

## Revised revisionism

*Emergence of a Free Press* by Leonard W. Levy. New York: Oxford University Press, 1985. 383 pages. \$29.95 (hard), \$9.95 (soft).

A review by Carolyn Marvin

University of Pennsylvania

The First Amendment is not only a fundamental constitutional guarantee but a potent symbol of American identity. To scrutinize potent symbols is to risk the wrath of those who claim them, as Leonard Levy discovered when he published a controversial study called *Legacy of Suppression* in 1960. That book did not argue for an all-wise First Amendment, the infinitely flexible product of the political genius of generous founding fathers described in civics texts, but for a historical First Amendment, an expedient, hasty political compromise intended more to preserve accepted restrictions than to forge new freedoms. Predictably, this thesis elicited a vitriol usually reserved for those who argue that the historical Bible is less the unitary revealed word of God than the contradictory cumulation of centuries.

Levy's historical argument had three elements. The first was that a prevailing Blackstonian view of the "liberty of the press," an eighteenth century cliché, condemned prior restraint but embraced seditious libel, the concept that words may criminally assault the government. If the founders had intended something different from the Blackstonian doctrine for their new constitution, Levy contended, they certainly would have said so. Second, he argued that the First Amendment embodied no magnanimous freedom for the thought we hate, no faith of its authors in the ultimate triumph of the people's wisdom. It was a political afterthought masterminded and guided by James Madison through hostile shoals of anti-Federalists for whom the omission of a Bill of Rights expressly guaranteeing to individuals or states powers denied to the federal government was the single issue around which to unify popular opposition to the Constitution. Insisted on by those who wished to make ratification of the Constitution impossible, the Bill of Rights was reluctantly embraced by the Federalists in a desperate compromise and then repudiated by its original defenders, the anti-Federalists, because it had lost its strategic value as a tactic to scuttle the Constitution. Third, Levy argued, not the First Amendment but the Alien and Sedition Acts of 1798, a model of progressive Blackstonian thought, forced the young republic into an internal confrontation from which emerged the basis, if not the actuality, of the latitudinarian freedom of expression we embrace in principle.

In the McCarthy-shocked atmosphere of the late 1950s, this thesis offended not only the group that had commissioned Levy to study the origins of the First Amendment, the liberal Fund for the Republic (the nascent Center for the Study of Democratic Institutions), but also worthy jurists like Hugo Black, who called it one of the worst blows ever sustained by the First Amendment. When it became clear that the Fund would not publish his work on the free speech-press clause, a miffed Levy took his study to Oxford University Press, which did. In the preface, he recalls now, he "maliciously thanked" his original benefactors who, finding his scholarship on free speech disquieting, had attempted to censor it.

Now, twenty-five years later, Levy has published a revised and expanded book. By his own admission, there are certain errors in the old one. The joke is on the critics, however, Levy holds most of his original arguments, filled out with a degree of primary detail to confound the most skeptical, more strongly than before. He has also taken on his accumulated critics, citing at length both them and the sources he

believes belie them. He still maintains that the revolutionary generation meant to keep the core idea of seditious libel, that the state legislatures which authored seditious libel statutes were more repressive than the courts, that the First Amendment was addressed to the founders' concerns for federalism, not their interest in expanding libertarianism, and that the amendment in no way challenged or reformed the common law of seditious libel, which held speakers accountable for abusing "free" speech. The major "error" in *Legacy*, says Levy, was that he failed to recognize the extent to which the American press ignored the law and published what amounted to seditious libel in spite of it. In his words, the American experience of freedom of expression was as broad as its theoretical base was narrow. The life of the framers' law, in the end, was the people's experience.

Levy doesn't speculate as to why the press was freer than the common law to which it was subject. He implies that Americans were more ornery by political disposition than their English counterparts were. This appeal to American exceptionalism is a standard but by now unconvincing piece of historical reasoning. One might speculate that the bureaucratic and logistical apparatus needed to regularly and systematically prosecute large numbers of lawbreakers did not exist in a new country with a scattered populace, few good roads, and an indifferent mail system, even at the state level where jurisdiction for this particular offense was assigned. Getting caught was a matter not merely of offending but of who had the resources both to discover the publication of offensive material and to marshal the machinery of Blackstonian justice. Most prosecution was sporadic, exemplary, and personally motivated.

Levy's evidence for what the framers did and did not believe is compelling and plentiful. It embraces private correspondence, legislative enactments, court decisions, newspaper reports, and official proceedings. His revised revisionism is somewhat unorthodox because he debates the logic and legal cogency of their arguments with his historical subjects. His intention is to illustrate how tentative, contradictory, and haphazard the discussion about freedom of expression during these decades was, as well as to give readers unaccustomed to legal reasoning a sense of the considerable subtleties of the argument and the law of the period.

And what, Levy asks, was the point of a law to protect the liberty of the press if nothing was meant to change?

*The most probable answer is disconcerting: the history of the writing of the American bills of rights does not warrant the presupposition that the process was a very systematic one. In the glorious act of reverting from a state of nature to a civil government by framing a social compact, Americans tended simply to draw up a glittering catalogue of "rights" that satisfied their urge for an expression of first principles. It was a terribly important and serious task executed in an incredibly haphazard fashion that verged on ineptness.*

Not just freedom of speech was badly handled by the framers but other rights as well: habeas corpus, representation of defendants by counsel in criminal trials, protection against unreasonable search and seizure, right to indictment by grand jury, provisions against bills of attainder.

There are heroes in this story, but they are not the usual ones. Levy's heroes come from the post-revolutionary generation that laid the ground after 1798 for the libertarian interpretation of the First Amendment that a government of the people, by the people, for the people could not libel itself. They include Nicholas Blake, George Hay, Tunis Wortman, and James Madison, who alone emerges as a revolutionary as well as a post-revolutionary hero in this context.

The history of free expression has been a subject of interest not only to legal historians but to communications historians as well. With the exception of Fred Siebert's pioneering studies, the work by communications historians that Levy cites does not fare well. Some of them seem to have overlooked a fundamental critical task, namely, to recognize that words, phrases, and even arguments with a consensual twentieth-century meaning may not have meant the same things in the mouths of eighteenth-century speakers. As Levy makes clear, freedom of speech and of the press and the right to criticize the government were American clichés that cannot alone tell us what they meant, how far they extended, and when they might be limited.

What should this search for origins teach us? This one has been resisted because it challenges the notion that we are a chosen people, our destiny and duty clear from the beginning. It could teach us that every age must wrestle anew with the First Amendment and may pass off the struggle to a glorified fictional past only at its peril. It should also remind us of the value of our historical achievement and of its human cost.