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## Legacy of Suppression by Leonard W. Levy

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# Book Reviews

LEGACY OF SUPPRESSION. By Leonard W. Levy. Harvard University Press, Cambridge, 1960. 353 pp. \$6.50.

The common law criminal offense known as seditious libel consisted essentially of criticizing the government. Any comment which tended, in the opinion of the government, to lower the government, its laws, officers, or policies in the public esteem subjected the speaker or writer to prosecution. In modern times it has been freely asserted that it was the purpose of the first amendment to abolish the common law of seditious libel. Justice Holmes declared in *Abrams v. United States*, "I wholly disagree with the argument . . . that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion."<sup>1</sup> Professor Zechariah Chafee, Jr. wrote that "The First Amendment was written by men . . . who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."<sup>2</sup>

Now comes Leonard Levy to demonstrate that these statements are historically invalid. The author is Dean of the Graduate School of Arts and Sciences and Professor of American Constitutional Studies at Brandeis University. He is the author of the useful work, *The Law of the Commonwealth and Chief Justice Shaw*. Dean Levy meticulously examines the views of every libertarian theorist and writer, British and American, from the time of Milton through the presidency of Jefferson. On the operating level, he summarizes the experience involving prosecutions for seditious libel in the American colonies before independence and in the states to the early 1800's. The conclusions at which he arrives are best set forth in his own words:

This book presents a revisionist interpretation of the origins and original understanding of the First Amendment's clause of freedom of speech and press. I have been reluctantly forced to conclude that the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics.

I find that libertarian theory from the time of Milton to the ratification of the First Amendment substantially accepted the right

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<sup>1</sup> 250 U.S. 616, 630 (1919). Justices Black and Douglas have also stated: "But the First Amendment repudiated seditious libel for this country." *Beauharnais v. Illinois*, 343 U.S. 250, 272 (1951).

<sup>2</sup> Chafee, *Free Speech in the United States*, p. 21. (1948).

of the state to suppress seditious libel. I find also that the American experience with freedom of political expression was as slight as the theoretical inheritance was narrow. Indeed, the American legislatures, especially during the colonial period, were far more oppressive than the supposedly tyrannous common-law courts. The evidence drawn particularly from the period 1776 to 1791 indicates that the generation that framed the first state declarations of rights and the First Amendment was hardly as libertarian as we have traditionally assumed. They did not intend to give free reign to criticism of the government that might be deemed seditious libel, although the concept of seditious libel was—and still is—the principal basis of muzzling political dissent. There is even reason to believe that the Bill of Rights was more the chance product of political expediency on all sides than of principled commitment to personal liberties. A broad libertarian theory of freedom of speech and press did not emerge in the United States until the Jeffersonians, when a minority party, were forced to defend themselves against the Federalist Sedition Act of 1798. In power, however, the Jeffersonians were not much more tolerant of their political critics than the Federalists had been.

This book prompts the question: if Dean Levy is right, how could Holmes and Chafee have been so wrong? More broadly, how many other accepted versions of history are equally as unfounded as the one Dean Levy disproves? Obviously, no answers are possible. A related question is: how does one choose between contradictory views and interpretations, each advanced by (presumably) experts? Clearly it is impossible for anyone to research all the questions himself. Here the answer seems to be to accept the expert whose views best substantiate one's own policy choices.

Dean Levy's book also raises the question of the relevance, in constitutional construction, of the original intent of the Framers. It seems fair to say that original intent will always be exalted by the proponents of any current policy when it supports them, but that it will be finessed one way or the other when it does not. Similarly, the opponents of any proposed policy will always argue that it violates original intent and subverts the foundations of the Republic.

Dean Levy in his preface (p. viii) says: "This has been a difficult book to write, because the facts have dictated conclusions that violate my predilections and clash with the accepted version of history. But just as my personal preferences as to current policy do not depend on what passed for wisdom in the eighteenth century, my views as a scholar do not depend on my civic convictions nor on historical convention." And he ends his book with these sentences (p. 309): "But there is no evidence to warrant the belief, nor is there valid cause or need to believe, that the Framers possessed the ultimate wisdom and best insights on the meaning of freedom of expression. It is enough that they gave constitutional recognition to the principle of freedom of speech and press in unqualified and undefined

terms. That they were Blackstonians does not mean that we cannot be Brandeisians.”

Dean Levy cannot complain, therefore, if the following prediction proves to be correct. Future civil libertarians will continue to quote Holmes and Chafee and then, to demonstrate their objectivity and their mastery of the materials, will add a footnote.<sup>3</sup>

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THE ECONOMICS OF REAL PROPERTY. By Ralph Turvel. Allan & Unwin, Ltd., London, 1957. 148 pp.

One of the secrets of the superiority of our modern standard of living over that of past centuries is the increased division of labor—the use of specialists. This applies to all types of production and at all levels of functional operation in society. Thus, for example, there is a division of labor between the decision-makers in government and business (usually called executives, administrators, planners, co-ordinators, commissioners, etc.) and those who provide the information as to “what, when, why and how” (usually called scientists—physical and social). The decision-maker operates with a general sense of the situation, a knowledge of alternative actions available, and an idea of goals, aims and purposes. He depends upon scientists to constantly clarify the situation and to provide information and reasoning. He must balance and coordinate the various scientific opinions relevant to the specific problem, relate the result to his values and to other relevant considerations, and make his decisions. The decision-maker and the scientist both need each other—whether this relationship is consciously formalized by organization or not. An effectively functioning society requires that they be able to work together. Thus, it requires that they overcome the barriers to communication set up by specialization and professionalization.

Mr. Turvey, who is a reader in economics at the University of London and one of the ablest young British economists of our day, has written this book on the economics of real property in order to aid the “people concerned with real estate problems, such as valuers and town planners” (p. vii). While the author would not argue that economics is the only study worth considering when dealing with such problems, he justifiably feels that many recent “expert commission” reports apparently ignore what economics may contribute

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<sup>3</sup> *But see* Levy, *Legacy of Suppression* (1960).

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