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LEVY VS. LEVY

David A. Anderson*

EMERGENCE OF A FREE PRESS. By *Leonard W. Levy*. New York: Oxford University Press. 1985. Pp. xxii, 383. \$29.95.

Leonard Levy is a master of the disarming preface. In his preface to *Legacy of Suppression*¹ in 1960, he depicted himself as the reluctant bearer of the bad news that the framers of the first amendment had no real appreciation of freedom of expression. His tone was less that of the historian presenting interpretations than that of a scientist presenting unwelcome but irrefutable discoveries. He said the book had been difficult to write, requiring him to violate his own predilections and put aside personal preferences.² He said he had tried to put himself "back into the 'twilight' where the past must be taken on its own terms."³ His approach had been to "believe nothing unless proved beyond a reasonable doubt."⁴ He said: "I do not write history from the standpoint of any ideological tong. Nor is it my intention to play the debunker who relishes smashing popular idols and myths. I would be delighted if this book were proven to be wrong."⁵

Rereading *Legacy*, one notes that Levy seems to have warmed to the role of myth-debunker, and the ferocity with which he defended *Legacy* against those who questioned it⁶ might make one a bit skeptical about his eagerness to see it proven wrong. But for twenty-five years, Levy has been viewed as the reluctant revisionist to whom fell the task of exploding the myth that the framers fought a Revolution and adopted the first amendment because they cherished freedom of speech and press. In fact, Levy insisted, the framers had no meaningful experience with freedom of expression, and understood the concept to mean no more than it meant to Blackstone: freedom from prior restraints.

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1. L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

2. *Id.* at viii.

3. *Id.*

4. *Id.* at ix.

5. *Id.* at xi.

6. See Levy, *The Legacy Reexamined*, 37 *STAN. L. REV.* 767 (1985), which is a response to Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 *COLUM. L. REV.* 91 (1984); Levy, *On the Origins of the Free Press*, 32 *UCLA L. REV.* 177 (1984), which is a response to my article, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455 (1983).

Emergence of a Free Press is the original revisionist's revision of *Legacy*. It could have been a work of major importance. For all his prickliness, Levy is still the most important first amendment historian. His work has stimulated and informed virtually all of the scholarship in the field. He has received the scholar's greatest reward: his is the work that all others study, challenge, and rely on. A reexamination of the subject by the master himself could have produced a milestone comparable to *Legacy* itself.

The preface to the new book is promising. Levy reveals that the author of *Legacy* was not quite the dispassionate scholar he pretended to be. In the 1950s The Fund for the Republic had commissioned Levy to write a memorandum on the original understanding of the first amendment. His research persuaded him that the framers had a narrow view of freedom of political expression. The head of the Fund, Robert M. Hutchins, was so displeased by this result that he declined to publish the portions relating to freedom of expression. Levy now writes:

I was angry and decided to strike back by giving what I thought would be maximum publicity to the material that The Fund rejected. . . . I wrote *Legacy of Suppression* to spite Hutchins and The Fund and as a result of a chance opportunity to explore the subject.

The title I chose and the rather strong theme I developed in that book reflected both my shock at discovering the neglected evidence and my indignation at Hutchins and The Fund for attempting to suppress my work. As a result I overdid it. I had a novel position, which I overstated. [pp. viii-ix]

This is only one of the confessions Levy makes in the new preface. He also confesses to many of the errors with which his critics have charged him over the years. He admits that:

— he ignored evidence that press criticism of government in the 1780s and 1790s was scorching and epidemic (p. x).

— he was wrong when he said the early American experience with freedom of expression was slight (p. x).

— "Americans respected freedom of expression far more than theoreticians and legalists had acknowledged before 1798" (p. xi).

— "I gave the misleading impression that freedom of the press meant to the Framers merely the absence of prior restraints" (p. xi).

— "[T]he press had achieved a special status as an unofficial fourth branch of government, 'the Fourth Estate,' whose function was to check the three official branches by exposing misdeeds and policies contrary to the public interest" (p. xii).

— "[F]reedom of the press had come to mean that the system of popular government could not effectively operate unless the press discharged its obligations to the electorate by judging officeholders and candidates for office" (p. xii).

These are remarkable concessions from a scholar who previously insisted that freedom of expression could only have meant freedom from prior restraint, since no other understanding existed. They lead one to expect that the revision will be a purified version of *Legacy*, retaining the healthy skepticism of the original, rejecting its excesses, and meeting forthrightly the arguments of its critics. But *Emergence* does not deliver what the preface promises.

Levy's treatment of his critics, though less contentious here than in his law review articles,⁷ is more quarrelsome than responsive. *Legacy* and Levy's subsequent writings stimulated immense amounts of praise, criticism, and further research.⁸ The revision offered Levy an opportunity to reevaluate his own work in light of this new scholarship. But instead of evaluating his critics' arguments, Levy lashes out at them, often over peripheral points or minor errors.

Richard Buel, who argued that patriot-controlled assemblies largely abandoned the use of parliamentary privilege to punish printers after 1760,⁹ is excoriated for offering no evidence, misleading readers, using a "weasel word" (p. 83), and having a stunted understanding of freedom of speech (p. 87 n.70). Levy's answer to Buel's point, however, is only the doubtful proposition that the assemblies' failure to punish printers is irrelevant because they did punish others (p. 84). Levy says Buel "perverts what I said in *Legacy of Suppression* yet freely borrows without giving credit" (p. 87 n.70), but he does not indicate what Buel perverted or borrowed. Buel's major point, that colonial Americans viewed the press as vital to the scheme of representative government, is not mentioned.

Vincent Blasi challenged the thesis of *Legacy* by showing that political thinkers of the eighteenth century viewed a free press as essential to check "the inherent tendency of government officials to abuse the power entrusted to them."¹⁰ Levy now adopts Blasi's argument as his own (p. xii) without a hint of credit. Indeed, his only

7. See Levy's articles cited at note 6 *supra*.

8. See G. ANASTAPLO, *THE CONSTITUTIONALIST* (1971); W. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976); H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965); Baldasty, *Toward an Understanding of the First Amendment: Boston Newspapers, 1782-1791*, 3 *JOURNALISM HIST.* 25 (1976); Buel, *Freedom of the Press in Revolutionary America: The Evolution of Libertarianism, 1760-1820*, in *THE PRESS AND THE AMERICAN REVOLUTION* (Bailyn & Hench eds. 1980); Anastaplo, Book Review, 39 *N.Y.U. L. REV.* 735 (1964); Cound, Book Review, 36 *N.Y.U. L. REV.* 253 (1961); Jensen, Book Review, 75 *HARV. L. REV.* 456 (1961); Storing, Book Review, 55 *AM. POL. SCI. REV.* 385 (1961); D. Teeter, *A Legacy of Expression: Philadelphia Newspapers and Congress During the War for Independence, 1775-1783* (1966) (unpublished dissertation, University of Wisconsin); see also Nelson, *Seditious Libel in Colonial America*, 3 *AM. J. LEGAL HIST.* 160 (1959), which was published before *Legacy*.

9. See Buel, *supra* note 8.

10. Blasi, *The Checking Value in First Amendment Theory*, 1977 *AM. B. FOUND. RESEARCH J.* 521, 538.

discussion of Blasi's work is a scurrilous assertion that Blasi manipulated historical data to mislead readers (p. 259 n.106).

Levy abuses even those to whom he acknowledges he is indebted. He credits Dwight Teeter with "breaking new ground" in showing the freedom with which the Philadelphia newspapers attacked politicians (p. 205 n.101). He uses Teeter's evidence extensively, and in the acknowledgements he says Teeter's work helped shape the revision. Teeter was one of those who showed that Levy was wrong when he asserted that no one in America had repudiated the concept of seditious libel by the time the first amendment was ratified.¹¹ Levy now accepts Teeter's proof that "Junius Wilkes" in 1782 unmistakably repudiated seditious libel (p. 208). Teeter also showed that in the same year Eleazar Oswald, the irrepressible Philadelphia printer, condemned the English doctrine of seditious libel.¹² But Levy deprecates Teeter's understanding of the subject (pp. 205 n.101, 290) and quibbles over minor errors (pp. 207 n.109, 209 n.111).¹³ Levy implies that Teeter misrepresented Oswald's position by failing to note that Oswald did not favor "unbounded Liberty" of the press (p. 207 n.105). But it is Levy who misleads here. Oswald's concession of the need for boundaries was not an endorsement of seditious libel; rather, as Teeter points out, Oswald drew a distinction between public and private libels, arguing that the former should be legally restrained but that "a Constant Examination into the Characters and Conduct of Ministers and Magistrates should be equally promoted and encouraged."¹⁴

Levy suggests that Teeter "mistakenly" understood seditious libel as encompassing criticism of government or its measures or officials (p. 290). But that is Levy's own definition: "the crime consisted of defaming or condemning or ridiculing the government: its form, constitution, officers, laws, conduct, or policies, to the jeopardy of the public peace" (p. 8).

Most outrageous of all is Levy's nontreatment of Merrill Jensen, the historian who first pointed out Levy's obliviousness to the fact that the newspapers of the framers' time were full of seditious libel.¹⁵ As

11. See Teeter, *supra* note 8; see also Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 JOURNALISM Q. 235, 239 (1968).

12. See Teeter, *Decent Animadversions: Notes Toward a History of Free Press Theory*, in NEWSLETTERS TO NEWSPAPERS: EIGHTEENTH-CENTURY JOURNALISM 237, 241-42 (D. Bond & W. McLeod eds. 1977).

13. Teeter identified one pseudonymous contributor to Oswald's paper as "Junius Wilkes." It was actually a different writer, using the pen name "Wilkes," who was in turn quoting from "Junius." *Independent Gazetteer*, Oct. 19, 1782.

14. Teeter, *supra* note 12, at 242. To Teeter's observation that both Oswald and Wilkes showed disgust with seditious libel, Levy responds that neither used that term. P. 207 n.109. This is hardly an answer, since Oswald referred to the concept as "the infamous English doctrine of Libels" and Wilkes argued that the press should be "perfectly free and unrestrained." See Teeter, *The Printer and the Chief Justice*, *supra* note 11, at 239.

15. See Jensen, *supra* note 8, at 457.

Teeter has observed, Jensen's 1961 review of *Legacy* was "a blueprint" for the revision that Levy now acknowledges was needed.¹⁶ But *Emergence* contains no mention of Jensen's review, let alone any admission that Jensen was right. Levy's attitude toward the critics whose work exposed the weaknesses of *Legacy* is revealed in his acknowledgements. He says he has read them, and that a few of them even influenced his revision. But after recognizing a "continuing obligation" to those who assisted him in the writing of *Legacy*, he writes: "I have accumulated no comparable debts for *Emergence of a Free Press*. People who borrow their opinions from others can scarcely repay their debts. Fortunately I have none" (p. xxi).

Whether it is the product of conversion or revelation, *Emergence* does repudiate at least some of the excesses of Levy's earlier work. In *Legacy* Levy tried to treat his evidence cautiously, making no claim that he had discovered the original understanding of the first amendment. His conclusion was merely that the traditional assumption that the framers held a libertarian view of freedom of expression was "subject to the Scottish verdict: not proven."¹⁷

He was careful to point out that "[n]o one can say for certain what the Framers had in mind,"¹⁸ and that there may have been no real consensus as to what they meant by freedom of speech and press.¹⁹ He was aware that "much of history lies in the interstices of the evidence and cannot always be mustered and measured."²⁰

But it was not Levy's meticulous sifting of historical evidence that gave the book its impact. The book was a sensation because of what its title implied: that our legacy from the framers was one of suppression, not freedom of expression. That point was only implied in the original text of *Legacy* but was expressed in the preface: "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."²¹

The thesis itself was not new; forty years earlier Professor Corwin published an article in the *Yale Law Journal* arguing that the first amendment had not been intended to forbid seditious libel prosecutions, that its purpose rather was to reserve the field to the states, and that Justice Holmes was wrong when he argued that the first amendment repudiated seditious libel.²² Although Levy cited Corwin's work

16. See Teeter, *From Revisionism to Orthodoxy*, 13 REVIEWS IN AM. HIST. 518, 520 (1985).

17. L. LEVY, *supra* note 1, at 237.

18. *Id.* at 236.

19. *Id.*

20. *Id.* at viii.

21. *Id.* at vii.

22. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 48 (1920).

in his bibliography, he did not otherwise mention it in *Legacy*. By treating his findings as discoveries rather than affirmations of a theory previously advanced, and by repeatedly professing his dislike of the revisionist's role, Levy encouraged readers to believe the book contained some important repudiation of previous wisdom.

In his own subsequent writings, Levy seemed to forget his own reservations. Two years after *Legacy* appeared, he wrote an article for the *American Historical Review* in which he asserted flatly that the first amendment did not repudiate "the Blackstonian concept that freedom of the press meant merely freedom from prior restraint,"²³ and that Blackstone's definition was universally accepted in America.²⁴ "No other definition of freedom of the press by anyone anywhere in America before 1798 has been discovered," he claimed.²⁵

A year later he wrote a new preface for a paperback edition of *Legacy*.²⁶ He rejected suggestions that he had underestimated the extent and vitality of newspaper criticism of government in the colonial and early national period.²⁷ He ridiculed the critics who had made this point, equating their argument with "the proposition that the existence of so many heretics during the reign of Bloody Mary proves that there was a great degree of freedom of religion, despite the fires at Smithfield . . ." ²⁸ He found it unnecessary to modify any of *Legacy*'s "principal theses," which by then had grown to six:

that the First Amendment was not intended to supersede the common law of seditious libel, that the legislatures rather than the courts were the chief suppressive agencies, that the theory of freedom of speech in political matters was quite narrow until 1798, that English libertarian theory was in the vanguard of the American, that the Bill of Rights was in large measure a lucky political accident, and that the First Amendment was more an expression of federalism than of libertarianism.²⁹

It was in 1966, however, that Levy's thesis reached full flower. Levy wrote a sixty-page introduction to an anthology of original source materials.³⁰ The original thesis of *Legacy* had been essentially negative: that the framers did not intend to abolish seditious libel. As to what they did intend, *Legacy* offered little beyond the suggestion that the Blackstonian proscription of prior restraints was the only widely accepted definition of freedom of the press. In the 1966 essay, however, Levy developed two affirmative corollaries of the original

23. Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIST. REV. 22, 22 (1962).

24. *Id.* at 26.

25. *Id.* at 27.

26. L. LEVY, *FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION* (Torchbook ed. 1963).

27. *Id.* at ix-xi.

28. *Id.* at xi.

29. *Id.* at ix.

30. L. LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* (1966).

thesis. One was that the first amendment was intended not merely to prohibit prior restraints, but to “prohibit any Congressional regulation of the press, whether by means of a licensing act, a tax act, or a sedition act. The framers meant Congress to be totally without power to enact legislation respecting the press.”³¹ The second — now described by Levy as the primary purpose of the first amendment — “was to reserve to the states an exclusive authority, as far as legislation was concerned, in the field of speech and press.”³² The Levy thesis had grown far beyond the modest conclusions contained in the text of *Legacy* itself.

In the new book, Levy is forced to abandon most of the post-*Legacy* embellishments. He repeats the two affirmative corollaries from the 1966 essay (pp. 268-70),³³ but what he identifies as the “principal thesis” (p. xii) of the new book is the original Scottish verdict: that history does not support the view that the first amendment was intended to abolish the common law of seditious libel.

Levy still wants to extrapolate, however, from this modest proposition to the larger idea that the framers did not intend to guarantee a truly free press. In *Legacy*, the argument was that the press clause must have been intended only to prohibit prior restraints because no broader understanding was available when it was framed. But now Levy is forced to recognize that broader understandings were available — for example, that the framers realized popular government could not operate successfully unless the press was free to criticize officeholders and candidates (p. xii).

So *Emergence* shifts to a slightly different argument: freedom of the press may have meant more than freedom from prior restraint, but it still was not a libertarian concept because it failed to repudiate seditious libel. Even if seditious libels were rarely prosecuted, and even if the Americans believed the harsh English doctrine should be reformed to make truth a defense and allow the jury to return a general verdict, the continued existence of seditious libel “implied an extremely narrow concept of freedom of the press” (p. 203). He argues that no broad libertarian theory was possible “until Americans understood the incompatibility between seditious libel and free government” (p. 121).

David Rabban has shown the fallacy of using seditious libel as the

31. *Id.* at lvi-lvii.

32. *Id.* at lix.

33. Levy is forced to concede that his first corollary is inconsistent with the language of the first amendment. If the framers really intended to prohibit Congress from making any law *respecting* the press, they knew how to say so, as the establishment clause shows: “Congress shall make no law respecting an establishment of religion . . .” Instead, the first amendment only prohibited Congress from *abridging* the freedom of the press. Levy concedes that “[t]he verbs in its various clauses, if taken seriously, pose insurmountable problems” for his proposition. But he dismisses them as merely “ineptness” of phrasing. P. 270.

measure of the framers' libertarianism.³⁴ Fifty years earlier, the Zenger case³⁵ had convinced Americans that the doctrine should be modified to make truth a defense and allow juries to decide whether the utterance was seditious. Though not incorporated into the law, these reforms were so widely embraced that by the time of the framers' generation seditious libel had ceased to be an effective deterrent to a free press. That it was later resurrected and enthusiastically enforced under the Sedition Act, and that the Zengerian reforms then proved to be inadequate, is no proof that the framers did not have libertarian intentions.³⁶ New ideas about popular sovereignty and republican government, derived from the Radical Whig movement in England, were far more important than the inherited law of seditious libel in shaping the framers' concept of freedom of the press.³⁷

Levy's new title makes the fallacy all the more glaring. If the book were really the history of the emergence of a free press, presumably it would tell us when that occurred. But by Levy's standard, the press cannot be free until seditious libel has been repudiated. It is not enough that the doctrine is ignored, and that the press behaves as if the law doesn't exist; the concept must be wiped from the books. If one accepts Levy's insistence that we look at law rather than practice, one might conclude that there is no meaningful freedom of the press in the United States today. The Supreme Court was given an opportunity in 1965 to declare seditious libel unconstitutional, but it failed to do so. In *Garrison v. Louisiana*,³⁸ a local district attorney was convicted of criminal defamation for accusing certain judges of inefficiency and laziness, and of thwarting aggressive prosecutions of vice. Levy might insist that this is "criminal libel," rather than seditious libel,³⁹ but the distinction is specious. The statements for which Garrison was sentenced to four months in jail or a \$1,000 fine⁴⁰ were precisely the kind of statements that were prosecuted at common law as seditious libels. In the Supreme Court, Garrison squarely argued that it was a seditious libel case and that seditious libel prosecutions were forbidden by the first amendment.⁴¹ The Court did not accept the argument. Instead, it held that the conviction could not stand because

34. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 809 (1985) (reviewing L. LEVY, *EMERGENCE OF A FREE PRESS* (1985)).

35. The classic report of the case is J. ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (S. Katz ed. 1963).

36. See Rabban, *supra* note 34, at 809-10.

37. *Id.* at 823-32.

38. 379 U.S. 64 (1964).

39. He asserts that "criminal libel was a redundant subcategory of the broad offense of criminal libel," of which seditious libel was another subcategory. Pp. 7-8.

40. Appellant's Jurisdictional Statement at 9, *Garrison*.

41. Brief for Appellant at 12-28, *Garrison*. In the first sentence of his concurring opinion, Justice Douglas referred to "this prosecution for a seditious libel." 379 U.S. at 80.

the state had not shown that Garrison spoke with actual malice — the same standard the court had adopted a year earlier for civil libel suits by public officials.⁴²

In practice, of course, such prosecutions have disappeared, and one might hope that if the Court meant what it said in *New York Times v. Sullivan*⁴³ — that the Sedition Act was unconstitutional — it would reverse a seditious libel conviction even if actual malice were shown. In any event, the existence of seditious libel on the books no more proves that the press is not free than does the Supreme Court's refusal to rule out all prior restraints.⁴⁴ But one who adopts Levy's archeological approach to legal history, focusing on artifacts rather than practice, must conclude that since the doctrine of seditious libel was not "repudiated" by *Garrison*, it still exists and the press therefore is not free today.

In the end, Levy is unable to decide how much of *Legacy* to repudiate. The result is a puzzle of inconsistencies. As Rabban has observed, the inconsistencies make it difficult "to determine how much he has really changed his mind."⁴⁵ One of Levy's key confessions in his new preface is that he was wrong when he said Americans had slight experience with freedom of expression before 1798: "From a far more thorough reading of American newspapers of the eighteenth century I now know that the American experience with a free press was as broad as the theoretical inheritance was narrow" (p. x). But in the text, he still insists that "during the entire colonial period, from the time of the first settlements to the outbreak of the Revolution and the framing of the first bills of rights, America had had slight experience with freedom of speech or press as a meaningful condition of life" (p. 86).

Even in those passages where he recognizes that the press of the framers' generation behaved as if it were free, he seems unable to decide whether this is relevant to the intended meaning of the first amendment. On the one hand, he insists that "the rarity of prosecutions for seditious libel, and the existence of an unfettered press do not illumine the scope and meaning of freedom of the press or the law on freedom of the press" (p. xvi). He explains:

I refuse to *prove* the existence of unfettered press practices by giving illustrations of savage press criticisms of government policies or vicious character assassinations of American politicians. I am not intent on measuring the degree of freedom that Americans enjoyed. I am inter-

42. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

43. 376 U.S. 254, 276 (1964).

44. See *New York Times v. United States*, 403 U.S. 713 (1971); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

45. Rabban, *supra* note 34, at 809.

ested, to use an analogy, in defining the concept of crime, and therefore do not find crime rate statistics to be helpful. [p. xv]

Adhering to this belief that theory is more important than practice,⁴⁶ he devotes most of the book to proving that seditious libel had not been repudiated by the time the first amendment was ratified. He retains *Legacy's* conclusion that the first amendment probably was intended to leave the law of seditious libel in force and embody the Blackstonian definition of freedom of the press, *i.e.*, nothing more than freedom from prior restraints (p. 281).⁴⁷ But he also reaches a new conclusion:

When the framers of the First Amendment provided that Congress shall not abridge the freedom of the press they could only have meant to protect the press with which they were familiar and as it operated at the time. They constitutionally guaranteed the *practice* of freedom of the press. They did not adopt its legal definition as found in Blackstone or in the views of libertarian theorists. By freedom of the press the Framers meant a right to engage in rasping, corrosive, and offensive discussions on all topics of public interest. . . . [p. 272 (emphasis in original)]

If he means — contrary to his thesis in *Legacy* — that the framers intended something more than Blackstone's freedom from prior restraint but something less than freedom from seditious libel, he should say so. To conclude that they intended to preserve seditious libel and Blackstone, and that they also intended to reject Blackstone and preserve the seditious press with which they were familiar, is not revision but confusion.

46. When the practice-over-theory argument serves his ends, however, Levy uses it. He cites the existence of widespread mob violence — which of course was illegal — against Tory printers to show that Americans had only an extraordinarily narrow concept of freedom of expression. P. 85.

47. In *Legacy*, L. LEVY, *supra* note 1, this conclusion appears at pp. 247-48. Levy at one point asserts that when he refers to Blackstone's view he does not mean merely freedom from prior restraints. P. xi. But that is precisely what Blackstone meant: "The liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE, COMMENTARIES *151-52 (emphasis in original). Elsewhere Levy acknowledges that "[t]he common law's definition of freedom of the press meant merely the absence of censorship in advance of publication." P. 13.