PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY. Edited by Pnina Lahav.[1] New York: Longman Inc. 1985. Pp. xvi, 366. $39.95.

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This collection of essays on press freedom in seven countries is more than the sum of its parts. It is a remarkable demonstration that freedom of the press depends less on the laws that protect or restrict the press than on the society's values, traditions, culture, and political philosophy. In essay after essay, the same message leaps off the page: the extent of press freedom in a country does not necessarily depend on the language—or even the existence—of a constitutional or other fundamental guarantee.

We have begun to understand this in the United States. Hans Linde has shown that "[t]he history of liberty of the press in the United States is not the history of the first amendment."[3] For the first century, it was the state courts, interpreting their own constitutions and the common law, that established the legal bases for press freedom in America.[4] The first amendment did not become the primary basis until well into the twentieth century. Even then, its influence was not dramatic. The Supreme Court's early first amendment decisions merely explained why the Constitution did not prevent various restraints on speech.[5] When the Court finally relied upon the amendment to invalidate such a restraint in 1931, in *Near v. Minnesota*,[6] it did so by ascribing to the amendment only the narrow purpose of preventing prior restraints, and then not in all circumstances. To use Linde's words again, "*Near* added nothing to the substance of free expression; if anything it sacrificed some substance to gain its major goal."[7] Since then, the Court's role has been as much to limit press freedom as to protect it. While creating a body of ringing libertarian rhetoric, the Court has allowed the government to muzzle the speech of anarchists, socialists, and com-

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3. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 207 (1981).
4. *See generally* Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L. J. 514 (1981).
5. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919).
6. 283 U.S. 697 (1931).
7. Linde, *supra* note 3, at 184.

munists;[8] it generally has refused to protect newsgathering activities;[9] and it has declined to extend the amendment's full protection to the most popular medium of communication, broadcasting.[10] If freedom of the press consisted only of those rights that the Supreme Court has been able to find in the first amendment, it would be a puny freedom.

Fortunately, the law provides many other sources of press freedom. The common law protected against prior restraints even before adoption of the first amendment,[11] and it has continued to respond to the needs of the press. For example, the common law of defamation recognized privileges that protected the press long before the Supreme Court saw any need for constitutional limitations on libel law.[12] Congress and the state legislatures have nurtured the press, through favorable postal rates,[13] exemption from antitrust laws,[14] shield statutes,[15] sunshine acts and freedom of information acts.[16] Administratively, government gives the press special access to places and officials, and operates a vast public information apparatus to meet the press's demands for information.[17]

These currents of press freedom flow not from the first amendment or any other fundamental law, but from a deep, powerful, and enduring consensus that freedom of the press is a good thing.[18] The first amendment is not the source of that consensus, only another product of it.

The essays collected in this volume show that it is the existence and strength of this social consensus that determines the degree of

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8. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Schenck v. United States, 249 U.S. 47 (1919).

9. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1 (1978); Nixon v. Warner Communications, 435 U.S. 589 (1978).

10. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

11. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151-52.

12. *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908).

13. *See* 39 U.S.C. § 3626 (reduced postal rates for periodicals).

14. *See* Newspaper Preservation Act, 15 U.S.C. § 1801.

15. *See, e.g.*, N.J. STAT. ANN. 2A:84A-21 (Supp. 1970); CAL. EVID. CODE § 1070 (West 1966).

16. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552; Sunshine Act, 5 U.S.C. § 552b; Texas Open Meetings Act, TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1980).

Sometimes the legislatures have come to the aid of the press after the courts have refused to do so. *See, e.g.*, Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (prohibiting newsroom searches); the statute was enacted after Zurcher v. Stanford Daily, 436 U.S. 547 (1978), in which the Court held that the first amendment did not prohibit such searches.

17. *See, e.g.*, M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

18. *See generally* Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

press freedom in any country. The press is often more or less free than a study of its press law alone would indicate. The West German criminal code contains a number of provisions that look like seditious libel. They prohibit public attacks on the President, the Federal Republic and its symbols, and the state and federal legislatures and their members.[19] We are assured, however, that in practice these provisions are "totally unimportant" because the officials who might prosecute never do so.[20] In Japan, the government treats information as confidential unless the government in its discretion chooses to release it; government employees are forbidden from divulging secrets, and a reporter can be prosecuted for inducing a civil servant to do so; yet we are told that there is little demand for freedom of information legislation because the Japanese press is so skillful at obtaining information informally.[21] France has a statute allowing the Minister of the Interior to prohibit distribution of foreign publications, and elaborate mechanisms for reviewing the Minister's prohibitions. In the past, this scheme was used to ban novels of Henry Miller, books by African writers, and even a publication of the Jehovah's Witnesses. Apparently, however, publishers in recent years have challenged these prohibitions more aggressively and have thereby discouraged their use, though the law remains in place.[22]

Many Americans will be surprised at the diversity of legal arrangements within which a free press can flourish. In West Germany, prior restraints are not only tolerated, but sometimes preferred. "The general impression in German legal opinion is that 'prior restraint' is a nonissue and that it is certainly better to avoid harm than to compensate it afterwards."[23] France gives public officials more protection against defamation than the private citizen enjoys.[24] Anyone wishing to publish a newspaper in Sweden or Israel must first obtain a license from the government.[25] Israel has a particularly effective way of controlling pretrial publicity: a litigant who uses the press to publicize his cause can have his action dismissed.[26] The British, in addition to their notorious Official Secrets Act, have a system of "D Notices" by which the government can effectively suppress publication of information that the

19. PRESS LAW IN MODERN DEMOCRACIES 202 (P. Lahav ed. 1985) [hereinafter cited as PRESS LAW].
20. *Id.*
21. *Id.* at 323.
22. *Id.* at 155.
23. *Id.* at 199.
24. *Id.* at 159.
25. *Id.* at 234, 271-72.
26. *Id.* at 288.

government believes would endanger national security.[27]

In Sweden, the right of anonymity is a cornerstone of the free press scheme. Under the licensing scheme, editors of newspapers and magazines must be identified, and must bear ultimate responsibility for the contents of their publications. Authors of books or pamphlets and contributors to newspapers and magazines, on the other hand, have a right to remain anonymous; coworkers are forbidden from revealing their identity and public authorities are prohibited from seeking to discover their identity.[28]

In Japan, Israel, and Sweden, libel is more likely to be treated as a criminal matter than as a basis for a civil suit. In Sweden this is because no cause of action lies unless the publication also constitutes a crime.[29] In Israel and Japan, however, it is because most victims prefer the criminal remedy; it provides a quicker and less expensive method of vindication.[30]

That a free press can thrive in such different legal environments ought to give pause to those who announce the death of freedom every time the Supreme Court rejects a new press attempt to extend the first amendment.

Of the seven countries treated in the study, the one whose law is most repressive of press freedom is Israel. The mechanisms for press control available to the Israeli government would make the Star Chamber envious. Under the Press Ordinance all publishers must obtain a license and post a deposit to guarantee payment of fines. The license can be suspended or revoked for violations, but its issuance is nondiscretionary. The Defense (Emergency) Regulations, however, require a second permit. Under these the District Commissioner has vast discretionary powers, and if he has the good sense to refuse to give reasons for his denial of a permit, the denial is not judicially reviewable. The result is a system that blatantly discriminates against pro-Arab applicants.[31]

The Israeli government has power to compel newspapers to publish official communiques and official denials of material previously published, though these powers apparently are not used.[32] It may suspend publication of newspapers that pose a high probability of danger to public peace.[33] It has broad powers of censorship, and the press is forbidden from protesting these; it is a crime to publish

27. *Id.* at 16-17.
28. *Id.* at 236-37.
29. *Id.* at 244.
30. *Id.* at 293-94, 330.
31. *Id.* at 271-72.
32. *Id.* at 272.
33. *Id.* at 272-73.

white space to indicate that material has been deleted by the censor.[34] The censor is even empowered to prohibit the Israeli press from republishing news items from abroad; two editors went to prison for reprinting a French magazine's story about the involvement of Israeli intelligence officers in the abduction of a Moroccan leader, and the Israeli press was forbidden to reveal facts of the case to the public.[35] The government may designate certain subjects as secret, and newspapers then must submit articles on those subjects for prior review.[36] Seditious libel is a crime; truth is not a defense; and the penalty can be termination of the newspaper and blacklisting of the offending individual for three years.[37] In private defamation, truth is a defense only if the publication is "of public interest"; in order to avail himself of the defense of good faith, the libel defendant must publish the complainant's reply.[38]

Lahav, who is author of the essay on Israel as well as editor of the book, struggles to explain the reasons for this repression. She sees it as a product of tension between the liberal instincts of enlightened Zionism, British constitutionalism, Anglo-American liberalism, and sociological jurisprudence, on the one hand, and authoritarian impulses derived from the preemancipation Jewish tradition, British colonialism, Continental liberalism, and legal formalism on the other.[39] It is difficult to accept her conclusion that "[t]he commitment to a democratic form of government and to libertarian values, characteristic of mainstream Zionist thought, has proved a sufficiently sturdy base on which a solid free press could develop."[40] She explains the flagrant discrimination against the Arab press on the ground that the latter "consciously and openly views itself as an arm of the Palestinian struggle."[41] But as she recognizes elsewhere, the Hebrew press is just as consciously and openly an arm of the Zionist movement;[42] the discrimination, therefore, cannot be explained on the theory that arms of political movements are not "press." Nevertheless, friends who have lived in Israel assure me she is correct in asserting that the Israeli press is remarkably vigorous in its criticism of those in power,[43] at least as long as it stays within the bounds of the Zionist consensus. Even in

34. *Id.* at 275.
35. *Id.* at 276, 279.
36. *Id.* at 276.
37. *Id.* at 278.
38. *Id.* at 292-93.
39. *Id.* at 265-67.
40. *Id.* at 298.
41. *Id.*
42. *Id.* at 275.
43. *Id.* at 282.

Israel, the press apparently is far more free than the law would lead one to expect.

The Israeli system is only a particularly dramatic illustration of a principle that can be seen operating in every country in the study: the scope of press freedom is largely determined by the country's cultural biases. Israel's system reflects a powerful authoritarian streak that is not confined to what Lahav calls "pre-emancipation Jewish culture."[44] The American system reflects a pervasive suspicion of government; *New York Times v. Sullivan*[45] only recognized a distrust of public officials that was implicit in the American scheme from the beginning.[46] The British, on the other hand, believe in government, and particularly in the civil service; this helps explain why they tolerate so much official secrecy and refuse to protect criticism of public officials.

Press Law in Modern Democracies is divided into three sections called "The Anglo-American Approach," "The Continental Approach," and "The Non-Western Approach." The "non-Western" representatives, however, are Israel and Japan, two of the most "Western" systems outside the West. Thus the book is really a study only of press freedoms in Western democracies and their derivatives.

The book makes no attempt to deal with issues raised by broadcasting and newer communications technologies. As the German contributor notes, the questions most frequently discussed in Germany today are not those addressed by this book, but those involving regulation of the electronic media;[47] that is probably true in the other countries as well.

Inevitably, language proves to be a problem; translation from the French produces the quaint observation that "[f]or the press, seizure is definitively harmful."[48] Multiplicity of authors is an enemy of timeliness; although the book is dated 1985, one of the essays apparently was completed before the end of 1983.[49]

Despite these flaws, it is an unusual and valuable book. Wisely, Lahav recognizes that freedom of the press issues are pretty much the same everywhere. Once a state vows fealty to the ideal of a free press, the questions all revolve around the extent to which that ideal must yield: to the security interests of the state, to the individual's interests in reputation and privacy, and to other social

44. *Id.* at 266.
45. 376 U.S. 254 (1964).
46. *See* Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).
47. PRESS LAW, *supra* note 19, at 218.
48. *Id.* at 157.
49. *Id.* at 251.

goals such as fair administration of justice, governmental efficiency, and diversification of media voices. This is the organizing principle of each essay. Each contributor describes how the law in his country attempts to deal with each of those issues. The essays are more than merely descriptive, however; they also evaluate each country's response. The conclusions vary widely, from the Englishman Michael Supperstone's harsh indictment of his country's penchant for secrecy[50] to Masao Horibe's assurance that "Japan is certainly a paradise for the press."[51] What is valuable, however, is not the essayists' opinions. Rather, it is that by asking them to evaluate as well as describe, Lahav has forced each of them to play Tocqueville in reverse: to interpret for a stranger not only his own country's laws, but its practices as well.

Nowhere does this strategem produce a happier result than in Aviam Soifer's essay on press freedom in the United States. It is one of those pieces—like Chafee's review of Meiklejohn's book[52] or Kalven's note on *New York Times v. Sullivan*[53]—that accomplishes far more than the modest purpose for which it was written. Soifer begins by asserting that "[f]reedom of the press in the United States is much more than a legal concept—it is almost a religious tenet."[54] He attributes the broad freedom enjoyed by the American press more to the beliefs of the American people than to the press's success in litigation.[55] Americans tend to invoke the first amendment "in ways that are partially mythic and largely symbolic."[56] He points out, for example, that even with respect to prior restraints, first amendment doctrine provides no sure protection; the *Pentagon Papers Case* left open the possibility that Congress might authorize prior restraints,[57] and *Nebraska Press Association v. Stuart*[58] endorses a process of judicial balancing in prior restraint cases. Nevertheless, "symbolic pronouncements and legal precedents still create an unusually strong presumption against imposition of judicial restraints prior to publication."[59] Soifer makes precisely the right point: whatever doctrinal doubts may remain, the reality is that the Nixon administration, at the height of its power, could not

50. *Id.* at 12-17.
51. *Id.* at 334.
52. Chafee, Book Review, 62 HARV. L. REV. 891 (1949).
53. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.
54. PRESS LAW, *supra* note 19, at 79.
55. *Id.*
56. *Id.* at 80.
57. New York Times Co. v. United States, 403 U.S. 713 (1971).
58. 427 U.S. 539 (1976).
59. PRESS LAW, *supra* note 19, at 101.

restrain publication of secrets that it (and the Court) believed posed a serious threat to national security.

Soifer does not ignore the corollary, that restrictions on press freedom can also have symbolic importance. Recent decisions allowing the government to censor the writings of former intelligence agents "may not establish doctrine which goes beyond their special facts,"[60] he says, but the Court's brusque treatment of the agents' constitutional arguments makes it clear that the Court is willing to put security ahead of first amendment concerns.[61]

Soifer acknowledges that first amendment jurisprudence ebbs and flows, depending upon the temper of the times and the election returns. But he also notes that "[t]o some extent, freedom of expression in the United States seems to exert its own pressure—almost to enjoy a symbolic life of its own—no matter who controls the apparatus of government."[62]

Soifer's essay is also full of smaller but no less valuable insights. He observes in passing that because the states are the most important source of law for most citizens, the Court's offhand dictum in *Gitlow v. New York*,[63] applying first amendment standards to the states, "must rank among the most significant legal victories for freedom of expression in the United States."[64] His footnotes are a bibliography of virtually everything worthwhile ever written about the first amendment, by judge or scholar.

For all of his emphasis on the nondoctrinal aspects of the first amendment, Soifer does not ignore its importance as law. He understands that the very existence of a legal theory, even if it is not fully accepted, can have an effect. For example, though the Court has not accepted the theory that reporters have a first amendment right to refuse to disclose confidential sources, neither has it rejected the theory outright.[65] As a result,

> law enforcement personnel and judges still do not casually order journalists to disclose confidential sources or similar information. They know that they are likely to become involved in time-consuming and expensive legal battles, and that many appellate courts require a strong showing of necessity for the information sought and a lack of alternative sources for the same information.[66]

Throughout the essay, Soifer recognizes the inseparability of the constitutional text from the values that it embodies. The text

60. *Id.* at 108.
61. *Id.*
62. *Id.* at 90.
63. 268 U.S. 652 (1925).
64. PRESS LAW, *supra* note 19, at 84.
65. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).
66. PRESS LAW, *supra* note 19, at 113.

cannot create freedom of expression if the society lacks a passionate commitment to that ideal. The French equivalent of a press clause[67] is almost identical to that of Pennsylvania and several other American states;[68] the relative lack of press freedom in France results not from a defective text, but from French ambivalence toward the idea of a truly free press. As Lahav notes, England, despite its lack of a constitutional commitment to a free press, is quite protective of the press, while France retains an authoritarian approach despite its formal commitment to the ideal.[69]

On the other hand, even the strongest libertarian instincts need the support of a text. As Soifer puts it, "To possess constitutional language considered fundamental and to be able to invoke an eloquent legal and philosophical tradition explicating the need for an unfettered press is important."[70]

Soifer writes only of the United States, but the comment could as well be a summary of the entire study. In all democratic societies, at least, freedom of the press is a product not merely of the country's constitution, or even of its entire body of press law, but of the position that freedom of expression occupies in its hierarchy of values.

67. Article 11 of the Declaration of Rights of Man and Citizen of 1789 states: "The unrestrained communication of thoughts and opinions, being one of the most precious rights of man, every citizen may speak, write, and publish freely, provided he be responsible for any abuse of this liberty in those cases determined by law." Under the French Constitution of 1958, this declaration has the force of a constitutional guarantee. *See* PRESS LAW, *supra* note 19, at 139.

68. *See* PA. CONST. art. 1 §7; other state constitutions with similar clauses are cited in Anderson, *supra* note 46, at 488 n.200.

69. PRESS LAW, *supra* note 19, at 345.

70. *Id.* at 80.