The Suppression of the *Nauvoo Expositor*†

*By Dallin H. Oaks*

The suppression of the *Nauvoo Expositor* by the Mormons in Nauvoo, Illinois, in 1844 has interest for historians because it was the first in a series of events that lead directly to the murder of the Mormon prophet, Joseph Smith.¹ The effect of the suppression of this anti-Mormon newspaper on the non-Mormon elements in the vicinity was explosive. In the neighboring cities of Warsaw and Carthage citizens in mass meetings declared the act revolutionary and tyrannical in tendency and resolved to hold themselves ready to cooperate with their fellow citizens in Missouri and Iowa "to exterminate, utterly exterminate the wicked and abominable Mormon leaders" and to wage "a war of extermination . . . to the entire destruction, if necessary for our protection, of his adherents."² Thomas Ford, then Governor of Illinois, called the event a violation of the Constitution and "a very gross outrage upon the laws and the liberties of the people."³ Even B. H. Roberts, a Mormon historian, conceded that "the procedure of the city council . . . was irregular; and the attempt at legal justification is not convincing . . . ."⁴ Roberts placed his defense of the action "on the grounds of expediency or necessity."⁵

This article will examine the legal basis of some of the charges the *Expositor* made against the leading citizens of Nauvoo and the legal implications of the suppression of the newspaper by those citizens. Before this is done, however, it will be helpful to review some facts that put the event in historical perspective.

I. Historical Background

After successively fleeing or being driven from their homes and property in Lake County (Ohio), Jackson County (Missouri), and Clay, Davies, and Caldwell counties (Missouri), the Mormon people gathered along the Illinois bank of the Mississippi River about forty miles north of Quincy. There, in the winter of 1839, they commenced to build the city of Nauvoo. Under the leader-

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¹ For other treatments of some of the historical material discussed here, see H. Smith, *The Day They Martyred the Prophet* (1963); Gayler, *The "Expositor" Affair — Prelude to the Downfall of Joseph Smith*, 25 Northwest Missouri State College Studies, Feb. 1, 1961, p. 3. An interesting contemporary account of these events, written by a non-Mormon resident of Hancock County, is a Letter From H. H. Bliss to Franklin Bliss, June 1844, on file, Indiana University Library, Bloomington, Indiana.

² J. Smith, *History of the Church of Jesus Christ of Latter-day Saints* 464 (2d ed. 1950) [hereinafter cited as Smith].

³ Id. at 534.


⁵ Roberts, *Introduction* to 6 Smith at xxxviii.
ship of their prophet and president, Joseph Smith, they obtained a generous city charter, erected substantial homes and public buildings, obtained a charter for a university, and initiated trading and some manufacturing.

By 1844 Nauvoo was the largest and one of the most prosperous cities in Illinois. But events already in progress were soon to prove its downfall. Some citizens were jealous of Nauvoo’s prosperity, others were hostile to the curious religion of a majority of its inhabitants, and many were suspicious of the political power of its leaders. Each of these sore spots was aggravated by events in the first six months of 1844. At this time Joseph Smith was mayor of the city of Nauvoo, ex officio chief justice of the municipal court, and lieutenant general of the Nauvoo Legion, a large body of state militia organized pursuant to the Nauvoo City Charter. Prominent church officers and members filled most of the other positions of leadership in the city and legion.

Antipathy toward the union of religious, civil, and military authority in Nauvoo was sharpened by Hyrum Smith’s candidacy for the legislature from Hancock County and by Joseph Smith’s announced candidacy for President of the United States. The Smiths’ candidacies gave the Mormons men they could support in preference to the alienated Whigs and Democrats, but they also put the two major parties on notice that neither could hope to win the decisive Mormon vote, thus removing any moderating influence either party might previously have exerted.

The enmities engendered by political controversies and local commercial rivalries between saint and gentile were magnified by religious and personal animosities. The religious turmoil was given a sensational focus in 1843–1844 by several new doctrines that the prophet was reportedly introducing, especially polygamy. Personal hostilities were magnified by the excommunication from the Church of several prominent religious and community leaders, including William Law, one of Joseph Smith’s counselors, Wilson Law, a general in the Nauvoo Legion, and Francis M. Higbee. In the troubled spring of 1844 these men and their associates proceeded to organize their own church and then joined with the anti-Mormon elements of Hancock County in efforts to humble Nauvoo and bring about the downfall of Joseph Smith.

Historians are fond of characterizing these conditions as combustible materials awaiting only a spark to set them afame to work death and destruction.8

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7 Mormon domination of local government and militia undoubtedly stemmed from the bitter Missouri experience, where the Mormon expulsion had been directed by hostile government officials and effected by the state militia. The presence of the well-trained and disciplined Nauvoo Legion served as a substantial deterrent — and irritant — to the anti-Mormon citizens of Hancock County and to the Missouri elements, who were rumored to be planning an armed invasion of Nauvoo and who had already abducted various Nauvoo citizens and attempted to kidnap Joseph Smith. 6 Smith 98–154, 5 id. at 430–75.

8 E.g., Nibley, Joseph Smith the Prophet 518 (1946); Roberts, Introduction to 6 Smith at xxxvii.
The spark came in the wrecking of the Nauvoo Expositor, a newspaper established in Nauvoo by anti-Mormons and suppressed by the city authorities on June 10, 1844, three days after its first issue. Francis M. Higbee, one of the newspaper’s proprietors, promptly made a complaint before a justice of the peace in Carthage, the Hancock County seat, against Joseph Smith, the city council, and other leading citizens for committing a riot while destroying the Expositor press. The Carthage justice issued a “writ” (arrest warrant) ordering state officers to “bring them before me or some other justice of the peace” to answer the charges.

When Joseph Smith and his associates were arrested on this warrant on June 12 in Nauvoo, he proposed to go before any justice of the peace in Nauvoo, but the constable insisted on what seems to have been his legal right to take the prisoners before the issuing justice in Carthage. Joseph Smith thereupon obtained a writ of habeas corpus from the municipal court of Nauvoo, which held a hearing on the case later that day. Exercising the broadest range of habeas corpus jurisdiction authorized by Illinois law, the municipal court held what amounted to a preliminary hearing on the guilt or innocence of the prisoner. After hearing testimony on this question the court decided that Joseph Smith had acted under proper authority in destroying the Expositor, that his orders were executed without noise or tumult, that the proceeding resulting in his arrest was a malicious prosecution by Francis M. Higbee, that Higbee should, therefore, pay the costs of the suit, and that Joseph Smith should be honorably discharged from the accusations and from arrest. On the following morning Joseph Smith took his seat as chief justice of the municipal court, and the court proceeded to consider the habeas corpus petitions of Joseph’s codefendants on the riot charges. After hearing testimony, the court ordered that these defendants also be honorably discharged, and that

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*6 Smith 453. The Illinois statute then in effect provided:

If two or more persons actually do an unlawful act with force or violence against the person or property of another, with or without a common cause of quarrel, or even do a lawful act, in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a riot, and on conviction, shall severally be fined not exceeding two hundred dollars, or imprisoned not exceeding six months.


*6 Smith 453.

*2 The Illinois statutes on this subject provided that the warrant should direct the officer to bring the prisoner “before the officer issuing said warrant, or in case of his absence, before any other judge or justice of the peace,” Ill. Rev. Stat. § 3, at 220 (1833), or “before the judge or justice of the peace who issued the warrant, or before some other justice of the peace of the same county,” Ill. Rev. Stat. § 7, at 222 (1833). Under these provisions, and under the language of the warrant itself, text accompanying note 10 supra, the constable would have had authority to take the prisoners before a justice of the peace in Nauvoo. But he was not compelled to do so, and returning them to the Carthage justice was probably the normal practice.

*2 Habeas corpus is defined and discussed in text accompanying note 106 infra.

*6 Smith 454–56.

*1 The question of the proper scope of inquiry under habeas corpus is discussed in text following note 125 infra.

*6 Smith 456–58.
Francis M. Higbee pay the costs. Thereupon, execution was issued against Higbee for the amount.\textsuperscript{16}

To the non-Mormons of Hancock County these actions of the municipal court, which were of questionable legality if interpreted to have the significance that the Nauvoo authorities assigned to them,\textsuperscript{17} added the insult of defiance to the injury of riot and gave substantial impetus to the furious citizens’ groups who met in nearby Warsaw and Carthage and called for “extermination.”\textsuperscript{18}

As the week progressed, the magnitude of the crisis became increasingly apparent. In a letter dated June 16, Joseph Smith advised Governor Ford of sworn information he had received that an attempt was going to be made to exterminate the Mormons by force of arms.\textsuperscript{19} He also placed the Nauvoo Legion at the Governor’s service to quell the insurrection and asked the Governor to come to Nauvoo to investigate the situation in person. On June 18, before any reply had been received from Ford, Joseph Smith declared the city of Nauvoo under martial law in view of the reports of mobs organizing to plunder and destroy the city.\textsuperscript{20}

Perhaps because of the rising tide of resentment against the Mormon leaders, and perhaps because of some doubts about the legality of the municipal court’s action on the riot charges, the Nauvoo authorities consulted the state circuit judge, Jesse B. Thomas. He advised them that in order to satisfy the people they should be retried before another magistrate who was not a member of their Church.\textsuperscript{21} This advice clearly explains the fact that on Monday, June 17, a citizen named W. G. Ware signed a complaint for riot in the destruction of the \textit{Expositor} against Joseph Smith and the other parties named in the Higbee complaint. Daniel H. Wells, a non-Mormon justice of the peace residing near Nauvoo, thereupon had the defendants arrested and brought before

\textsuperscript{16} \textit{Id.} at 461.

\textsuperscript{17} Joseph Smith apparently thought that the hearing before the municipal court was a final acquittal on the merits of the riot charge, since he later argued that a second trial would deprive him of his right not to be put in jeopardy twice for the same offense. Text following note 25 \textit{infra}; \textit{6 Smrrx} 498, 582. On habeas corpus, however, a court could inquire into guilt or innocence only for the limited purpose of determining whether there was probable cause for the arrest. See text following note 125 \textit{infra}.

\textsuperscript{18} More importantly, the municipal court of Nauvoo had no criminal jurisdiction. The aldermen who composed the municipal court were commissioned individually as justices of the peace, III. Laws 1840, § 16, at 55, but justices of the peace only had authority to hold criminal trials in cases involving assault, assault and battery, and affrays. III. Rev. Stat. § 1, at 402 (1833). Consequently, in a case involving a charge of riot, the aldermen (individually or as a body) could hold what amounted to a preliminary examination — and in their joint capacity as the municipal court of Nauvoo they could issue a writ of habeas corpus and discharge a prisoner from the custody of the arrest warrant if there was no probable cause for his arrest; but they could not finally determine a riot case by a judgment of acquittal.

\textsuperscript{19} It is clear, in any event, that the municipal court had no authority to impose liability for costs and to issue execution against Francis Higbee in a proceeding where he had no notice and opportunity to be heard. And it is also clear that it was highly inadvisable, if not illegal, for Joseph Smith to sit as a judge in the trial of his codefendants.

\textsuperscript{20} \textit{6 Smrrx} 463–65.

\textsuperscript{21} \textit{Id.} at 480.

\textsuperscript{22} \textit{Id.} at 497.

\textsuperscript{23} \textit{Id.} at 498, 582.
him for trial. After hearing numerous witnesses and counsel for both prosecution and defense, Wells gave the prisoners a judgment of acquittal.

This second trial seems to have been no more satisfactory to the anti-Mormons than the first. During the remainder of the week there were reports of mobs forming around Nauvoo and charges of violence on each side. The Nauvoo Legion began entrenching the city against attack. On Saturday, June 22, Governor Ford, who had come to Carthage because of the crisis, sent a rider to Joseph Smith with a letter declaring that nothing short of trial before the same justice by whom the original writ was issued would “vindicate the dignity of violated law and allay the just excitement of the people.” Joseph Smith’s reply reminded the Governor that the defendants had already been tried and acquitted by a justice of the peace for the riot offense, so that a second trial would rob them of their constitutional right not to be twice put in jeopardy of life and limb for the same offense. He also expressed willingness to stand another trial, but reluctance to rely on the Governor’s promised protection because he felt that the Governor could not control the mob and because additional writs were reportedly issued against the defendants that could be used to drag them from place to place “till some bloodthirsty villain could find his opportunity to shoot us.” Subsequent events proved these fears prophetic.

On Sunday, June 23, a posse sent by the Governor arrived in Nauvoo to arrest the prophet, but was unable to find him. He had crossed the river to Montrose, Iowa, during the night, contemplating a flight to the West. He returned to Nauvoo that evening, however, and sent the Governor a message offering to give himself up on the following day in reliance on the Governor’s pledge of protection.

On Tuesday morning, June 25, in Carthage, Illinois, Joseph and Hyrum Smith voluntarily surrendered themselves to the constable who had attempted to bring them to Carthage on the original riot warrant. Almost immediately thereafter, they were arrested also on a warrant sworn out by a private citizen for treason against the State of Illinois for declaring martial law in Nauvoo. This second arrest had unfortunate consequences for the prisoners, because they had much less chance of obtaining a release on bail from the capital offense of treason than from the relatively minor charge of riot. That after-

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22 Id. at 487.
23 Id. at 488-91. Wells had no authority to render a judgment of acquittal. See note 17 supra. Later, after Joseph Smith’s death, some of the defendants were again tried for riot, this time before a jury in the circuit court. All were acquitted. Ford, HISTORY OF ILLINOIS 368–69 (1854).
24 6 SMITH 504–24, 528, 531–32.
25 Id. at 536.
26 Id. at 540. “No person shall, for the same offense, be twice put in jeopardy of his life or limb . . . .” ILL. CONST. art. VIII, § 11 (1818). It is interesting to note that Joseph Smith only claimed to have been tried once for the charge. He did not rely on the original trial before the municipal court. See note 17 supra.
27 6 SMITH 540.
28 Id. at 548–49.
29 Id. at 550.
30 Ford, HISTORY OF ILLINOIS 337 (1854); 6 SMITH 561–62.
31 See note 37 infra.
noon the prisoners were taken before a Carthage justice of the peace, Robert F. Smith, who was also the captain of the Mormon-hating Carthage militia, and not the justice who had issued the original writ. At this preliminary hearing the justice fixed 500 dollars bail for each defendant on the riot charge. However, when this amount was promptly posted, the justice adjourned the proceedings and left the courthouse without calling the treason case, thus compelling the prisoners to remain in the custody of the constable under arrest for that offense. Later that evening the prisoners were hustled into the Carthage County jail by the constable and militia under Robert F. Smith's command pursuant to a mittimus which recited that they had been examined on the treason charge but that trial had been postponed by reason of the absence of a material witness — Francis M. Higbee. The statement in the mittimus was false; the examination had not been held; and the prisoners were thus committed for treason without an opportunity to be heard on the charges.

On the following day, June 26, the prosecution sought to remedy the defect in the mittimus by again bringing the prisoners before Robert F. Smith for examination on the treason charge. None of defendants' witnesses were present, however, so defendants requested and the court granted a one-day continuance and subpoenas for witnesses in Nauvoo. No question of bail was raised, apparently because a justice of the peace could not admit to bail persons charged with treason. Later that evening Robert F. Smith, without any consultation with the defendants or their counsel, altered the return day on the subpoenas to June 29, thus assuring that the defendants would be imprisoned without a hearing at least until that day.

On the morning of June 27, 1844, Governor Ford released most of the 1200 to 1300 militiamen then under arms in Carthage. But instead of ordering them to march to their homes for dismissal, he disbanded them in or near Carthage. To guard the prisoners at the jail, Ford selected the Carthage Grays, the company commanded by Robert F. Smith that had been so notorious for their uproarious conduct and for their threats toward the prisoners. With a few remaining troops the Governor then marched to Nauvoo, where he delivered a speech berating the inhabitants for civil disobedience.

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25 Smith 567. Joseph Smith's enemies, who castigated him for blending civil, military, and ecclesiastical authority in Nauvoo, apparently did not hesitate to make use of some of these same combinations when they had him in their power.
26 See id. at 568.
27 A mittimus is a written order from a court or magistrate commanding an officer to convey the named person to prison and commanding the jailer to receive and safely keep him until he shall be delivered by due course of the law.
28 Smith 569-70; 7 id. at 85.
29 Id. at 596-97.
30 Ill. Rev. Stat. § 3, at 221 (1833). Justices and judges of the supreme and circuit courts seem to have had power to issue bail in treason cases. Ill. Rev. Stat. § 3, at 220 (1833). The Illinois Constitution, art. VIII, § 13 (1818), stated “that all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption is great...”
31 Smith 600.
32 Id. at 606-07. By these acts, according to one historian, Ford “laid himself wide open for all time to the charge by pro-Mormons of collaborating with the assassination of the Smith brothers.” Gayler, Governor Ford and the Death of Joseph and Hyrum Smith, 50 J. ILL. HISTORICAL SOCY 391, 400 (1957).
Shortly after five o'clock on the afternoon of June 27, a mob of about a hundred men with blackened faces, apparently composed largely of members of the disbanded militia and perhaps also including some of the proprietors of the *Expositor*, overcame the token resistance of the militia guards, and shot Joseph and Hyrum Smith to death in their room in the jail. Two fellow prisoners survived to record the brutal details. This concluded the inexorable chain of events set in motion by the destruction of the *Nauvoo Expositor*.

II. THE *Expositor*

Nauvoo citizens had been notified of the coming of the *Expositor* by a prospectus issued May 10, 1844. Sylvester Emmons, a non-Mormon member of the Nauvoo City Council, was named editor, and William and Wilson Law, Francis and Chauncey Higbee, Robert and Charles Foster, and Charles Ivins signed as publishers. The prospectus declared that a part of the newspaper’s columns would be devoted to advocating free speech, religious tolerance, unconditional repeal of the Nauvoo Charter, disobedience to political revelations, hostility to any union of church and state, censure of gross moral imperfections wherever found, and, “in a word, to give a full, candid, and succinct statement of FACTS AS THEY REALLY EXIST IN THE CITY OF NAUVOO....” The publishers further declared their intent to “use such terms and names as they deem proper, when the object is of such high importance that the end will justify the means.”

The first and only issue of the *Nauvoo Expositor*, the four-page issue of Friday, June 7, 1844, was more sensational than distinguished. While the paper contained a short story, some poetry, a few news items (mostly copied from eastern newspapers), and a scattering of ads, it was principally devoted to attacking Joseph and Hyrum Smith and their unnamed associates in the Church and in the city government. With “lame grammar and turgid rhetoric” that John Hay termed dull or laughable, the paper assailed the Mormon leaders on three fronts: religion, politics, and morality. A summary of the most prominent charges will be set forth here as a basis for the discussion to follow.

A. Religion

The religious items are all contained in a “Preamble, Resolutions and Affidavits, of the Seceders from the Church at Nauvoo,” which, an editor’s note explains, is included in order to give the public the facts about the schism in the Church of Jesus Christ of Latter-day Saints. This lengthy document

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*See 7 Smith 143–46.
1 Id. at 616–22.
2 Id. at 444.
3 Ibid.
4 The excerpts from the *Nauvoo Expositor* that appear in the text were taken from an original copy in the Illinois State Historical Library at Springfield, Illinois, where it was said that there are only two known original copies in existence.
6 Nauvoo Expositor, June 7, 1844, p. 1, col. 5. The “Preamble,” “Resolutions,” and “Affidavits” were reprinted in the Salt Lake Tribune, Oct. 6, 1910, p. 4; the “Preamble” and “Resolutions” were quoted at length in the Deseret Evening News, Dec. 21, 1869.
commences with an affirmation that the gospel as originally taught by Joseph Smith is true and that its pure principles would invigorate, enoble, and dignify man. However, it proclaims that Joseph Smith is a fallen prophet who had introduced many doctrines that were “heretical and damnable in their influence.” It was resolved that, inasmuch as Joseph and Hyrum Smith and other officials unnamed had “introduced false and damnable doctrines into the Church, such as a plurality of Gods above the God of this universe, and his liability to fall with all his creations; the plurality of wives, for time and eternity; the doctrine of unconditional sealing up to eternal life, against all crimes except that of shedding innocent blood . . .,” they be denounced as apostates from the doctrine of Jesus. The allegation about plurality of wives was buttressed by the affidavits of William and Jane Law and Austin Cowles to the effect that in 1843 Hyrum Smith had read them a written document which he said was a revelation from God sanctioning this practice. The affiants’ descriptions of the revelation were very brief, but, insofar as they were specific about its contents, they gave generally accurate descriptions of portions of the revelation on plural marriage, later published in the Church's Doctrine and Covenants. The “Resolutions” also proposed that all persons presently preaching false doctrines come and make satisfaction and have their licenses renewed, presumably a bid for allegiance to the church recently organized by the seceders.

B. Politics

At the political level, the principal complaint was the Mormon leaders’ attempts to unite church and state. Various editorial notes and news articles described these attempts and the “Resolutions” condemned them. The specific complaints were three in number.

First, the “Preamble” speaks vaguely of “examples of injustice, cruelty and oppression” accomplished by “the inquisitorial department organized in Nauvoo, by Joseph and his accomplices . . . of the most pernicious and diabolical character that ever stained the pages of the historian.” If suffered to persist, the paper predicted, this inquisition “will prove more formidable and terrible

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47 Nauvoo Expositor, June 7, 1844, p. 1, col. 6.
48 Id. at 2, col. 3.
49 Id. col. 4.
50 Doctrine and Covenants § 132 (scripture of the Church of Jesus Christ of Latter-day Saints).
51 Nauvoo Expositor, June 7, 1844, p. 2, col. 4.
52 Ibid. The gravamen of these complaints is well represented in the following passage quoted from the Quincy Whig:

It is not so much the particular doctrines, which Smith upholds and practices, however abominable they may be in themselves, that our citizens care about — as it is the anti-republican nature of the organization, over which he has almost supreme control — and which is trained and disciplined to act in accordance with his selfish will. The spectacle presented in Smith's case of a civil, ecclesiastical and military leader, united in one and the same person, with power over life and liberty, can never find favor in the minds of sound and thinking Republicans [sic].

Id. at 4, col. 3.
53 Id. at 2, col. 3.
to those who are found opposing the iniquities of Joseph and his associates, than even the Spanish Inquisition did to heretics as they termed them." 58 Perhaps as an example of this inquisition — the only specific one given in the paper — the next paragraph alleges that the procedure used and the result reached in the excommunication of William and Wilson Law and R. D. Foster was contrary to Church law.

Second, an "Introductory" by the editor bitterly protested the Nauvoo authorities' use of the writ of habeas corpus to defy the law by inquiring into the guilt or innocence of prisoners and by releasing prisoners arrested or held in custody pursuant to the authority of the United States or the State of Illinois.55

The third specific complaint on the subject of politics related to the candidacies of Joseph and Hyrum. Excerpts from Joseph's letter to Henry Clay and from his Views on the Powers and Policy of the Government of the United States were quoted and ridiculed.56 The "Resolutions" of the seceders submitted that this bid for political power was not pleasing to God,57 and an open letter to the citizens of Hancock County by Francis M. Higbee argued that the citizens of the county should defeat the Smiths on sound self-interest, citing the candidates' alleged immoralities (discussed later herein), Joseph's being under indictment for adultery and perjury, the candidates' defiance of the law by using habeas corpus to rescue fugitives from justice, and the dangerous tendencies of their attempts for civil power.58 Both the editor's "Introductory" and Higbee's letter coupled opposition to the candidates with fervent pleas that the voters elect men who would, as Higbee put it, "go for the unconditional repeal of the Nauvoo Charter . . . whether they be Whig or Democrat . . . " 59 The "Introductory" is cast in terms of an appeal to "the old citizens," who had settled and organized the county and whose rights the Nauvoo combination allegedly had marked for "utter destruction." The editor did not openly advocate mob action, but he did not let that possibility remain unnoticed:

The question is asked, will you bring a mob upon us? In answer to that, we assure all concerned, that we will be among the first to put down anything like an illegal force being used against any man or set of men. . . . [But] if it is necessary to make show of force, to execute legal process, it will create no sympathy in that case to cry out, we are mobbed.60

C. Morality

The third and most pervasive theme was the alleged immorality of Joseph and his associates, of whom Hyrum was the only one specifically named. Some of these charges related to financial affairs or vague implications of murderous conduct. Most concerned sexual behavior.

58 Ibid.
55 Id. col. 6. See the discussion of this subject in text following note 109 infra.
56 Id. at 3, col. 2. The quoted material appears in 6 Saints 207–08, 376–77.
57 Nauvoo Expositor, June 7, 1844, p. 2, col. 4.
58 Id. at 3, col. 4.
59 Id. col. 5.
60 Id. at 2, col. 5.
The "Resolutions" of the seceders from the Church made serious charges of misuse of Church funds, of which the following is representative:

[W]e therefore consider the injunction laid upon the saints compelling them to purchase property of the Trustee in trust for the Church, is a deception practiced upon them; and that we look upon the sending of special agents abroad to collect funds for the Temple and other purposes as a humbug practiced upon the saints by Joseph and others, to aggrandize themselves, as we do not believe that the monies and property so collected, have been applied as the donors expected, but have been used for speculative purposes, by Joseph, to gull the saints the better on their arrival at Nauvoo, by buying the lands in the vicinity and selling again to them at tenfold advance . . . . 61

The general charges of knavery were numerous, varied, and unrestrained. Higbee's letter about the political candidates said this of Joseph:

Query not then for whom you are voting; it is for one of the blackest and basest scoundrels that has appeared upon the stage of human existence since the days of Nero, and Caligula. . . . Support not that man who is spreading death, devastation and ruin throughout your happy country like a tornado. 62

The Higbee letter concluded its opposition to Hyrum Smith by saying: "We want no base seducer, liar and perjured representative, to represent us in Springfield . . . ." 63 In relation to a letter (not quoted in the Expositor) that J. H. Jackson (an associate of the Expositor publishers) was said to have sent to the Warsaw Signal about the Mormon prophet, an editor's note states:

...It will be perceived that many of the most dark and damnable crimes that ever darkened human character, which have hitherto been to the public, a matter of rumor and suspicion, are now reduced to indisputable facts. We have reason to believe, from our acquaintance with Mr. Jackson, and our own observation, that the statements he makes are true; and in view of these facts, we ask, in the name of heaven, where is the safety of our lives and liberties, when placed at the disposal of such heaven daring, hell deserving, God forsaken villains. Our blood boils while we refer to these blood thirsty and murderous propensities of men, or rather demons in human shape, who, not satisfied with practising their dupes upon a credulous and superstitious people, must wreak their vengeance upon any who may dare to come in contact with them. 64

The reference in the "Preamble" to doctrines "taught secretly, and denied openly, (which we know positively is the case)" 65 was undoubtedly a reference to the doctrine of polygamy. This subject was referred to repeatedly in the paper, sometimes by implication and sometimes directly. Emmons' editorial "Introductory" declared:

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61 Id. col. 4.
62 Id. at 3, col. 5.
63 Ibid.
64 Id. col. 3.
65 Id. at 1, col. 6.
That there does exist an order of things with the systematic elements of organization in our midst—a system which, if exposed in its naked deformity, would make the virtuous mind revolt with horror; a system in the exercise of which lays prostrate all the dearest ties in our social relations—the glorious fabric upon which human happiness is based—ministers to the worst passions of our nature, and throws us back into the benighted regions of the dark ages, we have the greatest reason to believe.66

“We are earnestly seeking,” the “Preamble” declares, “to explode the vicious principles of Joseph Smith, and those who practice the same abominations and whoredoms . . . . It is absurd for men to assert that all is well, while wicked and corrupt men are seeking our destruction, by a perversion of sacred things; for all is not well, while whoredoms and all manner of abominations are practiced under the cloak of religion.”67

“It is a notorious fact,” the “Preamble” continues, as its charges begin to get specific, “that many females in foreign climes . . . have been induced, by the sound of the gospel, to forsake friends, and embark upon a voyage . . . as they supposed, to glorify God . . . . But what is taught them on their arrival at this place?” They are soon visited and told that there are great blessings in store for the faithful and that “brother Joseph will see them soon, and reveal the mysteries of Heaven to their full understanding . . . .” Later, the “harmless, inoffensive, and unsuspecting creatures” are requested to meet brother Joseph or some of the twelve apostles at some isolated spot. There, the “Preamble” alleges, the faithful follower of Joseph is sworn to secrecy upon a penalty of death and then told that God has revealed

that she should be his [Joseph’s] Spiritual wife; for it was right anciently, and God will tolerate it again: but we must keep those pleasures and blessings from the world, for until there is a change in the government, we will endanger ourselves by practicing it — but we can enjoy the blessings of Jacob, David, and others, as well as to be deprived of them, if we do not expose ourselves to the law of the land. She is thunderstruck, faints, recovers, and refuses. The Prophet dams her if she rejects. She thinks of the great sacrifice, and of the many thousand miles she has traveled over sea and land, that she might save her soul from pending ruin, and replies, God’s will be done, and not mine. The Prophet and his devotees in this way are gratified. The next step to avoid public exposition from the common course of things, they are sent away for a time, until all is well; after which they return, as from a long visit.68

The “Preamble” then goes into a lengthy and detailed description of the injured feelings, the broken health, and the eventual untimely death of those “whom no power or influence could seduce, except that which is wielded by some individual feigning to be God . . . .” — no one knowing the cause “except the foul fiend who perpetrated the diabolical deed.”69

66 Id. at 2, col. 5.
67 Id. at 1, col. 6.
68 Id. at 2, col. 1.
69 Ibid.
The account continues with this lament:

Our hearts have mourned and bled at the wretched and miserable condition of females in this place... turned upon a wide world, fatherless and motherless, destitute of friends and fortune; and robbed of that which nothing but death can restore.\footnote{70}

One of the most often repeated themes in the *Expositor* was the promise that future issues would be unrestrained in their exposure. The editor's "Introductory" declared:

We intend to tell the whole tale and by all honorable means to bring to light and justice, those who have long fed and fattened upon the purse, the property, and the character of injured innocence; — yes, we will speak, and that too in thunder tones, to the ears of those who have thus ravaged and laid waste fond hopes, bright prospects, and virtuous principles, to gratify an unhallowed ambition.\footnote{72}

And, so also from the "Preamble":

But Lo! it is sudden day, and the dark deeds of foul fiends shall be exposed from the house-tops. A departed spirit, once the resident of St. Louis, shall yet cry aloud for vengeance.

It is difficult — perhaps impossible — to describe the wretchedness of females in this place, without wounding the feelings of the benevolent, or shocking the delicacy of the refined; but the truth shall come to the world.\footnote{72}

The foregoing summary is representative of the worst that the *Expositor* had to offer. Comment on this material will follow a review of the Nauvoo authorities' reaction to the paper.

III. THE SUPPRESSION

The first issue of the *Expositor* produced a furious reaction from the citizens of Nauvoo, which, as one observer reported at the time, "raised the excitement to a degree beyond control, and threatened serious consequence." \footnote{73} Joseph Smith later gave this explanation to the Governor:

[C]an it be supposed that after all the indignities to which we have been subjected outside, that this people could suffer a set of worthless vagabonds to come into our city, and right under our own eyes and protection, vilify and calumniate not only ourselves, but the character of our wives and daughters, as was impudently and unblushingly done in that infamous and filthy sheet? There is not a city in the United States that would have suffered such an indignity for twenty-four hours.

Our whole people were indignant, and loudly called upon our city authorities for redress of their grievances, which, if not attended to they themselves would have taken the matter into their own hands, and have summarily punished the audacious wretches, as they deserved.\footnote{74}
The temper of the times suggests that the prospect of mob action against the Expositor press was real and not merely speculative. One historian has said that there were sixteen instances of violence in Illinois between 1832 and 1867 to presses or editors who dared to express highly controversial views contrary to those generally held in the community.\textsuperscript{75} Perhaps the best known incidents were those involving Elijah Lovejoy, who had three different printing presses destroyed at Alton, Illinois, between 1835 and 1837 and who was finally murdered by a proslavery mob that destroyed his fourth press.\textsuperscript{76} There were at least seven recorded instances of mob violence against newspapers in other states in the 1830's and 1840's.\textsuperscript{77}

On Saturday, June 8, 1844, the day following issuance of the Expositor, the Nauvoo City Council met for a total of six and a half hours in two sessions. The council then adjourned until Monday, June 10, when it met for an additional seven and a half hours.\textsuperscript{78} A "brief synopsis" of the council proceedings, giving a detailed account of what took place, was published.\textsuperscript{79}

Most of Saturday was spent discussing the character and conduct of the various publishers of the Expositor, particularly William Law and Robert Foster. Various citizens and councilors gave testimony that these men were guilty of oppressing the poor, counterfeiting, theft, conspiracy to murder, seduction, and adultery. The council also suspended Councilor Emmons for slandering that body.\textsuperscript{80} On Monday additional witnesses were heard on the immorality of the Expositor publishers.\textsuperscript{81} Then the council turned its attention to the Expositor itself.

Mayor Joseph Smith first expressed a concern, often repeated in the council deliberations, that what the opposition party was trying to do by the paper was to destroy the peace of Nauvoo, excite its enemies, and raise a mob to bring death and destruction upon the city.\textsuperscript{82} After reading the editor's "Introductory" aloud to the council, he argued that the paper was "a nuisance — a greater nuisance than a dead carcass," and urged the council to make some provision for removing it.\textsuperscript{83} This was not the first time that the city council had been urged to exercise the power given in its legislative charter "to declare


\textsuperscript{76} See Gill, Tide Without Turning (undated).

\textsuperscript{77} Mott, American Journalism 263, 307 (3d ed. 1941).

\textsuperscript{78} 6 Smith 430, 432.

\textsuperscript{79} The synopsis was published as an extra edition by the Nauvoo Neighbor, a Mormon newspaper. It is reproduced in Gregor, The Prophet of Palmyra, 245–68 (1890) and in 6 Smith 434–48. Councilor John Taylor's brief account of the proceedings appears in 7 id. 61–63.

\textsuperscript{80} 6 Smith 435–39.

\textsuperscript{81} Id. at 439–42. Since the scandalous testimony before the council regarding the private lives of the Expositor publishers was published by a Mormon newspaper, note 79 supra, the council was at least indirectly responsible for a newspaper issue as defamatory as the one they protested.

\textsuperscript{82} Id. at 438, 442.

\textsuperscript{83} Id. at 441.
what shall be a nuisance, and to prevent and remove the same.” 84 In October 1841, before Joseph Smith became mayor, a grog shop had been declared a nuisance and removed by order of the city council. 85

The Expositor prospectus was next studied, after which the mayor read Higbee’s letter aloud to the council. Hyrum Smith then announced himself in favor of declaring the Expositor a nuisance. 86 Councilor John Taylor said that no city on earth would bear such slander and that he was in favor of active measures. He read from the United States Constitution on freedom of the press and concluded: “We are willing they should publish the truth; but it is unlawful to publish libels. The Expositor is a nuisance, and stinks in the nose of every honest man.” 87

After the mayor read the provisions of the Illinois Constitution on the responsibility of the press for its constitutional liberties, 88 Councilor Stiles read Blackstone’s definition of and comments on abatement of nuisances and declared himself in favor of suppressing any more slanderous publications. Hyrum Smith stated that the best way to suppress it was to smash the press and pi (scatter) the type. Alderman Bennett pointed to a libel in the paper concerning the municipal court’s action in the case of Jeremiah Smith, and said he considered the paper a public nuisance. 89

Councilor Warrington, a non-Mormon, considered the proposed action rather harsh. He suggested assessing a heavy fine for libels and then proceeding to quiet the paper if it did not cease publishing libels. Hyrum Smith replied that, in view of the financial condition of the publishers, there would be little chance of collecting damages for libels. 90 Alderman Elias Smith favored putting an end to the paper and “believed by what he had heard that if the City Council did not do it, others would.” 91 Other aldermen and councilors supported the proposition, urging that there was no reason to suppose that the publishers would desist if fined or imprisoned and that it was unwise “to give them time to trumpet a thousand lies.” 92 Councilor Phelps, a lawyer, then expounded on the Constitution, charter, and laws, and concluded that the power to declare a nuisance was one of the charter powers and that a resolution containing a declaration to that effect was all that was required. 93

So far as the synopsis discloses, the council spent a great deal of time discussing means of stopping the Expositor and of exposing the character of its

84 See text accompanying note 139 infra.
85 4 SMITH 442, 444.
86 6 id. at 445.
87 Ibid.
88 Ibid. The synopsis says this was ILL. CONST. art. VIII, § 12. This section number was probably a misprint, for § 12 merely states the common law axiom that there should be a remedy for every wrong. The one actually read to the council was probably § 22, which contains the provisions on free speech and free press. This provision is quoted in the text accompanying note 169 infra.
89 6 SMITH 445.
90 Id. at 446.
91 Ibid.
92 Ibid.
93 Id. at 447.
publishers, but very little time considering and refuting its contents. The synopsis does recite that the paper's representations about the doctrine and practice of plural marriage were denied, and that the councilors made numerous general references to the paper's libelous nature without, however, specifically identifying the offensive statements.

By far the most pervasive objection to the Expositor was the fear that seemed to haunt the council that, if allowed to continue, this paper would be the means of destroying the peace and happiness of the city by arousing mob violence against its inhabitants. The following is representative of this theme:

Councilor Phineas Richards said that he had not forgotten the transaction at Haun's Mill [where 30 Mormon men and boys were shot down in cold blood by a Missouri mob: 17 dead and 13 wounded], and that he recollected that his son George Spencer then lay in the well [where the dead had been buried hurriedly by the survivors]... without a winding-sheet, shroud or coffin. He said he could not sit still when he saw the same spirit raging in this place. He considered the publication of the Expositor as much murderous at heart as David was before the death of Uriah; was prepared to take stand; by the Mayor, and whatever he proposes; would stand by him to the last. The quicker it is stopped the better.

Finally, at about 6:30 p.m. on Monday, June 10, the council resolved that the issues of the Nauvoo Expositor and the printing office from whence it issued were "a public nuisance... and the Mayor is instructed to cause said printing establishment and papers to be removed without delay, in such manner as he shall direct." The mayor promptly ordered the marshal to "destroy the printing press from whence issues the Nauvoo Expositor, and pit the type of said printing establishment in the street, and burn all the Expositors and libelous handbills found in said establishment...." He also ordered the Nauvoo Legion to be in readiness to execute the city ordinances if the marshal should need its services.

By eight o'clock that evening, the marshal had made a return to the order. Accompanied by a large crowd of citizens and by a number of the militia, he had proceeded to the Expositor office, destroyed the press, and scattered the type as ordered.

According to the criminal charges soon filed against the principals in this action, the manner of execution of the council's order constituted a riot. This crime was committed when two or more persons did an unlawful act "with force or violence against the person of another" or did a lawful act "in a violent

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84 Id. at 441-42.
85 Id. at 443, 445-46.
86 Id. at 438, 442, 446. Alderman Orson Spencer declared: "Shall they be suffered to go on, and bring a mob upon us, and murder our women and children, and burn our beautiful city! No!" Id. at 446.
87 Id. at 447. See 3 id. at 182-87, 325-26 for an account of the Haun's Mill massacre.
88 6 id. at 448.
89 Ibid.
90 Ibid.
and tumultuous manner . . . .” 301 At the two subsequent trials for riot numerous witnesses, including several visitors from cities outside Illinois, testified without significant contradiction that the whole transaction was accomplished quietly and without noise or tumult. 302 The marshal demanded the press, Higbee refused, the marshal opened the door (one witness said he ordered it “forced,” another said “a knee was put against it,” another named a man who had opened it; several said there was little or no noise or delay at its opening), Higbee left the premises unhindered, and from seven to twelve men went inside and carried out the press and type. Except for one minor deviation, all witnesses also agreed that there was no violence, and that nothing was destroyed or damaged that did not pertain to the press. 303 The contemporaneous account of Charles A. Foster, one of the Expositor publishers, states that the police broke down the door with a sledge hammer “injuring the Building very materially,” but in other respects he does not contradict testimony given at trial. 304

IV. THE LEGALITY OF THE COUNCIL’S ACTION

A. An Evaluation of the Expositor Charges

The legality of the council’s action in suppressing the Expositor depends upon the nature of the charges in the Expositor and the reaction which the city councilors could reasonably conclude that they were likely to produce in the community and the surrounding areas. While a weighing of conflicting evidence on the truth or falsity of these charges is beyond the scope of this article, some of the charges involve facts that are essentially undisputed or interesting questions of law on which some opinion can be rendered. In addition, it is possible to make some fairly reliable surmises about the probable community reaction in and out of Nauvoo.

1. Politics. The Expositor’s general complaints about the union of the authority of church and state in Nauvoo were essentially true. Notwithstanding the presence of non-Mormons on the city council, the dominance of Mormon


303 Ibid. This account is also borne out by contemporary letters and an affidavit reproduced in id. at 468–70; 7 id. at 130. One witness, who said he was at work in the printing establishment on the night the press was destroyed, testified that some valuable papers and a desk belonging to Dr. Foster were destroyed. 6 id. at 489. On cross examination, however, he admitted that he simply “presumed” they were destroyed, and that he had no knowledge of the matter. Ibid. Several other witnesses, present during the time, swore that no desk or other property was carried out and destroyed. Id. at 490–91.

304 Charles A. Foster’s letter of June 10, 1844, to Thomas G. Sharp, the editor of the Warsaw Signal, reproduced here in part by permission of the Yale University Library, states that after two days in extra session, the Nauvoo City Council enacted an ordinance declaring the Nauvoo Expositor a nuisance and directed the police to destroy the press and all materials connected with it. The letter then states:

Accordingly, a company consisting of some, 200 men, armed & equipped, with Muskets, Swords, Pistols, Bowie-knives, Sledge Hammers & assisted by a crowd of several hundred minions, who volunteered their services on the occasion, marched to the building, & breaking the door open with a Sledge Hammer, commenced the work of desperation & destruction they tumbled the press & Materials into the Street & set fire to them & demolished the machinery with sledge Hammers & injuring the Building very materially.
Church leaders in every branch of government in the city and legion was beyond question. In protesting this condition, in urging its readers to vote against Joseph and Hyrum Smith in their election contests, and even in advocating repeal of the Nauvoo Charter, the Expositor was performing the traditional function of a free press. The name calling accompanying the Expositor's political advocacy was pretty rough, but not particularly unique in view of the prevailing style of political commentary of that day.\textsuperscript{105} However offensive this aspect of the newspaper's copy may have been to the individuals in power, it offered no conceivable justification for harassment, much less suppression.

The Expositor's most specific complaints against Joseph's and Hyrum's political conduct or their qualifications for office were the charges that they had defied the law by using the writ of habeas corpus: (a) to release prisoners held in the custody of state or federal authorities and (b) to try the guilt or innocence of parties who applied for the writ. An evaluation of these charges requires a discussion of the habeas corpus law in Illinois in 1844.

Honored as the "highest safeguard of liberty," the writ of habeas corpus was the command by which a court or judge required a person who had another in custody to produce the prisoner and explain the cause of his detention.\textsuperscript{106} In Illinois during the Nauvoo period, the law of habeas corpus was the common law, as modified by the Illinois Habeas Corpus Act of 1827 and supplementary legislation. These laws authorized the writ of habeas corpus to be issued by the Illinois Supreme Court, by various circuit courts, or by any of the judges of these courts or the masters in chancery.\textsuperscript{107} In addition — and this was the source of contention — the legislative charter of the city of Nauvoo gave its municipal court "power to grant writs of habeas corpus in all cases arising under the ordinances of the city council."\textsuperscript{108} The Expositor's complaint related to several instances where the Nauvoo court had issued this writ to bring before it prisoners in the custody of state or federal officers, held hearings on the prisoners' guilt or innocence, and ordered them discharged.\textsuperscript{109}

The legality of this action will be considered first from the standpoint of the special problems involved in issuing the writ for a federal prisoner. In terms of today's law, any attempt by a municipal court — the judicial arm of a lesser sovereignty deriving its authority from state law — to free prisoners held by the supreme sovereignty of federal law would clearly be illegal. But the assertion of state jurisdiction over federal prisoners was not an unusual phenomenon in a pre-Civil War society where the doctrine of nullification was still untested and where the extent of "states' rights" was still problematical. Indeed, courts that had ruled on the matter prior to 1844 were practically unanimous in the

\textsuperscript{105} See, e.g., MOTT, AMERICAN JOURNALISM 237, 255, 263, 310 (3d ed. 1941); MOTT, A HISTORY OF AMERICAN MAGAZINES 1741-1850, at 159-60 (1930); Truth's Advocate and Monthly Anti-Jackson Expositor, Jan.-Oct., 1821 (Cincinnati newspaper).

\textsuperscript{106} For a general discussion of the law of habeas corpus, particularly during this period, see Oaks, Habeas Corpus in the States — 1776-1865, 32 U. CHI. L. REV. 243 (1965).

\textsuperscript{107} Ill. Rev. Stat. § 1, at 322 (1833) (Habeas Corpus Act of 1827); Ill. Laws 1834-35, § 2, at 32 (masters in chancery, appointed in each county, authorized to issue habeas corpus).

\textsuperscript{108} Ill. Laws 1840, § 17, at 55.

\textsuperscript{109} The instances are described in note 124 infra.
opinion that state courts had the power to issue the writ of habeas corpus for persons held by federal officers. In 1858, a leading authority on habeas corpus law declared: "It may be considered settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States." Among the cases relied upon were recent decisions by the supreme courts of Ohio and Wisconsin holding that the courts of those states had properly issued their writs of habeas corpus for prisoners arrested by federal officers or tried, convicted, and imprisoned by federal courts. It was not until 1859, when the Supreme Court of the United States reversed the Wisconsin judgment in the leading case of Ableman v. Booth, that it was established that persons held in federal custody could not be freed by a writ of habeas corpus issued by a state court. Consequently, there was nothing in federal statutory or state common law that forbade a court like Nauvoo's that the state had authorized to issue the writ of habeas corpus from issuing the writ for a federal prisoner.

It is equally true, however, that there was nothing to prevent a state from voluntarily forbidding its courts to interfere with the custody of federal prisoners, and Illinois had done just that in the following provision of its Habeas Corpus Act of 1827:

Sec. 8. No person shall be discharged under the provisions of this act who is in custody under a commitment, for any offence exclusively cognizable by the courts of the United States, or by order, execution, or process issuing out of such courts, in cases where they have jurisdiction... Did this provision apply to the municipal court of Nauvoo? The Nauvoo authorities could argue forcefully that it did not. By its terms section 8 only applied to federal prisoners "discharged under the provisions of this act" — the Habeas Corpus Act of 1827, which only applied to habeas corpus issued by the supreme and circuit courts and their judges. The habeas corpus authority of the Nauvoo Municipal Court was granted by the Nauvoo Charter in 1840. Consequently, although the issue is not free from doubt, it can be urged that the prohibition in section 8, quoted above, qualified the habeas corpus power of the supreme and circuit courts and their judges, but not the habeas corpus powers of the Nauvoo Municipal Court. This argument is further reinforced by the fact that the Nauvoo Charter was granted some years after the Habeas Corpus Act, so that the terms of the charter should prevail in the event of any inconsistency, or at least should be construed with an eye to the fact that the general assembly was aware of its prior restriction on state habeas corpus for federal prisoners, and would have been explicit if it had meant to impose a

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110 For a thorough list of these cases see Oaks, supra note 106, at 275 nn.166 & 167. These decisions were discussed and approved in then-current editions of volume 1 of Chancellor Kent's influential Commentaries on American Law 400 (4th ed. 1840).
111 Hurd, Habeas Corpus 166 (1858).
112 In the Matter of Collier, 6 Ohio St. 55 (1856); In re Booth & Rycraft, 3 Wis. 157 (1855); In re Booth, 3 Wis. 1 (1854).
similar restriction on the Nauvoo court. For the reasons just discussed, there
seems to have been considerable basis for the contention that the Nauvoo
court could properly issue its writ of habeas corpus for a federal prisoner.

Since the city of Nauvoo derived its authority from state law, the question
whether the municipal court had jurisdiction over state prisoners was simply a
question whether the legislature had given the court that authority in the
Nauvoo City Charter. The relevant charter provision, giving the municipal
court "power to grant writs of habeas corpus in all cases arising under the
ordinances of the city council," might have been read narrowly so that the
court would only have power to issue the writ in those cases where the prisoner
was confined by the authority of the city of Nauvoo. That was the interpreta-
tion urged by Governor Ford and his predecessor, Governor Carlin.\textsuperscript{116} But this
was not the only permissible construction.

The habeas corpus provision could also be read more broadly to give the
court power to investigate any confinement, state or federal, within the city of
Nauvoo that was in violation of the terms of a valid ordinance of the city of
Nauvoo. During the summer and fall of 1842, when Missouri was striving
feverishly to extradite Joseph Smith, the Nauvoo authorities relied on this later
interpretation to enact an ordinance which provided that, whenever any per-
son should be "arrested or under arrest" in Nauvoo, he could be brought before
the municipal court by a writ of habeas corpus. The court was thereupon
required to "examine into the origin, validity and legality of the writ of process,
under which such arrest was made . . . ."\textsuperscript{116} Since this portion of the ordinance
does not seem to have exceeded the council's charter authority to make ordi-

\textsuperscript{115} 6 Smith 535; 5 id. at 154.

\textsuperscript{116} Id. at 88. The full text of the pertinent portions of this important ordinance reads as follows:

Sec. 1. Be it ordained by the city council of the city of Nauvoo, that in all cases
where any person or persons, shall at any time hereafter, be arrested or under
arrest in this city, under any writ or process, and shall be brought before the
municipal court of this city, by virtue of a writ of habeas corpus, the court shall
in every such case have power and authority, and are hereby required to
examine into the origin, validity and legality of the writ of process, under
which such arrest was made, and if it shall appear to the court, upon sufficient
testimony that said writ or process was illegal, or not legally issued, or did not
proceed from proper authority, then the court shall discharge the prisoner from
under said arrest; but if it shall appear to the court that said writ or process
had issued from proper authority, and was a legal process, the court shall then
proceed and fully hear the merits of the case, upon which said arrest was made,
upon such evidence as may be produced and sworn before said court, and shall
have power to adjourn the hearing, and also issue process from time to time,
in their discretion, in order to procure the attendance of witness, so that a fair
and impartial trial and decision may be obtained in every such case.

Sec. 2. And be it further ordained that if upon investigation it shall be proven
before the municipal court, that the writ or process has been issued, either
through private pique, malicious intent, or religious or other persecution, false-
hood or misrepresentation, contrary to the constitution of this state, or the Con-
stitution of the United States, the said writ or process shall be quashed and
considered of no force or effect, and the prisoner or prisoners shall be released
and discharged therefrom.

\textit{Id}. at 87-88. This ordinance replaced a similar but briefer one enacted a month earlier.
\textit{Id}. at 57.
tion, convenience and cleanliness of said city,"\(^\text{117}\) it probably offers a valid basis for the issuance of the writ of habeas corpus if the broader construction of the charter's habeas corpus powers is the correct one.\(^\text{118}\)

The type of city government created in the Nauvoo Charter suggests that the legislature contemplated a wider use of the unique habeas corpus power granted to the municipal court than simply challenging the validity of confinements by the authority of the city of Nauvoo. The legislative charter provided that the municipal court should consist of the mayor and aldermen of the city,\(^\text{119}\) the same individuals who would normally be responsible for the arrest and confinement of anyone imprisoned under the authority of the city. Thus, if imprisonments brought about by its own membership were the only kinds of official restraints that the municipal court could examine by habeas corpus, the habeas corpus power conferred in the charter would be practically meaningless. In this view, the charter must contemplate that the municipal court's habeas corpus power be available to review some confinements other than those initiated by the membership of the municipal court itself.

In addition, the broad construction of the city's habeas corpus powers as permitting a challenge of confinements by state or federal authority is more consonant with the view then prevailing that the legislature had been extremely generous in the powers it granted in the Nauvoo City Charter. The session of the General Assembly of Illinois that granted the Nauvoo Charter seems to have deliberately attempted to create the impression that the city lawmakers were not to be inhibited by state or federal law.\(^\text{120}\) The charter gave the city

\(^\text{117}\) Ill. Laws 1840, § 11, at 54.

\(^\text{118}\) A later ordinance on habeas corpus, passed November 14, 1842, undoubtedly exceeded the charter authority as to the range of the municipal court's writ. This lengthy ordinance, which for the most part simply enacted the provisions of the Illinois Habeas Corpus Act of 1827 as a city ordinance, purported to give the municipal court power to issue the writ of habeas corpus for "any person or persons . . . committ[ed] or detained for any criminal or supposed criminal matter." Apparently without regard to whether they were detained in Nauvoo or even in the state of Illinois. In a speech delivered in June 1843, Joseph Smith is quoted as saying that the municipal court "has all the power to issue and determine writs of habeas corpus within the limits of this state . . . ." Roberts, *Introduction to the Law* at xxii. In another more complete version of the same speech, he is quoted as saying "within the limits of this city . . . ." 5 Smith at 466. See id. at 289, 463–73 for a discussion by Joseph Smith of the legal basis for the issuance of the writ of habeas corpus by the Nauvoo Municipal Court, which he said "had more power than any other court in the state . . . ." Id. at 473. See also Roberts, *Introduction to the Law* at xxii–xxiv.

\(^\text{119}\) Another possible point of illegality was the provision of the earlier ordinance, quoted in note 116 supra, that authorized the court (if the warrant was found legal) to "proceed and fully hear the merits of the case, upon which said arrest was made . . . ." This scope of review was perfectly acceptable if it merely meant that the court hearing the habeas corpus petition should determine whether there was probable cause for the arrest. See note 128 infra. If it meant to authorize the municipal court to hold the final trial on the merits of the case it was probably illegal since the general assembly had given the municipal court no criminal jurisdiction. See generally note 17 supra.

\(^\text{120}\) Ill. Laws 1840, § 17, at 55.

\(^\text{121}\) In his *History of Hancock County* 274 (1880), Thomas Gregg wrote that the Nauvoo Charter seemed to have been "contrived to give the Mormons a system of government so far as possible independent of the rest of the state," for which it purposely omitted the charter provision "guarding against infringement of state or federal law" even though such a provision was "in all other charters granted at that session of the General Assembly . . . ." It is true that although the Nauvoo Charter had the usual provisions against ordinances repugnant to the state or federal constitutions, Ill. Laws 1840, § 11, at 54, § 13, at 55, it did not have any provision against ordinances infringing state
such extraordinary powers that Governor Ford termed it "unheard of" and wrote that its provisions "seemed to give them power to pass ordinances in violation of the laws of the State, and to erect a system of government for themselves." In view of this popular (and adversary) appraisal of the scope of the charter powers, the better construction of the charter provision on habeas corpus jurisdiction would seem to have been the broader one adopted by the Nauvoo authorities.

Governor Ford conceded that the officials of Nauvoo "had been repeatedly assured by some of the best lawyers in the State who had been candidates for office before that people, that it [the municipal court] had full and competent power to issue writs of habeas corpus in all cases whatever." Historians have usually attributed the lawyers' advice to their ingratiating attempts to win political favor with the Mormons. This prospect may have motivated the counselors, but the foregoing discussion shows that their advice had considerable support in the law of that time. The better construction of the charter provision gave the municipal court authority to issue its writ of habeas corpus for any confinement within the limits of the city — state or federal — that was in violation of any valid ordinance of the city council. The Expositor's first criticism of the Nauvoo court's habeas corpus actions was, therefore, legally unjustified.

The Expositor's second complaint about the Nauvoo writ of habeas corpus — that the Nauvoo authorities defied the law by using habeas corpus to try the guilt or innocence of parties who applied for the writ — was also unfounded. These complaints concern instances wherein individuals held under warrants of arrest in Nauvoo were given a writ of habeas corpus to bring them before the municipal court, which held a hearing upon their cases and gave them discharges. A case in point, although obviously not the case specifically complained of by the Expositor, was the action of the municipal court in holding a hearing and releasing Joseph Smith and his codefendants from the custody of the Carthage marshal who had arrested them in Nauvoo for riot in the suppression of the Expositor.

or federal law, even though most of the other acts incorporating cities or towns during that session of the general assembly had such a provision. Ill. Laws 1840, § 5, at 58 (Quincy), § 4, at 318 (Macomb), § 7, at 323 (Galesburg), § 9, at 336 (Marion), § 7, at 345 (Trenton), § 8, at 350 (Rock Island).


123 Ford, History of Illinois 325 (1854). See 5 Smith 466–68, 471–73. Another lawyer, adverse to the people of Nauvoo, also gave this opinion. Id. at 338–39.


125 Joseph Smith's journal notes the following instances: 5 id. at 461–74 (Joseph Smith released from Governor's extradition warrant) ; 6 id. at 418–22 (Jeremiah Smith released from custody of two different federal marshals acting under writs issued by federal district judge). The court also used the writ to free persons seized under civil process. Id. at 80, 286.

126 Discussed in text following note 12 supra.
But it is apparent that this action and most, if not all, of the others complained of were perfectly legal uses of the writ of habeas corpus.

Under Illinois law, typical of the state law of that period, a person who had been arrested was promptly taken before a judicial officer — typically a justice of the peace — for an examination to determine "the truth or probability of the charge exhibited against such prisoner or prisoners, by the oath of all witnesses attending ...." The judicial officer would hear the evidence and then decide whether to commit the prisoner to jail to await trial or action of the grand jury, admit him to bail, or discharge him from custody. Although based upon evidence of guilt or innocence, the decision at the examination was only preliminary. If discharged, the prisoner could still be rearrested if additional evidence was secured. If held in jail or admitted to bail, he could still prove his innocence at his trial.

In Illinois most prisoners who had been arrested could obtain the same sort of hearing in advance of their examination by having themselves brought before a judge or appropriate court by a writ of habeas corpus. At common law and under the law of most states it would have been an abuse of the writ of habeas corpus to use it to consider questions of guilt or innocence, for the historical role of habeas corpus was simply to determine whether the arrest warrant was free from any formal defects and perhaps whether the warrant had been based on sufficient written evidence. But a few states, apparently including Illinois, assigned a broader role to habeas corpus, as explained in this passage from a Philadelphia lawyer's 1849 book on habeas corpus:

There is, however, an engraftment upon its use, as we derived this writ from the English law, which seems to have grown into strength in America, in some of the States by judicial decision, and in others by express statutory enactment, viz.: the hearing the whole merits and facts of the case upon habeas corpus, deciding upon the guilt or rather upon the innocence of the prisoner, and absolutely discharging him without the intervention of a jury, where the court is of opinion that the facts do not sustain the criminal charge.

In Illinois this approach was embodied in the statutory provision that permitted a petitioner for habeas corpus to "allege any facts to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge," and empowered the court or judge to "proceed in a summary way to settle the said facts, by hearing the testimony ... and dispose of the prisoners as the case may require." Under these provisions an Illinois prisoner who

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127 CHURCH, HABEAS CORPUS §§ 234–35 (1884); Oaks, supra note 106, at 258–60.

A leading case under this approach is Ex parte Mahone, 30 Ala. 49 (1857), discussed in CHURCH, HABEAS CORPUS § 237 (1884): "the better rule is that before indictment the whole question of the prisoner's guilt or innocence may be examined by the habeas corpus court." A leading federal case where the writ was apparently used in this manner is Ex parte Smith, 22 Fed. Cas. 373 (No. 12968) (C.C.D. III. 1843), where Joseph Smith was freed from custody under an extradition warrant after a full hearing that included introduction of affidavits to show his innocence of the crime charged. This case is also discussed in 5 SMITH 209–45.

had been arrested under a warrant issued by a justice of the peace could validly use a writ of habeas corpus to obtain a full judicial review of his case, including a hearing at which he could present witnesses or other evidence and a judicial determination of his guilt or innocence (to the limited extent of discharging him if he was clearly innocent, or holding him in custody or admitting him to bail if there was probable cause to believe that he had committed the charged offense). The Nauvoo Municipal Court may have erred in its application of these principles, and some of its members seem to have misapprehended the significance of the discharge — considering it a final adjudication of innocence that would preclude any further arrest or trial but the power that the court exercised was clearly authorized by law, not in defiance of it.

The Expositor’s charges about abuse of the writ of habeas corpus have provided the occasion for a discussion of the municipal court’s use of this ancient and honored remedy. Because the subject has considerable interest for historians, the discussion has been more comprehensive than was necessary for the immediate purpose at hand. It is readily apparent that, even though the Expositor’s charges of abuse of the writ were not well founded, the whole subject was well within the area of political controversy. There was nothing in the Expositor’s political copy that gave the authorities of Nauvoo any legal basis whatever for the suppression of the newspaper.

2. Religion. The same can be said of the Expositor’s charges that Joseph Smith was teaching false religious doctrines, notably polygamy. Since the Illinois Constitution provided that “no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship,” the teachings of religion could not properly be the concern of any civil authority. Consequently, the doctrinal controversy in the Expositor offered no conceivable basis for suppressionary action by city authorities.

3. Morality. Probably the most provocative portions of the Expositor were the claims that Hyrum Smith was a “base seducer, liar and perjurer” and the charges that Joseph Smith had spread “death, devastation and ruin,” that he had committed fraud in handling Church monies, and that he was guilty of practicing whoresom and had engaged in numerous seductions of the type vividly described, which were said to have caused the untimely death of the women involved.

Volumes have been written about the truth or falsity of these and similar charges relating to the character of the Mormon leaders. For present pur-

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220 The habeas corpus review described in the text applied in the usual case where the arrest warrant had been issued by a judge or justice of the peace. Where the prisoner was “in custody by virtue of process from any court,” on the other hand, a court could not review the evidence by means of a writ of habeas corpus, and could only discharge for certain enumerated causes related to a lack of jurisdiction in the issuing authority or formal defects in the process. Ill. Rev. Stat. § 3, at 324 (1833). The common law scope of review was similarly narrow where the prisoner was being restrained under the order of a superior court. E.g., Church, Habeas Corpus § 238 (1884).

221 See discussion in text following note 25 supra.

222 Ill. Const. art. VIII, § 3 (1818).

223 E.g., Brodie, No Man Knows My History (1945); Evans, Joseph Smith — An American Prophet (1933); O’Dea, The Mormons (1957).
poses it is unnecessary — even if it were possible — to resolve the conflicts between their detractors and defenders. Whether the charges were true or false, they were malicious, scandalous, and defamatory. By the standards of that day the account of the young girl's seduction may have been obscene. In view of the Mormons' undoubted affection for their leaders, the virulent attacks upon them had a tendency to provoke retaliatory mob action against the newspaper by the citizens of Nauvoo, as the councilmen observed in their deliberations. Finally, the councilmen also feared that the first and subsequent issues of the Expositor would arouse mobs of anti-Mormons to come to Nauvoo to drive out its citizens. Subsequent events, notably the mob murder of Joseph Smith and the eventual expulsion of the Mormons from Nauvoo by armed mobs, suggest that these fears were not groundless. Each of these aspects of the Expositor's charges was a legitimate concern of the city government, and a possible basis for its suppressionary action.

B. The Legality of the Suppression

Governor Ford and subsequent commentators have made three objections to the legality of the council's action in suppressing the Expositor. (1) The council had gone beyond its legislative powers of defining a nuisance by general ordinance and had entered upon the judicial prerogative of passing judgment on individual acts, all without notice, hearing, or trial by jury. (2) A newspaper, however scurrilous or libelous, cannot be legally abated or removed as a nuisance. (3) The council's action violated the state constitutional provision insuring the liberty of the press. These points will be discussed in that order.

1. The council's power to abate nuisances. So far as municipal government law is concerned, Governor Ford's insistence that "the Constitution abhors and will not tolerate the union of legislative and judicial power in the same body of magistracy . . ." was totally without merit. The concept of separation of legislative, executive, and judicial authority, so vital in our federal government, has relatively little application at the municipal level. The blend of legislative and executive authority inherent in the mayor-council form of government was and is familiar. Less common, but by no means unique, was the combination of executive, legislative, and judicial powers established by the Illinois General Assembly in the Nauvoo Charter. The city council was composed of the mayor, four aldermen, and nine councilors. This was the lawmaking body, whose legislative authority expressly included the power (invoked in the destruction

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324 Defamation, which includes libel and slander, consists of an attempt by words or pictures to blacken a person's reputation or to expose him to hatred, ridicule, or contempt. Truth may be a defense to an action for damages for defamation, but it does not make the words less defamatory. Prosser, Torts § 92, at 574, § 96, at 630 (2d ed. 1955).

325 Obscenity is largely a matter of the conscience and opinion of the community at the time, and does not admit of any precise definition. Siebert, The Rights and Privileges of the Press 233–40, 244–45 (1934), quotes several newspaper articles of a character similar to the Expositor's. Some were judged obscene; others were not.

326 Ford, History of Illinois 325 (1854); 6 Smith 534–35.

327 6 Smith 555.

328 Ill. Laws 1840, § 6, at 53. A complete copy of the Nauvoo Charter also appears in Grego, The Prophet of Palmyra 463–71 (1890), and in 4 Smith 239–48.
of the *Expositor*) "to make regulations to secure the general health of the inhabitats [sic], to declare what shall be a nuisance, and to prevent and remove the same." The judicial authority was vested in the individuals who were mayor and aldermen. As a group they comprised the municipal court. In addition, the mayor had exclusive jurisdiction in all cases arising under city ordinances (with an appeal from his decision to the municipal court), and he, with the various aldermen, had all the powers of justices of the peace within the limits of the city, both in civil and in criminal cases arising under state law.

The traditional function of legislative power is to enact general legislation to define what constitutes a crime, leaving it to the judiciary to determine whether individual acts or conditions come within that definition. Therefore, Governor Ford criticized the Nauvoo City Council for assuming both legislative and judicial functions by declaring particular property to be a nuisance and simultaneously ordering its abatement without first laying the matter before a court. In his conference with the Governor in Carthage, Joseph Smith undertook to justify this action on the ground that the council represented both legislative and judicial powers:

I cannot see the distinction that you draw about the acts of the City Council, and what difference it could have made in point of fact, law, or justice, between the City Council's acting together or separate, or how much more legal it would have been for the Municipal Court, who were a part of the City Council, to act separate, instead of with the councilors.

There are two reasons why Joseph Smith's argument was not well founded and why the council's action cannot be justified on the basis of the judicial powers of some of its members. First, judicial power cannot be validly exercised without notice to interested parties and an opportunity for them to be heard. The owners and publishers of the *Expositor* were not given notice or hearing. Second, the Nauvoo Charter guaranteed "a right to a trial by a jury of twelve men in all cases before the municipal court," and there was, of course, no jury trial prior to the suppression.

Joseph Smith was on sounder ground in the original explanation he gave of the *Expositor* suppression as simply an exercise of the council's legislative authority to abate nuisances. The destruction or removal (abatement) of nuisances was one of those classes of acts that the common law permitted without the interposition of judicial power. Blackstone, whose definitive work on the common law was studied by the councilors to determine the legality of

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140 Ill. Laws 1840, §§ 16–17, at 55.
141 See, e.g., Morison v. Rawlinson, 193 S.C. 25, 33–34, 7 S.E.2d 635, 639 (1940). In an early Illinois case the city council proceeded in this conventional fashion, passing an ordinance declaring the sale of liquor to be a nuisance and then prosecuting the defendants in court when they violated the ordinance. Goddard v. President of Jacksonville, 15 Ill. 589 (1854).
142 6 Smith 584–85. This argument was echoed by John Taylor about ten years later. 7 id. at 121.
143 Ill. Laws 1840, § 17, at 55.
144 6 Smith 538.
their proposed action, states that certain nuisances may be abated by the
aggrieved party without notice to the person who committed them.\textsuperscript{145} The
leading American case on summary abatement at this time was an 1832 de-
cision by the highest court of the State of New York concerning the right of the
city of Albany to pass an ordinance declaring a structure in its harbor to be a
public nuisance and directing its officers to abate it by destruction (without
any judicial proceedings).\textsuperscript{146} The court held that the municipality’s proposed
action was a valid exercise of its common law powers and of the police power
conferred by its statutory authority to abate nuisances, and that no judicial
hearing was required. The court’s conclusion on the latter point was as follows:

Much stress was laid by the counsel for the appellants upon the fact
that the exercise of the right claimed by the respondents would result in
the destruction of their property, without the benefit of a trial by jury,
and that consequently the ordinance in question was a violation of the
Constitution of [sic] the Bill of Rights. The same objection would apply
to the dejection of every nuisance, yet nothing is clearer or better settled
than the right to exercise this power in a summary manner, not only
where the whole community is affected, but where a private individual
alone is injured. It is a right necessary to the good order of society, and
the reason why the law allows this private and summary method of doing
one’s self justice is because injuries of this kind, which obstruct or annoy
such things as are of daily convenience and use, require an immediate
remedy, and cannot wait for the slow progress of the ordinary forms of
justice. 3 Black. Comm. 5.\textsuperscript{147}

The page in Blackstone’s Commentaries cited by the New York court in the
above passage is the very page that the Nauvoo City Council studied prior to
its action and later gave in defense of the legality of its abatement ordinance.\textsuperscript{148}
It is interesting that this same passage of Blackstone and this same New York
case were the principal authorities followed by the Illinois Supreme Court in
1881 in a nuisance-abatement case.\textsuperscript{149} There the court held that a munici-
pality’s charter authority to abate nuisances permitted it to pass a valid ordi-
nance ordering its marshal (without any judicial proceedings) to remove a roof

\textsuperscript{146} Quoted in text accompanying note 155 infra.
\textsuperscript{147} Id. at 609–10.
\textsuperscript{148} 6 Strawn 445, 467. The passage from Blackstone is quoted in the text accompa-
nying note 155 infra. Joseph Smith later gave the Governor this explanation of the coun-
cil’s reasoning:

Upon investigating the matter, we found that our City Charter gave us
power to remove all nuisances; and, furthermore, upon consulting Blackstone
upon what might be considered a nuisance, that distinguished lawyer, who is
considered authority, I believe, in all our courts, states, among other things, that
a libelous and filthy press, may be considered a nuisance, and abated as such.

Here, then one of the most eminent English barristers, whose works are
considered standard with us, declares that a libelous press may be considered a
nuisance; and our own charter, given us by the legislature of this State, gives
us the power to remove nuisances; and by ordering that press abated as a
nuisance, we conceived that we were acting strictly in accordance with law.
We made that order in our corporate capacity, and the City Marshal carried it
out.

\textsuperscript{149} King v. Davenport, 98 Ill. 305, 311 (1881).
that did not conform to fire regulations from a private home and destroy it, without any liability for damages. Similarly, in a later case the Illinois Supreme Court said that a municipality (whose charter powers to abate nuisances were practically identical to those of Nauvoo) could properly provide by ordinance that a certain house infected with smallpox germs be summarily abated by burning, if the circumstances were such that less drastic measures were not feasible.\textsuperscript{150}

From the authorities discussed above it appears that the first objection to the Nauvoo Council’s action — that it wrongly failed to use or that it improperly exercised judicial powers — was without foundation. If the \textit{Expositor} was a nuisance, and if it was the sort of nuisance that permitted summary abatement, the council’s legislative powers sufficed to justify the action taken. These two qualifications will be discussed next.

2. \textit{Abatement of newspaper as nuisance}. The common law defined a nuisance as any unreasonable, unwarranted, or unlawful use of property, or any improper, indecent, or unlawful personal conduct that produced material annoyance, inconvenience, discomfort, or injury to others or their property.\textsuperscript{152} Nuisances were private when they affected particular individuals, and public when their effect was general. Under this definition, if the \textit{Expositor} was a nuisance at all it could have been classified as both a public and a private nuisance, since its libels not only injured private individuals but were also of such a scandalous and provocative character as to be of concern to the community at large. A party injured by a private nuisance could sue to obtain damages or to compel its removal. The commission of a public nuisance was punishable as a crime. In addition, in certain circumstances private individuals could abate private nuisances and private individuals or public officials could abate public nuisances.\textsuperscript{152}

Governor Ford charged that a scurrilous and libelous newspaper could not be legally abated or removed as a nuisance, and indeed that such a thing had never been thought of before in the United States.\textsuperscript{153} It is not clear whether the Governor was correct that this was the first attempt in this country to abate a newspaper as a nuisance.\textsuperscript{154} It is clear that it was not the last. In any event, in retrospect there seems to have been considerable basis from which a person acting in 1844 could have concluded that a publication devoted to malicious, scandalous, and defamatory matter likely to provoke mob action could be abated as a nuisance.

\textsuperscript{150} Sings v. City of Joliet, 237 Ill. 300, 86 N.E. 663 (1908). The Nauvoo Charter provision on nuisance abatement is quoted in the text accompanying note 139 supra.

\textsuperscript{152} 1 Wood, \textit{NUISANCES} § 1 (3d ed. 1893).

\textsuperscript{153} 2 id. at 941–70.

\textsuperscript{154} 6 Smith 555–36.

\textsuperscript{156} Joseph Smith replied to the Governor’s claim as follows:

\hspace{1cm} We refer your Excelency to Humphrey \textit{versus} Press in Ohio, who abated the press by his own arm for libel, and the courts decided on prosecution no cause of action. And we do know that it is common for police in Boston, New York, etc., to destroy scurrilous prints: and we think the loss of character by libel and the loss of life by mobocratic prints to be a greater loss than a little property . . . .

\hspace{1cm} Id. at 539. I have been unable to locate the Humphrey case among the reported decisions of the Ohio appellate courts.
The passage of Blackstone's *Commentaries* referred to by the Nauvoo city councilors in their deliberations on what measures should be taken against the *Expositor* reads as follows:

A fourth species of remedy by the mere act of the party injured, is the *abatement*, or removal of *nuisances* (6) .... [W]hatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it. .... And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind [the examples just given were interference with ancient lights or erection of gate across public highway], which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

(6) .... As to private nuisances, they also may be abated .... So it seems that a libellous print or paper, affecting a private individual, may be destroyed, or, which is the safer course, taken and delivered to a magistrate. 5 Coke, 125, b. 2 Camp. 511.156

The basis for the statement in footnote six — the passage specifically relied on by the councilors156 — is the classification as a private or public nuisance of whatsoever has a deleterious influence upon the morals, good order, or well being of society. For example, in a case decided in 1854 the Illinois Supreme Court gave its opinion that obscene books, prints, and pictures could be categorized as a public nuisance because they were hurtful and injurious to the public morals, good order, and well being of society.157 Similar reasoning was employed by Illinois and her sister states in contemporary decisions classifying as nuisances (and requiring abatement of or imposing punishments for) obscene books and prints; scandalous, profane, and obscene language in public; disorderly houses; and other immoral, indecent, and unlawful public acts.158 Research has not disclosed any attempts to use the nuisance principles to

156 2 *Blackstone, Commentaries* 4–5 & n.6 (Am. ed. from 18th Eng. ed. 1832). The citation given in the synopsis of the council proceedings, 6 *Smith* 445, does not give the edition used, but the volume and page numbers are the same as for the American edition just cited. Like most contemporary editions of Blackstone, this 1832 American edition published Blackstone's original four books in two volumes, but it also carried the pagination of the original books in brackets. An 1826 London edition by Joseph Chitty appeared in four volumes, however, and this may have been the source referred to by Joseph Smith in his letter to Governor Ford: "See Chitty's Blackstone Bk. iii:v, and n., &c., &c." 6 *Smith* 467. Alternatively, he may have been referring to the original pagination in the American edition, of which Chitty was one of four editors. The material in 3 *Blackstone, Commentaries* 5–6 & n.6 (Chitty ed. 1826), and the material in the original edition, are identical with that quoted in the above text and cited at the beginning of this note.

157 See Goddard v. President of Jacksonville, 15 Ill. 589, 594 (1854); 2 *Russell, Crimes* 1731 (8th ed. 1923).

158 City of Chicago v. Shaynin, 258 Ill. 69, 101 N.E. 224 (1913); Oehler v. Levy, 234 Ill. 595, 85 N.E. 271 (1908); State v. Bertheol, 6 Ind. 474 (1843); Commonwealth v. Oaks, 113 Mass. 8 (1873); Commonwealth v. Holmes, 17 Mass. 335 (1821); Commonwealth v. Sharpless, 2 Pa. 91 (1815); State v. Graham, 35 Tenn. 134 (1855); Nolin v. Mayor & Aldermen, 12 Tenn. 163 (1833).
suppress defamatory, obscene, or mob-inciting newspapers prior to 1844, but there is a history of such attempts after that date.\textsuperscript{159}

On the question whether the type of publications described above constituted the sort of nuisance that could be abated summarily (without judicial hearing), there was little or no published judicial opinion in the 1840's. Subsequent cases and commentators, however, have laid down principles that could be used to sustain a certain limited degree of summary abatement in such circumstances. Thus, in 1920 the Illinois Supreme Court quoted approvingly this statement by a noted expert on the police power:

Where the condition of a thing is such that it is imminently dangerous to the safety or offensive to the morals of the community, and is \textit{incapable of being put to any lawful use by the owner}, it may be treated as a nuisance per se. Actual physical destruction is in such cases not only legitimate, but sometimes the only legitimate course to be pursued.\textsuperscript{169}

Subsequent discussion will demonstrate how the emphasized words require a distinction between the legality of the destruction of the issues of the newspaper on one hand and the printing press on the other.

The foregoing authorities suggest three bases for the characterization of the \textit{Expositor} and its individual issues as a nuisance. The safety and good order of the community were threatened by the \textit{Expositor}: (1) because the reaction of an outraged citizenry threatened the annihilation of the newspaper and perhaps the injury of its publishers by mob action in the city, (2) because its continuance might incite mob action by anti-Mormons in the surrounding areas against the city and its inhabitants; and (3) because of their scurrilous, defamatory, and perhaps obscene character, the individual newspapers were offensive to public morals. In view of the law discussed above, particularly the statement in Blackstone, the combination of these three considerations seems to have been sufficient to give the Nauvoo City Council considerable basis in the law of their day for their action in characterizing the published issues of the \textit{Nauvoo Expositor} as a nuisance and in summarily abating them by destruction.

The characterization of the printing press as a nuisance, and its subsequent destruction, is another matter. The common law authorities on nuisance abatement generally, and especially those on summary abatement, were emphatic in declaring that abatement must be limited by the necessities of the case, and that no wanton or unnecessary destruction of property could be permitted. A party guilty of excess was liable in damages for trespass to the party injured. This principle was illustrated by Indiana and Illinois courts shortly after the \textit{Expositor} affair. In an Indiana case in 1846 the owner of a bowling alley was convicted of keeping a public nuisance, a disorderly bowling alley. The trial judge fined the individual and ordered the sheriff to “remove and abate the nuisance, to wit, the ball alley.”\textsuperscript{161} The Indiana Supreme Court affirmed the

\textsuperscript{159} See examples cited in notes 196 and 205 \textit{infra} and accompanying text.


\textsuperscript{161} Bloomhoof v. State, 8 Ind. 205 (1846).
judgment imposing the fine, but reversed the order for abatement. Neither the ball alley nor the room in which it was kept was a nuisance, the court observed. “The nuisance was in the manner in which they were kept.”

In a leading Illinois case decided somewhat later, the Illinois Supreme Court rendered an opinion to the same effect. This was an action for damages for trespass against a worthy citizen who had broken into a saloon, smashed glasses, boxes, and beer kegs, and had torn down the building on the pretext of abating a public nuisance. The court affirmed the saloon keeper’s right to recover damages from the intruder. Even if the house were a public nuisance, the court said, “neither the common law nor the statute has authorized individuals or communities to tear down and destroy the buildings in which such unlawful business is pursued, nor does either permit the courts, on conviction, to have such buildings destroyed or abated.” This was not the sort of nuisance that could be abated by private parties, the court concluded, and, in any event, the nuisance was not the property destroyed but the manner in which it was used.

The principle applied in these cases was that set forth in Blackstone’s discussion of nuisances, which the council studied and used as authority for its abatement ordinance. The very passage relied on by the council made this distinction for, as pointed out by B. H. Roberts, “the destruction of libelous ‘prints and papers’ can scarcely be held to sustain the action of destroying a ‘printing press.’”

These cases make clear that there was no legal justification in 1844 for the destruction of the Expositor press as a nuisance. Its libelous, provocative, and perhaps obscene output may well have been a public and a private nuisance, but the evil article was not the press itself but the way in which it was being used. Consequently, those who caused or accomplished its destruction were liable for money damages in an action of trespass.

3. Constitutional guarantee of free press. It was not the destruction of private property without compensation that caused Joseph Smith and his associates to be condemned for the Expositor affair. The principal complaint would have been the same if the council had silenced the paper by a court order, by jailing the editor, or by padlocking the premises. The most important legal aspect of the Expositor suppression — the one that served to enrage public opinion, disenchanted sympathetic historians, and offend the sensibilities of modern students — is the charge that the action violated the freedom of the press.

The major modern bulwark of the free press, the first amendment to the United States Constitution, had no application to the suppression of the Nau-
voe Expositor. By its terms the first amendment only restricts the action of the federal government, and it was not until long after the fourteenth amendment was adopted in 1868 that the free-press guarantees became applicable to the agencies of state authority. Therefore, the only constitutional free-press guarantees relevant to the Expositor suppression are those that were embodied in the Illinois Constitution.

The pertinent provision of the Illinois Constitution of 1818, then in effect, was section 22 of the Declaration of Rights:

The printing presses shall be free to every person, who undertakes to examine the proceedings of the General Assembly or of any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The constitutional status of the abatement of the Expositor as a nuisance depends on the meaning to be drawn from these words in 1844. Since the Illinois Supreme Court had given no opinion on the meaning of the above provision by 1844, it is necessary to examine the history of the free-press guarantees and the meaning ascribed to comparable language in neighboring states.

The following discussion is indebted to Leonard W. Levy, whose illuminating Legacy of Suppression has demonstrated that “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.” The men who prepared, ratified, and sat as judges to construe the state constitutions discussed here were products of that same tradition. In attempting to ascertain the meaning of the Illinois free-press guarantee in 1844 we should look to the intentions and temper of their generation and not to the broader freedoms of our own day.

Although the Illinois free-press provision seems to have been copied from the guarantees previously adopted by Kentucky, Ohio, and Indiana, this particular phraseology was apparently first used in the Pennsylvania Constitution of 1790. Because there seems to have been no early interpretive litiga-

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168 E.g., Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707 (1931). In a letter to Abigail Adams, dated Sept. 11, 1804, Thomas Jefferson wrote, “While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so.” Dennis v. United States, 341 U.S. 494, 522 (1951).


172 ANTHONY, THE CONSTITUTIONAL HISTORY OF ILLINOIS 39 (1891). There were substantially identical provisions in Ind. Const. art. I, § 9 (1816); Ky. Const. art. X, § 7 (1799); Ohio Const. art. VIII, § 6 (1802).

tion in any of the first three states, the meaning that the Pennsylvania courts read into this provision is, therefore, of the greatest significance.

The first judicial opinion on the meaning of the general phrases later embodied in the Illinois Constitution came in a 1788 Pennsylvania case, which held that they simply meant that every citizen had a right to investigate the conduct of public officials "and they effectually preclude any attempt to fetter the press by the institution of a licensor." 174 This view that the great general guarantees of a free press were simply a precaution against reinstallation of the historic prior restraints or censorships on publication was reiterated by James Wilson, a renowned lawyer and Justice of the United States Supreme Court, who drafted the 1790 Pennsylvania Constitution.

"What is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual." 175

The Illinois Constitution also said that the editor should be "responsible for the abuse of that liberty." The usual form of responsibility was a civil action for damages or a state prosecution for criminal libel, particularly seditious libel, which consisted broadly of criticism of the form, officers, or acts of government. Such prosecutions were relatively common, especially at the turn of the 19th century. 176 The temper of the times is revealed by an 1805 Pennsylvania case. The defendant was indicted for seditious libel for statements in a weekly paper that were alleged to have been intended to bring the independence of the United States and the constitution of Pennsylvania into hatred and contempt, to excite popular discontent against the government, and to scandalize the characters of revolutionary patriots and statesmen. When the defendant urged the constitutional freedom of the press in defense, the Pennsylvania court gave this exposition of the meaning of the constitutional provision that was the prototype of the Illinois free-press guarantee:

There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community and the individual, if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to private men, affected by injurious publications, unless the discussion be proper for public information. But "If one uses the weapon of truth wantonly, for disturbing the peace of families, he is guilty of a libel." Per general Hamilton in Crosswell's trial, pa. 70. The matter published is not proper for public information. The common weal is not interested in such a communication except to suppress it. 177

174 Republica v. Oswald, 1 Dall. 319, 325 (Pa. 1788). This case concerned the meaning of provisions in the Pennsylvania Constitution of 1776 which declared "that the freedom of the press shall not be restrained" and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the Legislature, or any part of the government." Ibid.
175 Levy, Legacy of Suppression 201-02 (1960). (Emphasis omitted.)
176 Id. at 176-309.
177 Republica v. Dennie, 4 Yeates 267, 269-70 (Pa. 1805). (Emphasis added.)
The only other major source of judicial opinion on state free-press guarantees prior to 1844 was in Massachusetts, whose highest court in a notable 1838 decision gave substantially the same interpretation of the free-press guarantee as that issued earlier in Pennsylvania.\textsuperscript{178} After examining the effect of this and similar decisions one authority concluded:

In Massachusetts, as in other American states and in the British Empire, the courts long continued to maintain practical restrictions upon freedom of the press in the spirit of a system of law which recognized no affirmative right of freedom of discussion, but which sought primarily to preserve the peace and to protect the government and the reputation of the individual from injurious public criticism.\textsuperscript{179}

The cases decided before 1844 do not provide a definitive answer to the question whether the Illinois free-press guarantee would have permitted an agency of the state to use its nuisance-abatement powers to suppress a newspaper which was publishing material that offended the public’s sense of decency or threatened the public peace or welfare. They do hold that the only purpose of the general free-press lanaguage was to prevent formal prior restraints upon publication, such as licensing and censorship — an interpretation that was generally accepted for over a hundred years.\textsuperscript{180} They also show great judicial sympathy for stern repressive measures in the enforcement of the criminal libel and civil damage laws against newspaper editors who abused their privileges. Finally, the courts’ references to “suppression” and suppressionist sentiments voiced by some of the founding fathers\textsuperscript{181} reveal that damage actions or criminal prosecutions may not have been the only types of “responsibility” considered appropriate for abuse of the liberty. While there is no proof that any of these sources were studied and relied upon by the Nauvoo City

\textsuperscript{178} In upholding the conviction of a newspaper for blasphemous libel Chief Justice Shaw explained that the intention of the free-press article was to insure the general right of publication, at the same time leaving every citizen responsible for any offence capable of being committed by the use of language, as well when printed, as when oral, or in manuscript. Any other construction of the article would be absurd and impracticable, and inconsistent with the peace and safety of the State, and with the existence of free government. Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 219 (1838); accord, Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 15 Am. Dec. 214 (1825); Commonwealth v. Whitemarsh, Thacher, Cr. Cas. 441 (Boston Munic. Ct. 1836).

\textsuperscript{179} DUNWAY, op. cit. supra note 170, at 157.

\textsuperscript{180} BEMAN, CENSORSHIP OF SPEECH AND THE PRESS 208–09 (1930); 2 COOLEY, CONSTITUTIONAL LIMITATIONS 883 (8th ed. Carrington 1927); Vance, Freedom of Speech and of the Press, 2 Minn. L. Rev. 239, 248 (1918); see also text accompanying note 214 infra.

\textsuperscript{181} Thomas Jefferson, who is renowned as an advocate of a free press, wrote in 1807: “It is a melancholy truth . . . that a suppression of the press could not more completely deprive the nation of its benefits, than is done by its abandoned prostitution to falsehood. Nothing can now be believed which is seen in a newspaper.” LEVY, JEFFERSON AND CIVIL LIBERTIES 48 (1963); see also note 168 supra. Another signer of the Declaration of Independence concluded in 1776 that a council of safety would be justified on the plain principles of self-preservation in “silencing a press, whose weekly productions insult the feelings of the people, and are so openly inimical to the American cause.” LEVY, LEGACY OF SUPPRESSION 180–81 (1960). Benjamin Franklin, writing in 1789 of antigovernment writers, declared that “we should, in moderation, content ourselves with tarring and feathering and tossing them in a blanket.” Id. at 187. For accounts of mob violence against presses and publishers during the Revolutionary period see id. at 177–79.
Council, the source on which they did rely, Blackstone's *Commentaries*, is the leading authority to the effect that the liberty of the press consists merely "in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 2

As Levy has demonstrated, the generation that gave birth to the constitutional phrases that guarantee a free press, also, by their actions, bequeathed a legacy of suppression. Although the succeeding century was relatively free from litigation interpreting the free-press guarantees, the available evidence demonstrates that the 19th-century interpretation of constitutional provisions like that of Illinois laid far more emphasis on the "responsibility" of the press than on its "freedom."

The suppressionist attitude made itself felt in numerous criminal prosecutions against newspaper writers, editors, and publishers for various types of newspaper activity like the *Expositor's*. 3 One type of statute used in such prosecutions made it a crime to publish a newspaper that was devoted largely to the publication of "criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime" or "scandals, lecheries, assignations, intrigues between men and women, and immoral conduct of persons." 4 Apparently without exception such statutes were sustained against the contention that they offended the freedom of the press.

Although prosecutions for seditious libel fell into disuse soon after 1800, 5 Illinois and other states continued to punish as criminal the utterance or publication of words that tended to incite violent overthrow of the government, provoke a riot, or induce a breach of the peace. 6 Claims that these statutes were forbidden by the constitutional free-press guarantees were uniformly rejected.

The foregoing discussion shows that the Illinois free-press guarantees would not have been an obstacle if the Nauvoo authorities had brought criminal

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2 *Blackstone, Commentaries* 113 (Am. ed. from 18th Eng. ed. 1832). A pamphleteer who wrote in 1799 said that this Blackstone definition meant that "a man might be jailed or even put to death for what he published provided that no notice was taken of him before he published." L. Levy, *Jefferson and Civil Liberties* 51 (1963) (apparently paraphrasing rather than quoting a pamphlet by George Hay).

3 E.g., People v. Fuller, 236 Ill. 116, 87 N.E. 356 (1909); Clay v. People, 86 Ill. 147 (1877); Hartford v. State, 96 Ind. 461 (1884); Commonwealth v. Chapman, 54 Mass. (13 Met.) 68 (1847); State v. Burnham, 9 N.H. 34 (1837); Morton v. State, 3 Tex. Ct. App. R. 510 (1878).

4 Strohm v. People, 160 Ill. 582, 583, 43 N.E. 622 (1896); see State v. Mckee, 73 Conn. 18, 25, 46 Atl. 409, 412 (1900).

5 See In *re* Banks, 56 Kan. 242, 243, 42 Pac. 693, 694 (1895); State v. Van Wye, 136 Mo. 227, 37 S.W. 938 (1896).


prosecutions against the *Expositor* publishers for an abuse of the liberty of the press. A prosecution for criminal libel for the attacks on the city officials or a prosecution for unlawful assembly for the paper's efforts to incite violence would both have been feasible under Illinois laws then in effect. A8 The arrest and jailing of the editor and publishers might have stilled the *Expositor*. The same effect might also have been produced by suing these parties for damages for libel, obtaining judgment, and then satisfying the judgment by levying upon and selling the press. A third alternative, a suit for an injunction A8 against the publication of the newspaper, was not feasible as a practical matter, but it can be argued that even this restraint would not have offended the constitution. Although not as well settled then as it has become today, the rule that a court of equity will not enjoin defamatory material A0 would probably have prevented injunctive relief on the ground of defamation. But if the Nauvoo authorities could have convinced the circuit court (which had equity powers) that the newspaper was really inciting a riot, an injunction might have issued against what Justice Oliver Wendell Holmes later described as "words that may have all the effect of force." A1 Finally, later judicial authority suggests that there was no constitutional obstacle in 1844 to the obtaining of an injunction to prevent further publication of a newspaper that had been found to be a public nuisance. A2

There are two legal distinctions between these alternative methods of squelching the *Expositor* and the method (abatement by destruction) used by the council. First, it can be argued that the destruction of the press was a prior restraint with respect to later issues of the *Expositor*, and, therefore, illegal under the predominant purpose of the free-press provision. Although admittedly forceful, this argument falls short of being conclusive, for the free-press provision can be read to prohibit only licensing measures that allow the state to prevent initial publication of the writer's efforts. It may not have been meant to prohibit subsequent suppression as one of the ways in which the editor

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A libel is a malicious defamation, expressed either by printing or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt or ridicule: Every person, whether writer or publisher, convicted of this offence, shall be fined in a sum not exceeding five hundred dollars, or imprisoned, not exceeding one year. . . .


If two or more persons shall assemble together to do an unlawful act, and separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assemblage, and upon conviction thereof, be severally fined in a sum, not exceeding fifty dollars, or imprisoned not exceeding three months.


An injunction is a process by which a court orders (enjoins) a person not to do or to cease doing an act.

E.g., Montgomery Ward & Co. v. United Retail Employees Union, 400 Ill. 38, 79 N.E.2d 46 (1948); Dopp v. Doll, 13 Ohio Law Bull. 335 (1885).


See discussion in text following note 202 infra.
was "responsible" for the abuse of that liberty. As will be discussed hereafter, a unanimous state supreme court and four United States Supreme Court Justices have issued opinions to this effect in our own day. The constitutional provision clearly did not prevent criminal punishment, or civil attachment, even though either of these remedies could easily suppress subsequent writings. In addition, injunctions against incitement to riot or against obscene publications are an avowed prior restraint as to subsequent activities, and yet it has been suggested by high authority that this type of relief would not offend the free-speech provision. In numerous other instances legislative bodies have imposed, and courts have approved, restraints prior to publication. With the exception of avowed licensing measures, the prohibition against prior restraints, it seems, was relative and not absolute, and it is by no means obvious that the "prior restraint" rationale forbade what was done at Nauvoo.

Second, in a criminal prosecution or in a civil action for damages or an injunction, there is an interposition of judicial power between the party who desires to stop the newspaper and the application of the force that brings about that result. There was no such use of judicial power at Nauvoo. This is an important distinction to a people who believe in a rule of law. Nevertheless, there are circumstances in which the use of private property can be curtailed, forbidden, or, where necessary, even destroyed by the government or by private individuals without invoking judicial power. The summary abatement of nuisances, the theory on which the council proceeded, is one such example.

The action of the Nauvoo City Council in suppressing an opposition newspaper may have been the earliest example of official action of this type (in a day when mobs were not infrequently employed for the same purpose), but subsequent history shows that such official acts of suppression were not unique.

In 1863 General Burnside proclaimed the suppression of the Chicago Times and the Jonesboro Gazette "on account of the repeated expression of disloyal and incendiary statements," and took possession of the Times printing office with troops. Publication was resumed four days later when public pressure induced Lincoln to rescind the order, so the action was never tested in court.

In 1893 the city council of Seguin, Texas, passed an ordinance declaring that the Chicago Sunday Sun — a paper notoriously preoccupied with crime and immorality — was a public nuisance and prohibiting its circulation within the city limits. A county judge sustained the constitutionality of this measure, but a Texas appellate court held it in violation of the state free-press guarantee.

In 1918 the cities of Mount Vernon, New York, and North Bergen, New Jersey, passed ordinances forbidding the circulation within the city limits of newspapers published in the German language. North Bergen gave the prevention of riot in the township as its justification. The Mount Vernon ordi-

\[\text{\textsuperscript{193} Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931) (dictum).}\]
\[\text{\textsuperscript{194} See Note, Previous Restraints Upon Freedom of Speech, 31 Colum. L. Rev. 1148, 1151-55 (1931).}\]
\[\text{\textsuperscript{195} 3 Cole, The Centennial History of Illinois 303-04 (1919).}\]
\[\text{\textsuperscript{196} Ex parte Neill, 32 Tex. Crim. 275, 22 S.W. 923 (1893).}\]
nance demonstrated its purpose by also banning the New York American and the New York Evening Journal, two English-language publications which the council classified as harmful to the best interest of this nation in the prosecution of the war. The first court to examine these ordinances refused to give the newspapers any relief, relying on the rule that equity will not enjoin enforcement of the criminal law.\textsuperscript{197} Subsequent courts struck down the ordinances as unconstitutional infringements of the free press.\textsuperscript{198} The Mount Vernon City Council thereupon passed an ordinance requiring firms to obtain a license before circulating newspapers within the city limits, and reserved to themselves, in effect, the power to refuse licenses at their discretion. This ordinance, too, was held violative of the New York free-press guarantee.\textsuperscript{199}

A different form of restraint was attempted by Cleveland city officials in 1921. Charging that the weekly Dearborn Independent was calculated to excite scandal and had a tendency to create breaches of the peace, they had various newspaper vendors arrested for violation of Cleveland's ordinance forbidding the sale of indecent, obscene, and scandalous publications. A federal judge later found that the publication was not indecent, obscene, or scandalous, and that its sale upon the streets had been prevented solely because of its anti-semitism, which had no tendency to produce a breach of the peace. The city officials were enjoined from continuing this unconstitutional attempt to impose advance censorship of the contents of the newspaper.\textsuperscript{200}

In 1908 Kingston, New York, had a newspaper which consisted primarily of reckless and scurrilous attacks upon the public and private lives of some of the citizens of that city. As a result of a mass meeting of citizens, some of whom later swore that this newspaper "injurious affected the moral tone of large numbers of the community," police officers of the city of Kingston, under orders from their superiors, entered the newspaper building and seized and carried away 3700 copies of the newspaper intended to be circulated the following day. Holding that this action violated the New York Constitution's free-press guarantee (similar to Illinois'), a judge enjoined the police from further conduct of this sort.\textsuperscript{201} The judge concluded that when the constitution said that the press should be "responsible for the abuse of its liberty" it did not mean that, when an official thought that a newspaper had abused its liberty, he could have it summarily suppressed. This opinion is unquestionably correct by today's standards, but it is revealing that the judge reached this conclusion purely by assertion and without citation of any previous judicial authority to support it.

Since government officials are presumably advised by competent lawyers on the legality of their actions, the foregoing list of efforts to suppress obnoxious


\textsuperscript{200} Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479, 480 (N.D. Ohio 1921).

\textsuperscript{201} Ulster Square Dealer v. Fowler, 58 Misc. 325, 326, 111 N.Y. Supp. 16, 17 (Sup. Ct. 1908).
presses has some bearing on the reasonableness of the Nauvoo action for its
time. Most persuasive on this issue, however, is the final case, the ultimate out-
come and legal significance of which are familiar to every student of consti-
tutional law, and perhaps to all persons who have concern for the precious free-
doms of speech and press. Less well known are its early history and facts, which
have a remarkable similarity to the suppression of the Nauvoo Expositor.

In September 1927, a weekly newspaper, the Saturday Press, was established
in Minneapolis by Howard A. Guilford and J. M. Near. Its avowed mission
was to furnish an exposé "of conditions AS THEY ARE in this city. . . ." 
The various issues of the newspaper charged in brutally frank language that
the Twin City Reporter and various city officials were in league with or part of
the gangsters who controlled gambling, bootlegging, and racketeering in Min-
neapolis. The Press linked them with various instances of blackmail, murder,
and assault. The police chief was attacked for graft, neglect of duty, and com-
panionship with gangsters; the county attorney was accused of failure to take
corrective measures against known centers of vice; the mayor was castigated
for inefficiency and dereliction of duty. In later issues the paper was heavily
antisemitic.

Minnesota at this time had a unique statute providing that any person who
was engaging in publishing or circulating a malicious, scandalous and defama-
tory newspaper was guilty of a nuisance and could be enjoined. On Novem-

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203 Record, p. 15, Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) [hereinafter
cited as Record].

204 Following are samples:

Our attack last week was aimed at but two targets: The gambling syndi-
cate . . . and the Twin City Reporter, BOTH OWNED IN WHOLE OR IN
PART BY J. D. BEVANS AND ED MORGAN . . . .

[The men who shot Howard A. Guilford] HAD NO FEAR OF THE
MINNEAPOLIS POLICE DEPARTMENT! Doubtless they were told that
their case could be "fixed" if the shooting were to take place inside the city
limits.

. . . .

The Saturday Press was informed BEFORE THE FIRST ISSUE, that
the "City Hall" was receiving twenty-five per cent of the profits from the
gambling joint owned and operated by the Twin City Reporter, Moe Barnett
and "Red" Clare!

Record, pp. 57–58, 96.

205 There have been too many men in this city and especially those in official
life, who HAVE been taking orders and suggestions from JEW-GANGSTERS,
therefore we HAVE JEW Gangsters practically ruling Minneapolis. . . . It is Jew
thugs who have "pulled" practically every robbery in this city. . . . It was a gang
of Jew gunmen who boasted that for five hundred dollars they would kill any
man in the city. . . . Practically every vendor of vile hooch, every owner of
moonshine still, every snake-faced gangster and embryonic yegg in the Twin
Cities is a JEW.

Id. at 322–23.

206 Any person who . . . shall be engaged in the business of regularly or cus-
tomarily producing, publishing or circulating . . .

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodi-
cal, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other
periodical, is guilty of a nuisance, and all persons guilty of such nuisance may
be enjoined, as hereinafter provided.

Minn. Laws 1925, ch. 285, § 1, at 358.
ber 21, two days after the ninth issue of the *Saturday Press*, the county attorney filed a complaint under the above statute alleging that the *Saturday Press* was largely devoted to malicious, scandalous, and defamatory articles and asking for an injunction to abate the nuisance. The trial judge promptly issued an order restraining Guilford and Near from any further circulation of existing issues and from producing or publishing any further issues of the *Saturday Press*. Two weeks later the judge issued an opinion upholding the constitutionality of the Minnesota legislation and denying defendants' motion to dismiss the action. Later, after a consideration of the evidence, the judge reaffirmed this conclusion and entered an order that the nuisance be abated and that defendants Guilford and Near be permanently enjoined from further publication or sale of the *Saturday Press* or any other malicious, scandalous, or defamatory newspaper.

Twice this case was appealed to the Minnesota Supreme Court, and twice that court — without dissenting voice — affirmed the trial judge, holding that the suppressive action did not offend the constitutional guarantee of a free press.

First, the Minnesota Supreme Court concluded that a newspaper which exhibited "a continued and habitual indulgence in malice, scandal, and defamation" could validly be characterized as a nuisance within the meaning of the statute "since it annoy[s], injure[s], and endanger[s] the comfort and repose of a considerable number of persons . . . ." Second, the court ruled that, in declaring such a business to be a public nuisance, the statute was a legitimate exercise of the police power of the state:

The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime.

Finally, the court ruled that the action taken did not offend the liberty of the press guaranteed by the Minnesota Constitution (a provision similar to Illinois'), which simply "meant the abolition of censorship and that governmental permission or license was not to be required . . . ." The court's opinion on what the freedom of the press did mean is worth reproducing at length.

In making the publisher responsible for the abuse of the press the legislature is authorized to make laws to bridle the appetites of those who thrive upon scandal and rejoice in its consequence.

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206 Record, pp. 4, 7.
207 Id. at 1.
208 Id. at 336.
209 Id. at 360.
211 Id. at 459, 219 N.W. at 771.
212 Id. at 461-62, 219 N.W. at 772.
213 "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. Const. art. 1, § 3.
214 174 Minn. at 462, 219 N.W. at 772.
It was never the intention of the Constitution to afford protection to a publication devoted to scandal and defamation. He who uses the press is responsible for its abuse. . . . It is the liberty of the press that is guaranteed — not the licentiousness. The press can be free and men can freely speak and write without indulging in malice, scandal, and defamation; and the great privilege of such liberty was never intended as a refuge for the defamer and the scandalmonger. Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous, and defamatory printed matter. Obviously, indulgence in such publications would soon deprave the moral taste of society and render it miserable. A business that depends largely for its success upon malice, scandal, and defamation can be of no real service to society.

It is not a violation of the liberty of the press or of the freedom of speech for the Legislature to provide a remedy for their abuse. . . . Indeed, the police power of the state includes the right to destroy or abate a public nuisance. Property so destroyed is not taken for public use, and therefore there is no obligation to make compensation for such taking. 6 R.C.L. 480, §478. The rights of private property are subservient to the public right to be free from nuisances which may be abated without compensation. 12 C.J. 1279, §1085. The statute involved does not violate the due process of law guarantee. . . .

In equitable actions of this character the defendants are not entitled to a jury trial. . . . As indicated, this kind of an action involves more than a mere libel. The purpose of this statute is to repress the nuisance by a direct attack upon the property involved. It inflicts no personal penalties as punishments for evils involved. 215

Although the reaction of the nation's press to this decision was predictably intense, the ruling also had strong support, including the immediate endorsement of the Minnesota Legislature, which rejected an attempt to repeal the law by an 86 to 30 margin. 216

The United States Supreme Court's reversal of this Minnesota judgment by a bare 5 to 4 majority in Near v. Minnesota, 217 the first case where the United States Supreme Court struck down the action of a state for violating the freedom of the press, is well-known history. Interestingly, the Supreme Court did not find that the state practice constituted a prior restraint in the traditional sense. Rather, the practice was stricken in reliance upon an expanded concept of the free-press guarantees (made applicable to the states by the fourteenth amendment) as also forbidding other restraints on publication which, like the Minnesota statute, comprised "the essence of censorship." 218 Four dissenting justices, who adhered to the traditional definition, would have sustained the suppression.

The Minnesota opinion in the Near case stands at a turning point in the law of free speech. It was preceded and decisively influenced by the suppressionist philosophy that guided the action of numerous state authorities in the 19th

215 Id. at 463-65, 219 N.W. at 773.
216 Reman, op. cit. supra note 180, at 321. For a general list of sources supporting the position taken by the Minnesota court, see id. at 145-68, 188-91.
217 283 U.S. 697 (1931).
218 Id. at 713.
century and even extended its effects into the 20th century. It was followed by the enlightened liberalism of our own day, when the freedom of the press is so jealously guarded that we are able to forget that not many years have elapsed since responsible lawyers and judges united in attempts to suppress publications whose scandalous and provocative character were thought to have caused that freedom to be forfeited through abuse.

The facts that lead to the suppression of the Saturday Press and the Nauvoo Expositor are strikingly similar, and the legal theories upon which each was suppressed are practically identical. The method of abatement — by destruction or by injunction — was different, but the end results and the consequences of the action so far as a free press was concerned were equivalent. The reasoning of the Minnesota opinion was a justification not only of what was done in Minneapolis, but also of what was done over eighty years earlier in Nauvoo. If the Saturday Press, like the Nauvoo Expositor, had been printed in 1844 (when there was no fourteenth amendment), this state court judgment abating a newspaper as a nuisance would have remained unchallenged.

The crucial issue to the legality of the Expositor suppression under the Illinois Constitution was whether the rule that the editor shall be “responsible for the abuse of that liberty” is limited to the prospect of civil damages and criminal penalties or whether it also includes the risk that the publication will be suppressed as a nuisance. It is clear that damages or criminal penalties were the usual form of responsibility that these were and the approved form of responsibility once the Illinois Supreme Court finally got around to ruling on the meaning of the “responsible for the abuse” provision in 1948.219

There was no direct precedent in 1844 to support the use of nuisance-abatement powers to suppress a newspaper like the Expositor, but there was no direct authority against such use either. Subsequent history shows that other government officials also undertook to exercise suppressionist powers beyond the conventional damage or criminal action, and some even found high judicial approval for the use of the nuisance device. Once the Nauvoo City Council had concluded that its nuisance-abatement powers extended to the abatement of newspapers publishing scandalous or provocative material, it would be unrealistic to have expected them to observe limitations that were not articulated clearly in any constitution, statute or court decision of their day. To charge them with a willful violation of the Illinois free-press guarantees, one must overlook the suppressionist sentiments of the age in which they lived and attribute to them a higher devotion to the ideals of a free press than was exhibited from 1928 through 1931 by eight Justices of the Minnesota and United States Supreme Courts.

V. Conclusion

A historian friendly to the people of Nauvoo has called the suppression of the Nauvoo Expositor “the grand Mormon mistake . . . .”220 That its conse-

219 “We would infer from this language that it refers to punishment by way of damages or criminal penalties.” Montgomery Ward & Co. v. United Retail Employees Union, 400 Ill. 38, 46, 79 N.E.2d 46, 50 (1948).

220 Durham, A Political Interpretation of Mormon History, 13 Pacific Historical Rev. 136, 140 (1944).
quences were disastrous to the Mormon leaders and that alternative means might better have been employed cannot be doubted. Nevertheless, the common assumption of historians that the action taken by the city council to suppress the paper as a nuisance was entirely illegal is not well founded. Aside from damages for unnecessary destruction of the press, for which the Nauvoo authorities were unquestionably liable, the remaining actions of the council, including its interpretation of the constitutional guarantee of a free press, can be supported by reference to the law of their day.