

# Research in Brief

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## The Croswell Case: Paradox of History?

*By Nicholas N. Plasterer*

► Ask a schoolboy who John Peter Zenger was and very likely he will be able to give you at least a fairly satisfactory answer.

Ask a dozen adults who Harry Crosswell was and the chances are you'll get a unanimous response, "Never heard of him."

This could be one of the more inexplicable paradoxes of journalism history. The careers of Zenger and Crosswell contained striking similarities, yet puzzling differences.

Both were politically minded editors whose attacks on the ruling authorities resulted in trials for libel.

Zenger became famous as the result of a trial which had no direct effect on the law of libel and possibly not much indirect effect.

As far as the general public is concerned, Crosswell sank into comparative oblivion after his trial, which apparently had a direct and important causal relationship with our present libel laws.

Zenger's famous trial of 1735 based on his *New York Weekly Journal* attacks against the royal governor requires little retelling. Andrew Hamilton, famous lawyer from Philadelphia, induced the jury to acquit Zenger on a defense of truth of the statement. This was in direct conflict with the law of the time, which specified that truth was not a defense in libel, and also that in

such cases the judge would determine the law and the jury the facts.

Despite Zenger's acquittal, the libel laws remained unchanged until the passage of the Sedition Act of 1798. Even then, the new truth and law-fact provisions were in effect only during the life of the act. Certainly, the Zenger case had little if any effect on our libel laws.

After referring to the "not guilty" verdict which resulted from Hamilton's brilliant defense, Emery evaluates the case thusly:

But there are some negative aspects of the case. The verdict had no effect on libel law for more than half a century . . . It is very possible that expediency, rather than principle, guided the authorities after the trial. They admitted no new legal precedent in the Zenger case. It is quite probable that Zenger would have been rearrested for his very next offense, except for circumstances (the death of the royal governor).<sup>1</sup>

In the years that have followed, the "ineffective" Zenger case has grown in prestige. The influential Crosswell case, however, never attained comparable recognition.

► What was the background of the Crosswell case and why was it snubbed historically? Here was a case that should have been made to order for lasting prominence: A criminal libel trial based on the publication of a statement that Secretary of State Jefferson had paid James Thomson Callender, an "English political refugee and scandal

<sup>1</sup> Edwin Emery, *The Press and America* (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1962), p. 81.

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monger,"<sup>2</sup> for calling President Washington a traitor and robber and Vice President Adams an incendiary. And former Secretary of the Treasury Alexander Hamilton served as defense attorney in the case.

The offending publication is quoted:

Holt says the burden of the Federalist Song is that Jefferson paid Callender for calling Washington a traitor, a robber, a perjurer; for calling Adams a hoary-headed incendiary and for most grossly slandering the private characters of men he knew well were virtuous. These charges not a democratic Editor has yet dared or ever will dare to meet in an open and manly discussion.<sup>3</sup>

Who was this Callender whose name was linked with so prominent a quartet of our Founding Fathers? Who was Crosswell? What were the events leading to the trial that helped shape our present libel laws?

Callender had begun publishing in 1795 an annual called *Political Progress* and later given the name *American Annual Register*.<sup>4</sup> Then he wrote for the Richmond (Va.) *Examiner* and later was its editor.<sup>5</sup>

For publishing a pamphlet, "The Prospect Before Us," in which he attacked Adams, the Federalists and the Alien and Sedition Acts, Callender was indicted in 1800 on a charge of sedition.<sup>6</sup> He had the misfortune to be tried by Judge Samuel Chase, tyrannical federal judge. Chase had held court in Philadelphia, where he presided over the trial of Dr. Thomas Cooper, physician by profession and Jeffersonian by political belief. Chase charged the jury in a highly partisan manner, referring to the licentiousness of the press as a method to destroy a republic. Cooper was given a six-month sentence and fined \$1,000.

Judge Chase proceeded southward to Virginia for his appointment with Calthe lawyers in Virginia the difference lender, boasting that he "would teach between liberty and licentiousness of the press."<sup>7</sup>

In the Callender trial in Richmond, Chase reportedly told the marshal to see that none of the "rascally Democrats" were on the jury.<sup>8</sup> The trial was a mockery and Callender was fined \$200 and sentenced to nine months imprisonment.

After Callender had served his sentence, Jefferson, then president, pardoned the publicist. However, Callender also asked to be given the Richmond postmastership as a reward. Realizing the limitations of Callender's character, Jefferson refused. This embittered Callender, and he directed some of the poison of his pen at his former benefactor.<sup>9</sup>

► Callender's attacks on Jefferson were vicious and it was at this point that Crosswell's and Callender's paths crossed. The statement which led to the trial was first published in Alexander Hamilton's New York *Evening Post* and then Crosswell reprinted it in his Hudson, N.Y., weekly.

Most authorities believe that Callender, bitter because Jefferson refused to make him postmaster of Richmond, lied about the relationship between the statesman and himself. They do not believe that money given by Jefferson to Callender was for the express purpose of slandering Washington and Adams. Of course, there was some "smoke." Jefferson's political opponents could make much of Callender's charge, for Jefferson was not above doing some political manipulation and having others publish attacks on the opposition.

"The value of political propaganda

<sup>2</sup> Frank Luther Mott, *American Journalism* (New York: The Macmillan Company, 1962), p. 135.

<sup>3</sup> James E. Pollard, *The Presidents and the Press* (New York: The Macmillan Company, 1947), p. 76.

<sup>4</sup> G. H. Payne, *History of Journalism in the United States* (New York: D. Appleton and Company, 1920), p. 194.

<sup>5</sup> Mott, *op. cit.*, p. 135.

<sup>6</sup> Payne, *op. cit.*, p. 194.

<sup>7</sup> Claude G. Bowers, *Jefferson and Hamilton* (Boston: Houghton Mifflin Company, 1925), p. 398.

<sup>8</sup> Bowers, *op. cit.*, p. 398.

<sup>9</sup> Payne, *op. cit.*, p. 194.

was an essential part of Jefferson's beliefs; but he preferred to work secretly and privately, not in the open as did Hamilton and Adams," according to W. C. Ford.<sup>10</sup>

Ford tells of Jefferson's letter to Norborne Nicholas of North Carolina dated April 7, 1800, when the contest for the presidency was at its height. With the letter, Jefferson sent copies of a pamphlet by Dr. Cooper containing some political principles, "with a view that one should be sent to every county committee in the state, either from yourself personally or from your central committee."

Jefferson added, however, that it should not be made known that it came from him, for "you will readily see what a handle would be made of my advocating their contents."

There is no question that Jefferson did help Callender financially. We may refer to his own words, expressed in a letter to Mrs. Abigail Adams, wife of President Adams:

Dear Madam, Your favor of the 1st was duly received, and I would not have again intruded on you, but to rectify certain facts which seem not have been presented to you under their true aspect.

My charities to Callender are considered as rewards for his calumnies. As early, I think, as 1796, I was told in Philadelphia that Callender, the author of the *Political Progress of Britain*, was in that city, a fugitive from persecution for having written that book, and in distress. I had read and approved the book; I considered him as a man of genius, unjustly persecuted.

Jefferson speaks of contributing to Callender's relief, then later in the letter adds:

When he first began to write, he told

<sup>10</sup> Worthington C. Ford, "Jefferson and the Newspaper," in *Records of the Columbia Historical Society*, Vol. 8 (Washington, 1905), p. 79.

<sup>11</sup> Saul K. Padover, ed., *A Jefferson Profile as Revealed in His Letters* (New York: John Day Inc., 1956), pp. 151-2.

<sup>12</sup> Dumas Malone, *Jefferson and the Ordeal of Liberty* (Boston: Little Brown, 1962), pp. 326-33.

<sup>13</sup> Emery, *op. cit.*, p. 172. Pennsylvania had included the two principles in its 1790 constitution (Emery, p. 81).

some useful truths in his coarse way; but nobody sooner disapproved of his writing than I did, or wished more that he would be silent. My charities to him were no more meant as encouragements to his scurrilities, than those I give to the beggar at my door are meant as rewards for the vices of his life, and to make them chargeable to myself.<sup>11</sup>

Another instance is cited by Malone. Callender wrote "The History of the United States for 1796," which revealed a scandal involving Hamilton and a married woman. On June 20, 1797, before the publication was completed, Jefferson paid Callender the odd figure of \$15.14. Apparently this was in the attempt to make the transaction look like the purchase price of a copy or copies of the publication, rather than a subsidy. Malone says that Jefferson likely knew the book was to include an attack on Hamilton.<sup>12</sup>

► Whether there is any truth in the statement that Jefferson paid Callender for the express purpose of attacking Washington and other Federalists perhaps will never be completely resolved. There should be no question, however, that the resulting Crosswell trial was important to the development of the law of libel as we know it today. Statements of representative authorities are quoted in the following paragraphs.

Emery has this to say:

The significance of the Crosswell trial can be seen in legislation immediately following Hamilton's plea. Even before the judges had handed down the verdict, a bill was engrossed in the New York Legislature providing that truth thereafter was to be admitted in defense. The same bill gave the jury the right to determine both the law and the fact. By 1805, these principles had become law in New York — 70 years after Zenger's trial. Soon other states followed suit.<sup>13</sup>

Mott makes this statement:

Hamilton's argument was so effective that even before the case was decided the New York legislature enacted a statute making it possible to introduce the truth, when published with good mo-

tives, as a defense in a criminal libel suit. This "Hamiltonian doctrine" was later made part of most state constitutions.<sup>14</sup>

Steigleman refers to the case in regard to liability for reprinting articles:

The courts a number of times have upheld actions brought against papers which merely reprinted stories from other publications. In fact, one of the most celebrated of American libel cases was that brought in 1804 against Harry Crosswell, editor of a Federalist paper in Hudson, N.Y., for an article he had reprinted from the New York *Evening Post*, attacking President Jefferson. Crosswell lost, although his brilliant defense by Alexander Hamilton was one of the steps toward obtaining statutes permitting the jury to pass upon both the law and fact.<sup>15</sup>

Says Thayer:

The effect of this case was so repugnant to the popular opinion of the state that the New York legislature in 1805 passed an act establishing a practice for accepting the defense of truth in criminal libel when such was published with good motives and for justifiable ends, and giving the jury the right to determine both the law and the fact under direction of the court.<sup>16</sup>

Payne speaks of Hamilton's defense of Crosswell, then has this to say:

The court divided after a long argument and the law was upheld, but so profound was the impression made on the lawmaking body by his speech, that the New York legislature subsequently passed a statute authorizing the truth to be admitted in evidence and the jury to be the judges of the law as well as of the facts in libel cases.<sup>17</sup>

Hamilton was brilliant in his arguments before the judges. D. S. Alexander quotes Chancellor Kent, a contemporary of Hamilton:

I have always considered General Hamilton's argument in this case as the greatest forensic effort he ever made. He had come prepared to discuss the points of law with a perfect mastery of the subject. He believed that the rights and liberties of the people were essentially concerned. There was an unusual

solemnity and earnestness on his part in this discussion. He was at times highly impassioned and pathetic. His whole soul was enlisted in the cause, and in contending for the rights of the jury and a free press, he considered that he was establishing the surest refuge against oppression. He never before in my hearing made any effort in which he commanded higher reference for his principles, nor equal admiration of the power and pathos of his eloquence.<sup>18</sup>

► In recapitulation, we find a trial involving four of our Founding Fathers, Washington, Jefferson, Adams and Hamilton, producing a brilliant legal defense and influencing our libel laws. Its importance has been recognized by journalists, yet in popular knowledge it never made the grade as an historical milestone. Why?

It must be admitted that it lacked some of the dramatic appeal of the Zenger case. The accused editor did not languish in jail, as did Zenger, supposedly directing his publication by passing copy through the peephole opening of his cell door to his faithful wife.

Crosswell's continued freedom still should not detract from the importance of the case, with Hamilton's theories soon becoming incorporated in New York libel legislation.

Perhaps general historians felt Hamilton's stand was disproportionately influenced by personal motivations. After all, the published statement did attack his political enemy, Jefferson.

Also, historians may have thought Hamilton felt a moral obligation to defend Crosswell. The offending statement had first appeared in Hamilton's *Evening Post* and Crosswell had only reprinted it.

<sup>14</sup> Mott, *op. cit.*, p. 170.

<sup>15</sup> Walter A. Steigleman, *The Newspaperman and the Law* (Dubuque, Iowa: Wm. C. Brown Company, 1930), pp. 276-7.

<sup>16</sup> Frank Thayer, *Legal Control of the Press* (Brooklyn: Foundation Press, 1956), p. 26.

<sup>17</sup> Payne, *op. cit.*, p. 199.

<sup>18</sup> D. S. Alexander, *A Political History of the State of New York*, Vol. 1, pp. 132-3.

The writers of history also may have been influenced, subconsciously perhaps, by the fact that Hamilton earlier in his career did not seem to be too much concerned over freedom of the press.

At any rate, the chroniclers have not given the Crosswell case an important billing in the drama of American events. To add the insult of implied indifference, they are not even able to agree on the name of Crosswell's weekly newspaper published at Hudson, N.Y. To some historians it is the *Wasp*; others refer to it as the *Balance*.

## Newspapers as Sources in Historical Journals

By John D. Stevens  
and Donald L. Shaw

► Newspapers have been widely used as source material by American historians at least since 1883, when the first volume of John Bach McMaster's *A History of the People of the United States From the Revolution to the Civil War* appeared. McMaster was a pioneer in using newspapers, but others followed his lead. In 1923 Lucy M. Salmon published the thorough analysis, *The Newspaper and the Historian*.

This study examines use of newspapers in footnotes in scholarly historical journals. To measure trends over time, four articles were sampled from the *American Historical Review* (established in 1895) for the years 1900, 1920, 1940 and 1960. Similarly, four

articles were analyzed from the *Journal of American Historians* (published as the *Mississippi Valley Historical Review* from its founding in 1914 until 1965) for the years 1920, 1940 and 1960. Only articles dealing with American history were included in the sample.

Footnotes were divided into two classes: those which referred, in part at least, to a newspaper, and those which referred to all other sources, such as private letters, official records, books and articles.

Table 1 indicates historians publishing in these two major journals consistently have made heavy use of newspaper sources. The percentage of footnotes based on newspapers has remained fairly steady at about one in five.

To see if newspapers were used more in the writing of certain types of history, 32 articles were randomly sampled from among 64 state, regional and special-topic historical journals, all published in the first half of 1966. In these journals, newspapers were cited less frequently (15%) than in the two major journals.

Articles on political, economic, social and intellectual topics made more frequent use of newspapers than did other articles. These are subjects, of course, which the newspapers have covered traditionally. Eighteen of the articles were on these subjects, and 21% of the footnotes cited newspaper sources. On the other hand, in the 14 articles on other topics (military campaigns, reminiscences, local churches, etc.), only 2% of the footnotes referred to newspapers. Either personal memories or official government records are the principal sources for such articles.

TABLE 1  
Newspaper Documentation by Time in Two Leading Historical Journals

Year	Articles Sampled	Footnotes	Footnotes per Page	Footnotes Citing Newspapers
1900	4	272	3.2	33%
1920	8	322	2.3	21
1940	8	586	3.4	21
1960	8	369	2.5	18
Average	7	387	2.9	22%

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