

March 1962

Book Review of Legacy of Suppression

James P. Whyte Jr.
William & Mary Law School

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Repository Citation

James P. Whyte Jr., *Book Review of Legacy of Suppression*, 3 Wm. & Mary L. Rev. 540 (1962),
<https://scholarship.law.wm.edu/wmlr/vol3/iss2/26>

Copyright c 1962 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

LEGACY OF SUPPRESSION

By LEONARD W. LEVY. Cambridge: Harvard University Press (Belknap), 1960. xii. 339 pp. \$6.50

In his preface to *Legacy of Suppression*, Dean Levy reluctantly concludes that the framers of the Constitution of the United States and of the Bill of Rights did not believe in a broad scope for freedom of expression, especially in the realm of politics. This he does in spite of the admitted fact that he wishes it were otherwise.

The book deals, of course, with the First Amendment and particularly with the clause on freedom of speech and press. The author's concern is not, however, with obscenity or libel or slander which is personal in nature. It is concerned wholly with seditious libel. But in a day filled with controversy over whether or not to consider membership in the Communist party criminal conduct, this alone is enough to make the book timely and important.

The author's approach to explaining that the freedom of speech clause is not absolute in regard to seditious speech is, in large measure, historical. While the book begins with an exposition of the conflict between the ideas of a literal reading of the first amendment and the right of government to self-protection and ends with a discourse on the emergence of what the author calls "An American Libertarian Theory", in between are four chapters devoted to scholarly and well-documented explanations of the status of free speech in the American colonial experience, early English theory, the period from the well known Zenger case to the American Revolution and the period from the Revolution to the First Amendment.

The chapter on American colonial experience demonstrates in Dean Levy's words, that "... during the entire colonial period, from the time of the first settlements to the Revolutionary War and the framing of the first bills of rights, America had very little experience with freedom of speech or press as a meaningful condition of life." In support of this well-founded conclusion, are found, among many other accurately chosen

examples, discussions of the laws and punishments for speaking against established governments from the colonies of Maryland, New York, Pennsylvania and Virginia. In 1660, for one illustration, it is related that Virginia's House of Burgesses had committed a man for "scandalous, mutinous, and Seditious words." The poor soul had dared to criticize the House on a tax matter!

That freedom to criticize colonial governments was not only unknown, but when exercised the subject of medieval punishments, is revealed by mention of harsh punishments invoked in Maryland. There, whipping, branding, boring through the tongue, fine, imprisonment, banishment or death were from time to time invoked for speech considered " . . . against all Sense, Equity, Reason, and Law . . . relating to his Lordship and Government, that shall thought to be Mutinous and Seditious."

Even in the last half of the eighteenth century, when one would think some basic idea of the freedom to at least criticize governments existed, examples are multiplied from nearly all the colonies to show that previous restraint of the press was the rule rather than the exception and that punishment was frequent and relatively sure for the orator who voiced criticism of courts or legislatures.

In chapter three, entitled, "Early English Theory: from Milton to Cato," Dean Levy comes closest to realizing his hope of first amendment literalness—that there is no limitation on freedom of speech. Here, for example, is evidence from Spinoza, Machiavelli, Hobbes and a group known as the English Levellers which tends to support the conclusion that one had a right to speak against the state. The author is most careful, however, to explain limitations on this view. These men were aware of sovereign power's right to treat as enemies those whose views did not coincide with the government's. Further, pointing out that Milton has been regarded as a great apostle of the free mind, Dean Levy immediately reminds us of Milton's personal concept of free speech.

Much the same, it is developed, can be said for the attitudes displayed in the writings of Cato. It is well known that these

writings ridicule the idea of attempting to preserve human rights by means of laws on sedition and faction. But, at the same time, the Cato essays, as the author is again careful to note, did not argue for the uncontrolled liberty of men to "calumniate against each other or the government." Always libels against the government were considered base and unlawful.

The author's explanation of the famous Zenger case, contained early in the fourth chapter, accurately sets the pace for the rest of the period ending with the American Revolution. Here it is pointed out that the result of the trial of Zenger for allegedly publishing materials seditious in nature was to leave in effect the common law. And the common law, it will be remembered, demanded loyalty of speech and press to the government. What happened in the Zenger case, to summarize Dean Levy's interesting explanation, is that Zenger's acquittal by jury verdict permitted the laws of seditious libel to remain in force. Hamilton, arguing in behalf of Zenger, urged the adoption of truth as a defense to seditious libel. The court, however, rejected this argument, whereupon Hamilton urged the idea of the jury determining the law as well as the facts instead of returning a verdict on the fact of whether or not Zenger had made the alleged statements. Thus the idea of truth being a defense to a charge of seditious libel lost its import, and the courts in colonial times continued to reject the idea.

Not only in America, but also in England, according to Dean Levy, prevalent concepts of seditious libel remained unabated in force. Citations from Blackstone and Mansfield are given to bulwark the idea that whatever reform was underfoot was directed more to general reforms than to expanding notions of free speech.

Chapter five, "From the Revolution to the First Amendment," should prove satisfying to those who, from time to time, become peeved with legal methods used in "determining the intent of the legislature." This chapter is devoted to an attempt to discover from the actions and words of the chief characters on the American scene from the Revolution to the Bill of Rights whether or not it was intended for the First Amendment to abolish common law concepts of seditious libel. The conclusion, in Dean Levy's words is, "The result of such a Consti-

tutional Donnybrook [Federalists v. Jeffersonians in the debate over the Sedition Act of 1798] would be inconclusive leading to the proposition that we do not know what the First Amendment's freedom of speech and press clause meant to the men who drafted and ratified it at the time they did so. Moreover, they themselves were at that time sharply divided and possessed no clear understanding either. If, however, a choice must be made between two propositions, first, that the clause substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the known evidence points strongly in support of the former proposition. Contrary to Justice Holmes, history favors the notion." In short, the author, after carefully weighing the evidence—from Madison, Jefferson and Wilson, to mention only a few—concludes with judicial-like restraint that the case for First Amendment literalness fails.

The author of *Legacy of Suppression*, Dean of the Graduate School of Arts and Sciences and Earl Warren, Professor of American Constitutional Studies at Brandeis University, has indeed made a valuable contribution to law students (for whom the book should be required reading), lawyers and judges. It is written clearly, yet colorfully. It shows remarkable appreciation for the quantum and clarity of proof required to prove legal principles. It will give its readers detailed and accurate background for the study of present day cases construing and applying the various provisions of current laws dealing with regulation and prosecution of the Communist party and its members. Libertarians perhaps would have preferred a frontal assault on what Dean Levy shows to be the dictates of history. Yet for them, too, the book is of great value, for clearly marked are many starting points for the emergence of libertarian theory and policy.

JAMES P. WHYTE

Professor of Law, Marshall-
Wythe School of Law, Col-
lege of William and Mary.