Pained by the popularity of his new presidential devil, FDR, and bitter over his own declining reputation, Mencken claimed he was "never much interested in the effects of what I write" and that he had now lost interest in appealing to the public. "My belief is that every really rational man preserves his major opinions unchanged from his youth onward. When he vacillates it is simply a sign that he is stupid." Thus, Mencken wrote "simply to provide a kind of katharsis for my own thoughts," not to contribute to any public dialogue that fights for free speech might help to sustain.⁹ Such skepticism about public dialogue seems unlikely to have armed Mencken with the kind of combative convictions that free-speech battles have demanded of their participants.

In many ways, then, the Hatrack manuscript is not, as Carl Bode would have it, another stirring reminder of the duty to fight censorship; rather, it seems a somewhat sad memoir of an old-fash-

8. See, e.g., Mencken, *American Journalism*, in H.L. MENCKEN: THE AMERICAN SCENE: A READER 241 (H. Cairns ed. 1965).

9. *DIARY*, *supra* note 2, at 133.

ioned battle, the virtuous Mencken versus the Philistines. By 1926, and certainly by 1937, Mencken's melodrama failed to address the complexities of free-speech problems.¹⁰ In December of 1937, when he intended the manuscript for deposit in the New York Public Library, Mencken modestly wrote that it was "conceivable that this detailed narrative . . . may someday interest an historian of American culture in the early twentieth century." Eight years later, after he had determined that his private treasure trove of unpublished manuscripts, including the Hatrack typescript, would remain in Baltimore, he feared that they "are bound to be neglected as I pass out of memory, and some of them, in all probability will be forgotten," burned in a future war, or otherwise destroyed amidst the primitive fury of some radical revolution.

Mencken's manuscript, of course, survived and deserves to be read and remembered. Despite its lack of analysis, his narrative of the Hatrack case provides a revealing, insider's look at the legal-political dimensions of magazine publishing during the 1920s. More important, this manuscript and Mencken's other writings about free speech also merit consideration, if only as downbeat subtexts in the first-amendment canon. In this case, as elsewhere, Mencken may have underestimated his potential audience. Even at their grumpiest, Mencken's writings can still reward those who share his keen curiosity about American life and culture, even if they reject his skepticism about the importance of ongoing social struggles for freedom of expression.

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With the promulgation of the Charter of Rights and Freedoms in 1982, Canada abandoned the inherited British tradition of Parliamentary supremacy in favor of the American model of entrenchment of individual rights in a written constitution. The implications of this change for Canadian constitutional scholarship have

10. See also P. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* 105-09 (1972).

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