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Book Review: Protecting the Best Men: An Interpretive History of the Law of Libel. by Norman L. Rosenberg.

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groups devoting their best energies to an unnecessary constitutional amendment suggests, at the very least, a defective set of priorities.

PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL. By Norman L. Rosenberg.[1] Chapel Hill, N.C.: University of North Carolina Press. 1986. Pp. 369. $29.95.

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When defamation suits are often Page One news—and when Attorney General Meese says the Supreme Court must return to the framers' intentions—this book is all too timely. Professor Norman Rosenberg set out to write an interpretive history of the law of libel. Along the way, however, he poked holes in "original understanding" arguments so often hung on the first amendment. Without meaning to, he may have built a snappy little Meesetrap.

This is an ambitious book. Covering the American experience with political libel—both criminal and civil—from colonial times to the 1980s is a tall order, especially in only 270 pages of text plus 100 pages of detailed end-notes. Fortunately, Professor Rosenberg is a seasoned scholar who is equal to the task of generalizing without superficiality. This is not only a book about libel. It is rollicking good first amendment history, and it is a long-needed start toward a synthesis of the many secondary sources that he stirred together with his own research on political libel and on Michigan jurist-scholar Thomas M. Cooley. Rosenberg may have devoted a disproportionate amount of space to nineteenth-century Michigan libel law, but his book should encourage other state-by-state studies of political libel. Rosenberg is generous in crediting other scholars, has read widely, and seems to have no particular axes to grind. Equally important, he does not fall into the pit some revisionists dig for themselves, revising so ardently that their debunking, as has been said, often winds up as re-bunking.

Rosenberg has jumped into the ongoing scholarly fray over seditious libel[3] touched off by Leonard W. Levy in his *Legacy of Sup-*

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3. Defamation law began by protecting the "best men" in England's feudal order, a society that, Rosenberg says, was "held together not by an absolutist state but primarily by personal bonds of honor and loyalty." Under the common law of England, truth was not a defense to a criminal prosecution for libel. From 1606 to 1641 the infamous Court of the Star

pression: Freedom of Speech and Press in Early American History (1960), a fray revitalized by his 1985 revision of *Legacy*, entitled *Emergence of a Free Press*. Levy's 1960 work persuasively refuted Zechariah Chafee, Jr.'s claim that the first amendment was intended to erase the common law of seditious libel, "and to make further prosecutions for criticism of the government, without an incitement to law-breaking, forever impossible in the United States of America."[4] Levy contended that seditious libel remained in force in this country long after the adoption of the first amendment. The 1960 book asserted: "It is closer to the truth to say that the Revolution almost got rid of freedom of speech and press instead of the common law on the subject."

Some critics responded that Levy should have looked more carefully at what was being published in the newspapers of Revolutionary America. For example, Merrill Jensen while praising *Legacy of Suppression*, wrote that Levy overestimated the power of law and undervalued the amount of press freedom in practice. Citing the feisty and ribald Philadelphia newspapers during the War for Independence, Jensen declared that they published "vast amounts of some of the bitterest, most dishonest (and seditious) writing in American political history. Despite the law, there was freedom of expression in fact."[5]

In *Emergence of a Free Press*, Levy yielded a bit to some of his critics. After doing additional research in eighteenth century American newspapers, he conceded that he had become puzzled by

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Chamber held any political statement that had a "bad tendency" to lessen the public's regard for government authority to be the crime of "seditious libel."

Defendants in civil suits were somewhat better off. To be sure, common law jurists held that truth could be libelous even in civil suits. But truth nevertheless worked as a defense, because if the defamation was true, the plaintiff was not entitled to an unblemished reputation and therefore could not recover damages. Eventually truth became an "absolute justification" in civil libel actions, though not in criminal libel cases in England under Lord Campbell's Act of 1743.

Strands from the development of libel law in England are easily followed to the American colonies and through much of the nineteenth century. "Zengerian principles" and "Blackstonian libel doctrines" need to be explained here. In the 1735 common-law seditious libel trial of New York printer John Peter Zenger, the jury—following the English system—was supposed to have a minor role. It was to decide only whether the defendant had "published" the libel. The judge would decide whether the writings complained of were criminal. But Zenger's canny old Philadelphia lawyer, Andrew Hamilton, adroitly urged the jury to a broader role, and the jury defiantly rendered a general verdict in favor of Zenger.

"Zengerian principles," as Rosenberg calls them, amounted to permitting truth as a defense and also allowing jurors to determine "the law of the case," not merely the fact of publication. In contrast, Sir William Blackstone, whose *Commentaries on the Law of England* first appeared in 1765, would not allow truth as a defense to criminal libel. His concept of free speech entailed only an absence of prior restraints.

4. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 21 (1941).

5. Jensen, Book Review, 75 HARV. L. REV. 456 (1961).

the paradox of nearly unfettered press practices in a system having heavy legal fetters. Newspaper practices aside, Levy reaffirmed his belief that Sir William Blackstone's view of seditious libel held sway in America throughout the eighteenth century.

Rosenberg, on the other hand, attaches more importance to eighteenth century locutions about the proper role of the press than did Levy. Some formulations, Levy contended, were too limited and too qualified to be called a theory of free expression. Rosenberg, however, sees an intellectual foundation for a right to criticize government in the "Moderate Whig" theory of a free press. He views Andrew Bradford of Philadelphia's *American Weekly Mercury* as an articulate voice for this "country" or "Moderate Whig" view during the Zenger trial of 1735. According to Rosenberg, Bradford rejected

> . . . the notion that all political criticism carried a dangerous tendency. Bradford leaned, instead, toward the country view that meaningful expression included "a Liberty of detecting the wicked and destructive Measures of certain Politicians . . . of attacking Wickedness in high Places, of disentangling the intricate Folds of a wicked and corrupt Administration, and pleading freely for a Redress of Grievances.

Rosenberg found a variety of attitudes toward criticism of government in the American colonies, in Revolutionary America, and well into the nineteenth century.[6] Eighteenth century views, for example, included the printers' frequent (if self-serving) statements

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6. Although it is now fashionable for managers of "the press" of the 1980s to bemoan the high cost of litigation and a number of exorbitant (often soon-to-be reduced) libel verdicts, proliferation of civil libel suits is nothing new. Early in the nineteenth century, for example, civil libel suits were seen as an effective alternative to seditious/criminal libel prosecutions. In that century's first decade, James Cheetham of the *American Citizen* was sued for libel thirteen times in two years.

Over time, public officials turned away from the criminal libel—which often generated troublesome adverse publicity—and began using civil libel as a weapon against dissent. After all, as Rosenberg observed, the Federalists' use of the Sedition Act of 1798 "gained the Jeffersonians much more in campaign ammunition than it ever cost them in editorial firepower." And in any case, the Jeffersonians' libertarian credentials were by no means spotless.

This may be seen in the framed criminal libel case against Federalist Harry Croswell. He republished James Callender's claim that Callender had been paid by Jefferson to slander Washington. This case brought forth Alexander Hamilton as Croswell's attorney, defending against the prosecution brought by Jeffersonian Republicans.

Hamilton, who as Secretary of Treasury in the Washington Administration advocated several libel prosecutions, was thus in an ironic and unfamiliar position. Alexander Hamilton's arguments, however, fell short of those advanced by Zenger's lawyer, Andrew Hamilton (no relation). Alexander Hamilton backed away from the full Zengerian approach of using truth as a complete defense. Instead, truth should be a defense only when published—a marvelous weasel phrase—"for good motives and justifiable ends." Hamilton, however, did follow the Zengerian idea of the role of a jury: allow it to return a general verdict of guilty or innocent.

The prosecution of Croswell failed when New York's Supreme Court split along party lines and could not reach a decision. Understandably, the case became a rallying point for

about offering a free forum ("Open to All Parties, But Influenced by None"), plus writers who made statements

> . . . of support for Zengerian principles, of endorsement of Orthodox Whig doctrines, and of *Cato*-like sentiments from opposition politicians, and of nearly universal condemnations of "licentiousness"—but certainly it should be obvious that no single view, and certainly not the Blackstonian one as Leonard Levy claimed, dominated colonial discussion about free expression."

Even if there was agreement that public officials could put legal limits on discussion of public matters, Rosenberg contends, there was sharp disagreement over what the legal limits were.[7] In 1782, in the first issue of Philadelphia's *Independent Gazetteer; Or, the Chronicle of Freedom*, the combative soldier-duelist-journalist Eleazer Oswald conceded that freedom of the press had no fixed, agreed-upon definition. Oswald wrote that "the Liberty of the Press, so highly extolled by all Persons, has not been clearly defined by any. Some contend for unbounded liberty, and that this being equally allowed on all sides, Truth and Justice having fair Play, would necessarily over-power their Opposition, and finally prevail."[8]

Levy, Rosenberg said, was " . . . perfectly correct in maintaining that 'few, if any, legal writers in Revolutionary America rejected the "core" of seditious libel, the notion that government may be criminally assaulted by mere words.' " But Rosenberg also concluded that the Revolutionary generation "was not united in a

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Federalist complaints about Jeffersonian hypocrisies. As Federalist Thomas Green Fessendon, a Vermont newspaper editor and lawyer, wrote in 1805:

> I'll search in Democratic annals
> Elicit truth from dirty channels
> Describe low knaves in high condition
> Though speaking truth be deem'd sedition."

7. Rosenberg might have included more examples of newspaper printers touting virtues and benefits of a "free press." Consider some wretched poetry, attributed to Benjamin Franklin and published by Francis Bailey of Philadelphia's *Freeman's Journal* in 1781:

> WHILE free from force the Press remains;
> Virtue and freedom chear (sic) our plains,
> And learning largesses bestows,
> And keeps unlicensed open house
> . . . .
> This Nurse of Arts, and Freedom's Fence,
> To chain, is treason against sense,
> And Liberty, thy thousand tongues
> None silence who design no wrong;
> For those that use the gag's restraint,
> First rob, before they stop complaint.

(Philadelphia) Freeman's Journal, April 25, 1781.

8. (Philadelphia) Independent Gazetteer; Or the Chronicle of Freedom, April 13, 1782. Oswald was echoing John Milton's 1644 *Areopagiticia*: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?" J. MILTON, AREOPAGITICIA 59 (W. Haller ed. 1927).

Blackstonian consensus, and neither, as Leonard Levy's *Legacy of Suppression* maintained, were opposition ideas simply 'in the air.' " Instead, Rosenberg argues that in the years from 1781 to 1787, many Americans were rejecting Blackstone's assertion that would make criticism of government—virtually any criticism—a crime.

What then of "the intent of the Framers," so recently touted by Attorney General Meese,[9] when the first amendment is concerned? In Rosenberg's view, the "original understanding" does not exist, or, at any rate, cannot be known. The adoption of the first amendment and the Bill of Rights—"designed to calm fears of the Antifederalists"—left little evidence of what was intended by "freedom of speech, or of the press."

> The paucity of evidence on the drafting of the First Amendment itself, together with the abundance of evidence attesting to the absence of precise agreement on state libel laws, points to one conclusion: even the relatively small group of people who framed and ratified the First Amendment shared no common original understanding about its precise meaning or implication for the future.

Unlike Levy and many other scholars, Rosenberg does not limit his attention to early American history. As journalism professor and historian Margaret A. Blanchard observed in 1982, it is not easy to trace the development of efforts to put meaning into the phrase "freedom of the press." She noted that most first amendment history—including that by renowned scholars like Thomas I. Emerson and Zechariah Chafee—dealt with the eighteenth century (the trial of John Peter Zenger in the 1730s, the ratification of the first amendment, and the bleak days of the Alien and Sedition Acts of 1798), and then skipped over the nineteenth century to World War I (the Espionage Act of 1917 and its 1918 Sedition amendment) and the two thousand cases generated in that time of profound hysteria.[10] Professor Rosenberg has provided a useful, if partial, survey of nineteenth century political libel cases and has helped to begin "filling the void" in a century's worth of needed first amendment scholarship.

Especially valuable is his discussion of the Ohio jurist and political theorist, Frederick Grimke. Grimke put great reliance on the press: " 'If the press were extinguished, the great principle on which representative government hinges, the responsibility of public agents to the people,' would be largely lost." Grimke argued that

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9. *See* Floyd Abrams, "Mr. Meese Caricatures the Constitution," The New York Times, July 25, 1986 at 23; Stuart Taylor, Jr., "Administration Trolling for Constitutional Debate," The New York Times, Oct. 28, 1985, Sec. F, at 10.

10. Blanchard, *"Filling the Void," Speech and Press in State Courts Prior to Gitlow*, in THE FIRST AMENDMENT RECONSIDERED 14-16 (B. Chamberlin & C. Brown eds. 1982).

the most scurrilous political diatribes in newspapers would be unlikely to harm the republic. From his mid-nineteenth century vantage point, he relished the clashes of partisan newspapers as healthy and inevitably leading to social and political stability.

Protecting the Best Men is not as strong in its discussion of the twentieth century. Libel cases of the last decade or two are discussed almost perfunctorily. Further, Rosenberg may not be critical enough of the legal establishment to suit some observers. He suggests that the proliferation of libel suits has stemmed from more journalists producing more column inches about events of greater public interest. Now there are also more lawyers in the U.S.—about 650,000, or two-thirds of the world's supply. Separate courses in media law are offered in many law schools—adding mightily to the several lectures that used to be devoted to defamation and invasion of privacy in torts courses roughly twenty years ago—so that the frequency of lawsuits against the media in the 1980s is not surprising. (The old saying goes, put one lawyer in a town; that lawyer will starve. Put two in a town, they will both get rich.)

Beyond Professor Rosenberg's splendid beginning, there is much work to be done, much reinterpretation. As he observes:

> Indeed, the prominent libel battles of the mid-1980's—General Ariel Sharon versus Time, Inc., William Tavoulareas versus Washington Post Co., and General William Westmoreland versus CBS—assumed the character of trench warfare involving elite members of the modern corporate-military order. If, as some observers insist, late twentieth-century politics revolve around a new kind of "feudalism," might not many modern liberal trials be seen as contemporary versions of baronial conflict among the self-styled best men?

TAKINGS. By Richard A. Epstein.[1] Cambridge, Ma.: Harvard University Press. 1985. Pp. xi, 362.

Edward Foster[2]

Public law, argues Professor Richard Epstein, should be a coherent and consistent extension of the individual rights that are secured by private law. Although public law covers relationships between groups, these must be translatable into statements about individuals; public law should not deny rights that the government is pledged to protect in private law. *Takings* argues that the origi-

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