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Reviewed by R. B. Bernstein (New York Law School)
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A Famous Victory

History is more than just the past. It is also what we make of the past, and how we use the past to give our lives meaning. We construct a spectrum of “usable pasts,” each one revolving around a different set of key ideas and events, and we invoke one or another of them to give context and direction to our struggles with modern problems.[1]

Few historical events figure as prominently in so many usable pasts as the 1735 trial of John Peter Zenger. For more than two hundred fifty years, Zenger has been a secular patron saint of the journalistic profession, First Amendment lawyers, and anyone who values freedom of the press. The usable-past version of his story is quickly and easily told:

A vengeful royal governor and his conservative allies, bent on stifling all criticism of their domination of the province’s government, prosecuted an innocent printer for printing articles in his newspaper attacking them. The government tried to stack the deck against the printer, but the greatest lawyer in America made a surprise appearance in the courtroom as the printer’s attorney. Rejecting oppressive English legal doctrine, the lawyer persuaded the jury to uphold freedom of expression by acquitting the printer, despite the biased court’s commands. The printer’s acquittal vindicated freedom of the press in America.

Recent scholars – such as Stanley N. Katz, Leonard W. Levy, Patricia U. Bonomi, Paul Finkelman, and Eben Moglen – have dramatically revised this traditional read-

ing of the Zenger case.[2] They have given us (i) a dramatic chapter in the tangled political history of colonial New York and (ii) a case study of interactions among law, politics, and the technology of disseminating information.

The best source for understanding the Zenger case remains Stanley N. Katz’s definitive edition (for the “John Harvard Library” of Harvard University Press) of James Alexander’s 1735 pamphlet, “A Brief Narrative of the Case and Tryal of John Peter Zenger, Printer of the *New-York Weekly Journal*.” Unfortunately, Katz’s edition, published originally in 1963 and in a revised and updated version in 1972, is out of print. Now Paul Finkelman, Distinguished Professor at the University of Tulsa, has produced a new edition of the Alexander pamphlet, clearly intended for –and eminently suitable for – classroom use. It presents a full and carefully annotated text of the Alexander pamphlet, accompanied by an extensive introduction that situates the Zenger case in its political and legal contexts. The appearance of this edition is cause for celebration. The balance of this review sketches the fuller understanding of the case made possible by the work of Katz, Levy, Bonomi, Moglen, and Finkelman.

The Zenger case had roots in two distinct yet related contexts. It was a byproduct of the bitter partisan politics of colonial New York, a colony second only to Rhode Island in its reputation for factional conflict. It also was the latest chapter in a centuries-long struggle in England and its North American colonies to strike a balance be-

tween law and information technology. *Zenger* marked the point of collision between these two evolving stories.

The clash between law and the printing press has deeper roots in the past and stronger connections to the present; it is the major reason for Zenger's status as an exemplar of liberty.^[3] The movable-type printing press spread swiftly through the Western world after its invention in the 1480s. Political and religious authorities were wary of the printing press, for the new invention made it easier to circulate ideas and information and harder to trace them back to their source. They therefore sought to impose a variety of legal controls on printers.

In particular, English jurists adapted common-law doctrines to create a set of legal controls on what subjects could be addressed, what arguments could be made, in print. The most useful doctrine was that governing the crime of sedition (criticizing the government or its officials) and its subset for printed works, seditious libel. Anything deemed seditious libel was punishable because it cast government and its officials into disrepute. That the offending remarks were true only made matters worse; as the old saying had it, "The greater the truth, the greater the libel." In the seventeenth and eighteenth centuries, English officials increasingly used seditious libel as a handy tool with which to cow and assail opponents and critics.

So stood the law in Great Britain and the British Empire in August of 1732, when Colonel William Cosby arrived in New York City to assume his duties as royal governor of the province of New York. Cosby had few qualifications to be governor. He secured his office by seeking it with desperate determination and by having the good luck to have married Grace Montague, a sister of the Duke of Halifax and a first cousin of the Duke of Newcastle, the British secretary of state and the guiding force in British colonial administration.

Cosby was a bad choice to represent the Crown in this pivotal, wealthy, and divided colony. Since 1664, when the Dutch colony of Nieuw Amsterdam surrendered to forces commanded by the Duke of York (later King James II), the renamed colony exhibited a staggering level of factional strife. Colonial New York's political history is a bewildering succession of truculent governors, conniving politicians, and contentious printers. Historians have identified a complex interplay of factional allegiance, focused on great and wealthy families, dividing by allegiance or opposition to the Crown, and complicated by religious and ethnic divisions; historians have also come to appreciate the seriousness of colonial political argu-

ments and the sincerity with which contending sides espoused them.

Governor Cosby bears principal blame for the crisis into which he plunged New York. One reason was his hunger for money; he saw his governorship as a means to rebuild his shattered finances. New Yorkers soon had reason to dislike and distrust their new governor, who showed his determination to wring as much money out of his post as he could. Cosby made matters worse for himself with his contempt for those whom he was sent to govern, and his clumsy and arrogant interventions in the politics of colonial New York. He knew little and cared less about the structure of the colony's politics, and in particular the delicate truce between its two leading partisan alliances, one clustered around the Philipse and DeLancey families (who tended to support Crown authority) and the other allied with the Morris and Livingston families (who tended to defend local interests). Cosby openly courted the Philipse-DeLancey faction, offending and infuriating the Morrisites. Over a year of frenzied, bitter politicking left a stalemate in place by late 1733: The Morrisites controlled New York City and Westchester County; the rest of the colony either was neutral or leaned to the Cosby-Philipse-DeLancey alliance; and Cosby still controlled the colonial legislature, the governorship, and the judiciary.

Stymied in their efforts to break the stalemate, the Morrisites decided to try to win public opinion, with the ultimate goal of appealing to London to secure Cosby's recall. Their instrument was the press. Giving up on William Bradford's pro-Cosby *New-York Gazette*, James Alexander and William Smith decided to found a newspaper loyal to the Morrisite cause. They approached John Peter Zenger, a thirty-seven-year-old printer and German immigrant, who declared himself willing to undertake the experiment. Thus, on 5 November 1733, Zenger (with the skilled pens and covert advice of Alexander and Smith) launched *The New-York Weekly Journal*.

Zenger's *Weekly Journal* won a wide readership with its entertaining menu of news items, essays, poems, satires, and advertisements, all with anti-Cosby subtexts chosen to change the minds of Cosby's friends and stiffen the resolve of Cosby's foes. Zenger reprinted material from British papers, such as the literary essays of Joseph Addison and Richard Steele and the more polemical "Cato" letters of John Trenchard and Thomas Gordon. Alexander, Smith, and their allies also penned anonymous essays focusing on New York politics. The Morrisites were delighted with their new political weapon,

and jubilant at the abuse that the *Weekly Journal* was heaping on the governor and his allies. They celebrated the press's function as the only punishment for corrupt officials beyond the law's reach.

At first, Cosby's allies fought back in the *New-York Gazette*, but they soon decided to use the law against the *Weekly-Journal*. After two abortive attempts to move against Zenger, Governor Cosby and Chief Justice DeLancey secured Zenger's arrest on charges of seditious libel, brought by Attorney General Richard Bradley in the form of an information because the grand jury refused to return an indictment. Zenger sat in jail, for a time denied access to family and friends; even his bail proceedings became counters in the political struggle. The contest grew more heated, as each side rifled the legal toolbox for weapons, including Zenger's lawyers' demands for a writ of habeas corpus and the court's decision to disbar Zenger's lawyers, James Alexander and William Smith.[4]

Stymied, the Morrisites secretly approached Andrew Hamilton of Philadelphia, the preeminent lawyer in British North America, and persuaded him to take Zenger's case. They then planned a theatrical ambush for the prosecution.[5]

Zenger needed the best lawyer in colonial America, for the law of seditious libel cut against him on every issue. In seditious-libel cases, the jury had to deliver a special verdict (that is, answer a series of specific questions focused on the factual issues whether Zenger had printed the matter deemed seditious) rather than give a general verdict of "guilty" or "not guilty." Also, truth was not a valid defense to seditious libel; again, the issue was not the seditious truth or falsity but its tendency to throw the government into disrepute. As the Morrisites secretly briefed Hamilton, the two sides fought another skirmish over the jury. In a legal maneuver that proved critical to the defendant's case (though not appreciated by Zenger's partisans or by historians), Chambers denied the Cosbyites sole power (through the Sheriff) to choose the jury.

On 4 August 1735, Zenger's trial began in New York's City Hall, at the intersection of Wall Street and Broad Street in Manhattan. Attorney-General Bradley read the information, and then John Chambers made his first speech for the defendant. His meticulous but lackluster performance convinced those gathered to hear the case that Zenger would have a weak defense. Then, in a theatrical masterpiece, Andrew Hamilton arose at the back of the courtroom to announce that he would take part

in the case. Despite Attorney-General Bradley's protests and the judges' anger, Hamilton mounted a frontal challenge to the law of seditious libel. An experienced lawyer and a shrewd politician, Hamilton blended law and politics in his arguments for Zenger, focusing his efforts on winning over the twelve jurymen by appealing to their knowledge of politics and their sense of what the law should be.

Hamilton argued that the jurors had the right and the duty to deliver a general verdict combining issues of fact and law, rather than letting themselves be tied to the factual questions that would drag them to a special verdict against Zenger. Further, Hamilton insisted, the jury could and should consider whether the publications for which Zenger was indicted were true and published for good motives. And, attacking the authority of any Star Chamber precedent (relied on by the Crown), Hamilton pointed out that the court itself had been abolished in 1641, and that any precedent it had established was no longer good law.

Like any good trial lawyer, in 1735 or 2000, Hamilton made a cornerstone of his case his attempts to connect with the jury. He argued to them that at issue was not only Zenger's right as a printer to publish material critical of the governor, but their own right to criticize their rulers in a free country. He added that, though they were subjects of the British king and beneficiaries of the British constitution, they were also situated in circumstances distinct from those in Great Britain. Seditious libel was for the benefit of the King and his ministers, Hamilton argued – not for the benefit of the King's agent, the royal governor, and his council. Moreover, Hamilton insisted, the doctrine was inappropriate in a land where the distance between rulers and ruled was not so great as it was in the mother country. Throughout, Hamilton argued politics rather than law – a brand of politics designed to form common ground between the jury and Zenger, and to encourage them to assert their authority to deliver a general verdict, no matter what instructions they received from the bench.

After Hamilton finished his argument, Chief Justice DeLancey instructed the jury that they could return only a special verdict and strongly hinted that they should find against the defendant. He then ordered the jury to retire to consider their verdict. To the bench's consternation and the spectators' excitement, the jury returned after only a few minutes and reported that they had reached a verdict of "Not Guilty." They had ignored DeLancey's demand that they return a special verdict and his insistence

that they convict Zenger.

Far from being a landmark, Zenger's acquittal was little more than a "famous victory," leaving no clear legacy in its wake. The brawling between the two factions in New York continued unabated; indeed, the prime movers in the struggle, the Morrisites, never recaptured New York's legislature and wasted energy in disputes over political spoils and internal squabbles, dissipating whatever gains they had made. By 1738, they had collapsed as a political force in New York.

Moreover, the Zenger case had no direct doctrinal impact in America or in Britain. Seditious libel stayed a key component of the common law, surviving the adoption of state declarations of rights in the 1770s and 1780s and the adoption of the U.S. Bill of Rights in 1789. When Congress enacted the 1798 Alien and Sedition Acts, the statute's Republican opponents again evoked the spirit of Zenger and the arguments of Andrew Hamilton, but to no avail.

Not until the 1804 case of *People of New York v. Crosswell* did the state's common law revisit the Zenger case's core principle: that truth published for good motives was not punishable as seditious libel under the common law.^[6] In that case, Alexander Hamilton (no relation to Andrew Hamilton) defended Harry Crosswell, a Federalist printer, against a seditious-libel prosecution brought by the Republican administration of New York State. The case posed the ironic spectacle of Federalists (who had supported the federal Sedition Act) defending freedom of the press against a state seditious-libel prosecution conducted under the aegis of the Republican party, which had opposed the 1798 federal law as a violation of the First Amendment but invoked common-law seditious-libel against its adversaries at the state level.

In *Crosswell*, in one of the ablest arguments of his career, Hamilton tracked the reasoning of his distinguished predecessor's arguments in Zenger. The state's appellate court divided, leaving the verdict against Crosswell undisturbed, but virtually all the members of both houses of the New York legislature attended Hamilton's argument. The next year, the legislature enacted a statute writing into the state's law the Zenger-Crosswell principle that truth published for good motives was not seditious libel. Virtually every other American jurisdiction swiftly copied the New York statute. Thus, not until seven decades after the jailing of John Peter Zenger, did New York law and American law finally absorb the lesson of Zenger.

NOTES

[1]. For this concept, see generally Henry Steele Commager, *The Search for a Usable Past: And Other Essays in Historiography* (New York: Alfred A. Knopf, 1966).

[2]. James Alexander (Stanley N. Katz, ed.), *A Brief Narrative of the Case and Trial of John Peter Zenger—*, rev. ed. (Cambridge, Mass.: John Harvard Library/Belknap Press of Harvard University Press, 1972); Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York: Columbia University Press, 1971); Stanley Nider Katz, *Newcastle's New York: Anglo-American Politics, 1732-1753* (Cambridge, Mass.: Harvard University Press, 1968); and Michael Kammen, *Colonial New York: A History* (New York: Charles Scribner's Sons, 1975; reprinted, New York: Oxford University Press, 1997). The only contemporary history, which has received a first-rate modern edition, is William Smith (Michael Kammen, ed.), *The History of the Province of New-York* (1813; Cambridge, Mass.: John Harvard Library/Belknap Press of Harvard University Press, 1972). See also the brilliant, concise interpretation of colonial politics offered in Bernard Bailyn, *The Origins of American Politics* (New York: Alfred A. Knopf, 1968; Vintage paperback) and R. C. Simmons, *The American Colonies: A History* (New York: David McKay, 1978; Norton paperback). The latest study of Zenger, and one of the best, is Eben Moglen, "Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York," *Columbia Law Review* 94 (1994): 1495-1524.

[3]. On freedom of the press in colonial and revolutionary America, the leading studies are: Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), supplemented by Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson* (Indianapolis, Ind.: Bobbs-Merrill, 1966), and Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (New York: Oxford University Press, 1988). For the broader context, see Elizabeth I. Eisenstein, *The Printing Press as an Agent of Change*, 2 vols. (Cambridge; Cambridge University Press, 1978; one-vol. abridged ed., 1993).

[4]. See Moglen, "Considering Zenger," 1514-1517, for the most thoughtful analysis of this episode's legal context and consequences. Moglen suggests that DeLancey consulted overnight with Governor Cosby before disbarring the attorneys.

[5]. Ironically, six years earlier, in 1729, Hamilton, as Speaker of the Pennsylvania Assembly, had taken part in

the seditious-libel prosecution of printer Andrew Bradford, William Bradford's son, for having attacked the legislature on the proprietors' behalf. Katz, "Introduction," in Alexander (Katz, ed.), *Brief Narrative*, 22-23. Again, for a probing analysis, see Moglen, "Considering Zenger," 1517-1519.

[6]. James Morton Smith, *Freedom's Fetters: The Alien and Sedition Acts and American Civil Liberties* (Ithaca, N.Y.: Cornell University Press, 1955; 2d ed., 1963); Levy, *Emergence of a Free Press*; Smith, *Printers and Press Freedom*. On *Croswell*, see the discussion and docu-

ments in Leonard W. Levy, ed., *Freedom of the Press from Zenger to Jefferson* (Indianapolis: Bobbs-Merrill, 1967), lxxvii-lxxix, 377-399. The fullest discussion is in Julius Goebel and Joseph H. Smith, eds., *The Law Practice of Alexander Hamilton*, 5 vols. (New York: Columbia University Press, 1964-1980), 1: 775ff.

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