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## Protecting the Best Men: An Interpretive History of the Law of Libel

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PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL. By *Norman L. Rosenberg*. Chapel Hill: University of North Carolina Press. 1986. Pp. xi, 369. \$29.95.

In *Protecting The Best Men*, Norman L. Rosenberg<sup>1</sup> traces chronologically the law of political libel<sup>2</sup> in the United States from the end of the colonial era to the present day. In his introduction, Rosenberg warns the reader not to expect a traditional legal history.<sup>3</sup> He promises, instead, to take a new approach which "seeks to interpret the tangled history of . . . the law of political libel . . . by examining forces that are not distinctly legal, especially changes in political practices, in ideas of social and political order, and in the nature of American journalism" (p. 7). Because Rosenberg takes on such a complex set of materials, problems relating to thematic development and organization at times make the book seem confusing. On the whole, however, Rosenberg weaves this material together in a way that is both interesting and useful to the legal historian.

The first of the book's two major themes is that the law of political libel did not "evolve" in the sense that it developed in a progressive and orderly manner toward a free speech ideal. Rather, Rosenberg posits that from one period to the next the law "ebbed and flowed," depending on the influence of a variety of political and social forces (pp. 9, 264). In support of this proposition, Rosenberg describes, in

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1. Associate Professor of History at Macalester College, and co-author of *IN OUR TIMES: AMERICA SINCE WORLD WAR II* (1982). Rosenberg is also author of *The Law of Political Libel and Freedom of the Press in Nineteenth Century America: An Interpretation*, 17 *AM. J. LEGAL HIST.* 336 (1973); *Alexander Addison and the Pennsylvania Origins of Federalist First-Amendment Thought*, 108 *PA. MAG. OF HIST. & BIOGRAPHY* 399 (1984); *The New Law of Political Libel: A Historical Perspective*, 28 *RUTGERS L. REV.* 1141 (1975); *Thomas M. Cooley, Liberal Jurisprudence, and the Law of Libel, 1868-1884*, 4 *U. PUGET SOUND L. REV.* 49 (1980).

2. Rosenberg generally uses "political libel" to refer to libelous statements used in criticism of government. See generally pp. 10-11.

3. Rosenberg disagrees with those traditional "whiggish" scholars who study the law of libel in isolation from underlying social forces and conclude that the law has evolved toward a free speech ideal (p. 9). See, e.g., Green, *The Right to Communicate*, 35 *N.Y.U. L. REV.* 903, 904 (1960) ("What began as control of speech and press by suppression, censorship and persecution has come to be protection of the widest freedom for all the means of communication."). *Protecting The Best Men* is part of a movement in legal history which seeks to explain legal change by looking to underlying social, political, and economic pressures. For examples of this more comprehensive approach to history, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) and M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

chronological order and great detail, specific periods in American history during which the restrictiveness of libel law fluctuated in response to contemporary social events. For example, according to Rosenberg, although the American Revolution had a liberalizing effect on the law of political libel (pp. 51-55), the growing threat from a competing political party<sup>4</sup> caused the Federalist-dominated Congress to attempt to chill political criticism by enacting the Sedition Act<sup>5</sup> in 1798 (pp. 79-89). As another example, Rosenberg explains that the Supreme Court's adoption in 1964 of a less restrictive approach in political libel cases was partially due to the Court's fear that libel doctrine would be used as a weapon against the civil rights movement.<sup>6</sup> These are only two of the several turning points that Rosenberg traces over more than two hundred years of American history.

Rosenberg is probably correct in rejecting the notion that the law of political libel evolved in a progressive and orderly manner. As the author skillfully shows, legal theorists, influenced by often complex and unpredictable social forces, do not always elaborate doctrine in an orderly fashion. For example, according to Rosenberg, Thomas Cooley's<sup>7</sup> confidence in less restrictive libel law during the mid-nineteenth century was largely based on increasingly popular free market theory.<sup>8</sup> Intimidated by a rise in irresponsible popular journalism, Cooley later revised his theories in favor of more restrictive libel laws (pp. 178-89).

Rosenberg, however, is so determined to refute those historians who suggest that libel law has developed in a smooth, orderly manner that he does not adequately address the possibility that this body of law, despite its ebbs and flows, did, on average, become less restrictive during the nineteenth century.<sup>9</sup> Evidence in the book itself suggests such a progression. The Sedition Act of 1798, for example, repre-

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4. Two distinct and viable political parties did not exist until 1796, when the Jeffersonian Republicans became the primary political opponents of the Federalists, who gained power with the election of John Adams as president. See, e.g., D. COLE, *HANDBOOK OF AMERICAN HISTORY* 78 (1968).

5. The Sedition Act of 1798 provided severe punishments for "false, scandalous, and malicious" statements against the government. D. COLE, *supra* note 4, at 58.

6. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court granted constitutional protection to nonmalicious criticisms of public figures. Under *Sullivan*, "malice" exists if the defendant publishes a falsehood "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 280. See also pp. 243-48.

7. Cooley was one of the nation's first lawyer-academicians, teaching at the University of Michigan Law School and serving on the Michigan Supreme Court. P. 161. See generally Rosenberg, *Thomas M. Cooley, Liberal Jurisprudence, and the Law of Libel*, *supra* note 1 (examining Cooley's views on libel).

8. Free market ideology, in an intellectual context, posits that the best idea will prevail if there is a free competition of ideas. Under this theory, since inferior ideas such as libelous falsehoods will not ultimately gain acceptance, the courts need not play an active role in preventing their publication. See, e.g., Duval, *Free Communication of Ideas and the Quest For Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 *GEO. WASH. L. REV.* 161, 188-94 (1972).

9. See, e.g., C. LAWHORNE, *THE SUPREME COURT AND LIBEL* (1981).

sented a progressive departure from past doctrine in allowing truth as a defense in a libel suit (pp. 86-87). By the end of the nineteenth century, an even more liberal version of political libel, allowing a conditional privilege for even false political criticisms, had gained recognition as a "minority view" (p. 201). Finally, the Supreme Court in 1964 generally made this conditional privilege a constitutional requirement (pp. 243-48). Only in the last chapter does Rosenberg appear to acknowledge this progression (pp. 258-62).

The second major theme in *Protecting the Best Men* is that the law of political libel can be best understood as a tool that the "best men" have tried to use to bolster their positions in society. It is apparently to this proposition that the title *Protecting the Best Men* refers. During the seventeenth century, according to Rosenberg, ordinary small-town Americans frequently used libel doctrine as a means of protecting their reputations (pp. 12-25). During the eighteenth century, however, the rich and powerful began to use this doctrine to protect their political and social dominance (pp. 25-40). Interestingly, Rosenberg shows that libel law has generally failed those who have attempted to use it for this new purpose. The Sedition Act of 1789, for example, turned out to be a "relatively flimsy legal tool" against the Federalists' Jeffersonian opposition (p. 265). In a subsequent example, Rosenberg explains that James Fenimore Cooper's libel actions against his critics "only served to discredit the legal and political principles [Cooper] hoped to vindicate."<sup>10</sup>

The book's organization sometimes makes it difficult for the reader to understand how Rosenberg's theories relate to the history he discusses. Rosenberg devotes the first and last chapters to discussing his interpretation of the historical events he recounts in the intervening chapters. Only in the last chapter, for example, does he discuss in any detail how the "best men" have tried to use the law of libel to protect their dominant positions in society (pp. 265-66). Because he does not highlight the theme in the foregoing chapters, the reader is left without this aid in unifying the complex material the book describes.

The reader's confusion may also be amplified by Rosenberg's imprecise style. In discussing his theories and interpretations in the last chapter, for example, the author refers to undefined concepts such as the "deeper implications of legal realism" (p. 267). He frequently uses imprecise terms such as "best men," "surveillance state," and "Fourth Estate" without explanation (pp. 200, 208, 264). Although some of these terms may be clear to readers with a background in history, con-

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10. P. 265. Newspapers associated with the Whig political party had criticized Cooper's political ideas and literary talents. In response, Cooper instigated several libel suits to which he devoted most of his energies in 1840 and 1841. Cooper's motivation was not simply revenge, but also his fear that newspapers' attacks on the reputation of the landed gentry would deprive the country of needed leadership. Pp. 137-40.

fusion about the meaning of "best men" is particularly troubling since it is part of the title and relates to an important theme in the book.

On the whole, Norman L. Rosenberg has succeeded in documenting an enormous amount of research on this subject. Although he does not fully explain some important terms and concepts,<sup>11</sup> his purpose in writing the book was not to provide detailed explanations, but to "sketch a broad picture . . . [that] will provide the framework for more specialized work on particular jurisdictions and more limited time periods" (p. 8). Rosenberg has, indeed, uncovered an impressive set of primary and secondary sources and woven them together in an interesting way. *Protecting the Best Men* would serve as an excellent reference for a student of legal history seeking a general framework for understanding libel law, as well as sources relating to a specific time-period or event.<sup>12</sup>

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11. Evidently because of the enormous amount of material he must discuss in order to cover over two hundred years of American history, Rosenberg often mentions seemingly important events or time periods without discussing them in the degree of detail that a reader might expect. Rosenberg's brief discussion of the Progressive Movement, for example, is incomplete. *See* p. 191. Rosenberg's discussion of other historical phenomena, however, is quite detailed. His interesting discussion of Thomas Cooley, for example, spans 28 pages. *See* pp. 161-89.

12. The book contains an excellent 16-page bibliography as well as a useful index. The author's 66 pages of notes, moreover, refer the reader to other studies concerning specific time periods or occurrences.