

# THE PRESS AND THE DILEMMA OF THE FOURTH ESTATE

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- Lee C. Bollinger. *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford: Clarendon Press, 1986). viii + 295 pp. Notes, index. \$19.95.
- Thomas C. Leonard. *The Power of the Press: The Birth of American Political Reporting* (Oxford: Oxford University Press, 1986). 273 pp. Notes, bibliography, index. \$22.50.
- Norman L. Rosenberg. *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill, N.C.: University of North Carolina Press, Studies in Legal History, 1986). xi + 369 pp. Notes, bibliography, index. \$29.95.
- Rodney A. Smolla. *Suing The Press: Libel, the Media and Power*. (Oxford: Oxford University Press, 1986). viii + 277 pp. Notes, index. \$18.95.
- Patrick S. Washburn. *A Question of Sedition: The Federal Government's Investigation of the Black Press during World War II* (Oxford: Oxford University Press, 1986). x + 296 pp. Notes, bibliography, index. \$19.95.

These five recent books explore important questions regarding the press and the First Amendment. With the exception of *A Question of Sedition*, all deal with the relationship between the press and the public, rather than the relationship between the press and the government. In the 1950s and 1960s, most First Amendment doctrines were carved out through conflicts between the government and the press. In *A Question of Sedition*, Washburn presents such a conventional First Amendment setting in his description of the harassment of the black press by the Roosevelt administration during World War II. Washburn tells the unsurprising story of the attempts by J. Edgar Hoover and others in the government to silence the black press and its denunciation of discrimination in both the military and in American society. The hero in Washburn's story is Attorney General Francis Biddle, who almost single-handedly prevented official government suppression of the black press during World War II. In many ways, Washburn's book is an official recognition of Biddle's "contribution to the preservation of freedom of the press" (p. 205). On a more subtle level, however, it is also a description of the antilibertarian

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forces at work in our society (explained more in *The Tolerant Society*).

What *A Question of Sedition* does not contain is a social, political, and cultural analysis of the black press. What led to the growth of the black press between World War I and World War II? Why were so many blacks subscribing to black press publications? What effect did the black press have on the political participation of blacks in America? Did the black press have an impact on creating a black consciousness and pride and in forming the groundwork for the civil rights movement of the 1960s? Finally, what are the implications for blacks of the recent decline in the number of black presses?

These are the type of questions addressed in the remaining books covered in this review. The authors of these books also fashion a broader analytical framework by incorporating a social, cultural, and political viewpoint. *Suing The Press* presents a cultural analysis of the press and of libel suits; *The Tolerant Society* offers a social and cultural interpretation of the First Amendment; *The Power of the Press* analyzes the role of the press in the American political process; and *Protecting the Best Men* provides an example of the new legal history through analysis of political libel law. The First Amendment issues raised in these books flow from the relationship between the press and society.

The socializing value of a free press is illustrated in *The Power of the Press*. Leonard begins his book by asking the question: "What led Americans to pay so much attention to their government . . . to welcome debate . . . and to vote?" (p. 3). In other words, what caused Americans to find politics interesting? Leonard initially outlines his thesis and his answer: the press created "a vernacular—a common language in both words and pictures—for political interests to be expressed and shared" (p. 4). Leonard theorizes that the development of political reporting nurtured American political participation.

Leonard correctly points out that the creation of a republican style of government did not necessarily foster democratic participation in that government (p. 6). This latter achievement was left to the press. For example, Leonard traces the frenzy of political activity and the high voter turnout of the latter half of the nineteenth century to widespread reporting about government and politics. Leonard also argues that the early twentieth century conversion of reporters into "muckrakers" actually raised public skepticism about the political process and engendered the high level of voter apathy that exists today.

Leonard's description of political reporting in America is lively and enlightening, but his hypothesis that the nature of political reporting influenced the nature of American politics is suspect. First, Leonard focuses much of his research on what and how journalists reported, not on how the American public actually

acted on what was reported. Second, Leonard assumes that Americans' political interest directly derived from political reporting. In other words, his thesis would seem to contradict the modern slogan that the press reports what the public wants to hear. Likewise, Leonard ignores the substantial historical material that outlines the breakdown of the deferential style of politics in the nineteenth century.

Nonetheless, Leonard offers an interesting alternative to the studies we have of the institutional development of press and party. He shows that the press plays a much greater political role than that envisioned by the advocates of the Fourth Estate Model of the press. That model calls for First Amendment protection of the press as an institutional check on government: a fourth estate of government. According to the advocates of this currently popular view, the First Amendment gives the press all necessary powers to fulfill such a checking role. However, Leonard shows that elevation of the press to a role of an aloof critic can cause it to lose touch with the public and diminish public involvement in the process of political communication. The Fourth Estate Model holds that the health of a democracy depends on the ability of the press to check and expose government, rather than on voting, which in turn depends largely on participation in the communicative process. Under the logic of *Power of the Press*, adoption of the Fourth Estate method could further increase voter apathy.

*Protecting the Best Men* also examines the press in social and political contexts. An in-depth and comprehensive example of the "new" legal history, *Best Men*, probes the historical interaction between the law of political libel and discernible cycles of American history.

Rosenberg nicely blends history and theory through the concept of the "politics of reputation." This notion held that "the best legal science on the law of defamation offered a hierarchical vision of political discussion that proposed considerable deference on the part of political writers for the reputations of the 'best men'" (p. 206). Rosenberg carefully connects this concept to the evolution of free expression. Until the early 1960s, defamation law was not a prominent free-expression issue. The creation of the surveillance state through the Sedition Act of 1917, however, partly rested on the revival of early nineteenth century libel doctrines, which safeguarded the individual right of reputation and assumed that government and public officials needed firm legal controls to discourage dangerous political statements. On the other hand, creation of the surveillance state meant that laws regulating expression replaced libel as the major legal weapon against unorthodox public speech.

The Supreme Court did not directly address the issue of whether the First Amendment might require some protection for political libel defendants until *New York Times v. Sullivan* (376

U.S. 254 (1964)). Until that case, even without First Amendment protection, the complexities of libel litigation—despite the tough-looking libel laws—favored the defendants and did not significantly threaten publishers.

Rosenberg's discussion of *Times* displays the value of the press in providing for extensive public debate. According to Rosenberg, the fundamental issue in *Times*, given the "blockages" created by Southern libel laws to political discussion and to the political aims of the civil rights movement, was the legitimacy of the larger political process and the capacity for social change. The *Times* decision also illustrates what happens when the press is sensitive to political and social concerns. Groups and individuals seeking political power must first communicate their aims and agenda.

Rosenberg has written a fine book that demonstrates that libel law, like other supposedly timeless and apparently fundamental legal doctrines, depends on historical forces and follows no clear line of development. Yet, early in the book, Rosenberg states what he believes to be a central theme in the history of libel law: that the creators of legal doctrines have found it necessary to have some type of protection for the right of reputation of the "best men" running the government. Without such a protection, the public might be denied the services of the "best men—the most virtuous, wise, and talented members of the community" (p. 11). As an aside, this connection of the law of libel to the process of self-government, through the desire of the best men to govern, presents an interesting contrast to Alexander Meiklejohn's connection of the First Amendment to the process of self-government through open debate (Meiklejohn, 1948). More important, however, Rosenberg's best men theory leaves several crucial questions unanswered. Where is the evidence that plaintiffs, juries or judges actually adhered to this belief? Where is the evidence that political leaders had any deep fear of liberal libel laws? While the best men theory may have been advocated by legal theorists, did it actually influence plaintiffs, juries and judges?

According to Rosenberg, political libel has always addressed the basic issue of how much critical speech an open, liberal society can safely tolerate, the issue at the heart of Bollinger's *The Tolerant Society*. Bollinger offers a fascinating interpretation of the First Amendment. In *The Tolerant Society*, he outlines a new theory of free expression based on a new set of values and functions of free speech.

Bollinger notes that we protect more speech activity than any other society. The *Skokie* case (*Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978))—where the American Civil Liberties Union defended, and the courts upheld the right of a Nazi group to conduct a march in Skokie, a Chicago suburb with a large Jewish population—provides Bollinger an example of extremist speech that is protected by the

First Amendment. He also notes the striking paradox of our reluctance to impose legal restraints against speech while we embrace many informal restraints. One can imagine that none of the ACLU attorneys representing the Nazis would allow one of the group to freely express, without severe coercive reaction, his or her political beliefs in a social gathering hosted by that attorney. But as long as that attorney defends in court the Nazi's right to march, is the spirit of the First Amendment being upheld? According to Bollinger, it is not. The reason: we should protect extremist speech only to further the tolerant nature of our society.

The value of protecting extremist speech, according to Bollinger, lies in its promotion of a vitally important trait or character of society—tolerance. Bollinger offers a social interaction theory of speech based on a “social behavior” model. The tolerance theory effectively considers not so much the substance of the speech nor the right to speak as the act of communicating and the value of listening. Bollinger recognizes the impulse to intolerance existing in our society and devises his free speech model not just to protect speech but to deal with “the phenomenon of what we have called the ‘impulse to excessive intolerance’ generally, though we do that by insisting on an extraordinary degree of toleration only in the limited context of speech activity” (p. 107).

Thus, Bollinger uses a community-building model based on the importance of social tolerance. The vital importance of tolerance and the role of free speech in promoting social tolerance “leads us to think about free speech as our premier constitutional principle, of wider compass and significance than all the others” (p. 143).

Bollinger must be given credit for his courage in devising and presenting such a unique and broad theory of the First Amendment. Also, his fine contribution in his criticism of the theories under which extremist speech is currently protected, and in his articulation of the paradox of legal versus nonlegal sanctions against speech must be recognized. But is tolerance that important to a society? Do we want our society to become so tolerant that we become uncivilized? Should we base our First Amendment protections on a theory grounded at least in part on sociological conditions or facts?

Despite these unanswered questions, Bollinger offers a fine discussion on the social value of speech. He incorporates his view of modern society and his vision of how the character of society should be shaped. (According to Bollinger, there “have been few serious attempts to integrate into the general free speech discourse a more complex and realistic view of modern society” (p. 74).) Bollinger's theory seeks to promote a certain type of society, rather than a certain quality of government as envisioned by the classical model of free speech. Bollinger goes beyond government and, we assume, recognizes that the nature of our government de-

pends on the nature of our society. This prompts another question. Is free expression under Bollinger's theory a protected individual right or a constitutionally-directed tool for improving society?

Nonetheless, Bollinger's social-interaction theory of the First Amendment gives powerful ammunition to those critics of the Fourth Estate Model, which focuses primarily on the role of an unchecked press in acting as an institutional watchdog on government. No concern with society, and no involvement with society: it is just the press against the government. Bollinger, however, posits that a central function of free speech is to provide a social context in which we collectively speak. This social function is not served by the Fourth Estate Model; and if we are to have social communication we must have the forums—the press—in which to do so.

None of the books reviewed here specifically criticize or set out to criticize the Fourth Estate Model. However, their analyses appear to contradict its foundations, finding as they do that contemporary press behavior increases public suspicion of the press. *Suing The Press* addresses this critical matter.

Smolla examines many of the more famous recent libel suits, including those brought by Lillian Hellman, Ariel Sharon, Carol Burnett, Jerry Falwell, and General William Westmoreland. He labels this apparent libel explosion a "cultural movement" and "one of America's newest growth industries" (pp. 4, 5).

One reason for this explosion, according to Smolla, is that Americans are too thin-skinned and too preoccupied with reputation. He hypothesizes that Americans have obviously changed from a time when a "toughening of the mental hide was thought of as a better protection against the frictions and clashings incident to a robust and open society than the law could ever be" (p. 17). Americans have come to have a reverence for reputation, have focussed more on "narcissistic self improvement," and, contrary to the days of the Vietnam War, have turned inward to the "movement" (p. 19).

Americans may be more concerned about reputation, especially given Fawn Hall's recitation of the Andy Warhol statement: Everyone will be famous for fifteen minutes. However, Smolla offers no proof of this transformation and no proof that it is something new, particularly in light of the discussion in *Best Man* of the colonial concern with protecting reputation. A focus on lawsuits by celebrities, who rely heavily on media-created regulations, does not necessarily reveal anything about American culture. The juries in these lawsuits, however, might vicariously tell us something about American culture; and Smolla recognizes the "sympathy of modern juries for those who have had their reputations impugned" (p. 20). Although Smolla provides a lively discussion of various libel suits, he does not muster enough evidence about the

attitudes of the jurors to infer legitimately that their large awards stem from an American preoccupation with reputation. A more plausible causative factor is public distrust of the press.

Smolla's discussion of individual cases does not provide adequate support for his broad, yet insightful, assertions concerning the relationship of cultural change to libel law. Nonetheless, Smolla's work is another example of the erosion of the Fourth Estate Model of the press. A powerful press, without sufficient accountability and without adequate means for allowing public participation in social communication, is both the consequence of the Fourth Estate Model and the cause of the public backlash against the press. The public and the press have somehow become disconnected. The press has become an institution of investigation rather than a marketplace for communication. The concentrated, conglomerate nature of the modern media—with its objective corporate image rather than the personalized image of the press during the nineteenth century—makes social communication a one-sided affair.

These books show that modern First Amendment issues are far more than simple legal questions. They reveal that to be understood, the press must be assessed as an integral part of the social process.

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