"IN EVERY VIEW INTERESTING": ALEXANDER HAMILTON AND THE CROSWELL CASE

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CHAPTER ONE

INTRODUCTION

The trial of Harry Croswell for seditious libel is in Alexander Hamilton's own words, "in every view interesting." For advocates of freedom of the press, the case introduced a usable test for charges of criminal libel; for legal historians, the case created a definitive doctrine for American jurisprudence; for students of Alexander Hamilton, it is the last of a triad of precedent-setting cases in Hamilton's legal career.[1]

The Croswell case was actually born of a personally motivated feud between a Republican Party boss in New York state and the junior editor of a Federalist paper. Had it not been for the participation of Hamilton, the Croswell case would not have caused a tremor beyond state borders. Hamilton's argument in the Croswell case sucessfully challenged interpretation of a two-hundred-year-old law. He did not win a new trial, but he convinced New York legislators to change the law. The Sedition Act of 1798 was purported to ameliorate the common law of seditious libel, but its perversion in the courts by Federalist judges defeated that purpose. Hamilton's prescription for a balance between freedom of the press and the limits on that freedom satisfied both common sense and society, in that his

definition was quoted almost verbatim in twenty-three state constitutions or statutes.[2]

The participation of the press is a distinctive aspect of the political process of the United States. The influence of the press in the American Revolution and the Revolution of 1800, when the Federalists peacefully transferred power after twelve years of uninterrupted rule, has been generally conceded.[3] Yet defining the responsibilities of a highly influential yet unaccountable component of the political process has troubled thoughtful citizens, not only of our own republic, but of earlier ones as well. "Who will guard the guards?" has never been answered satisfactorily. What limits, if any, they could place on freedom of the press, and how to define those limits, was a matter of concern to members of the new constitutional government.

It was recognized early in the American republic that a free press was a vital part of a just government, calling rulers to account to the governed. Defining the parameters of that accountability proved troubling, as printed critiques of government in the early constituional era became unbearably harsh. The fury of press criticism provoked the government into a search for means to suppress "licentiousness" while preserving liberty. The most efficient tool, one that had been employed since 1605, was the charge of seditious libel.

Seditious libel was a distinctive form of libel, defined as printed matter that brought the government into "public hatred, contempt and ridicule," thus contributing to "breach of the public peace." The concept of seditious libel has been regularly reconsidered throughout the twentieth century, often in response to events that raised the question of how much political dissent was permissible in time of national crisis. The Sedition Act of World War I evoked a flurry of articles, which gave rise to the current scholarship regarding freedom of the press, and its permissible limits.[4]

One of the earliest challenges to the assumption that the existence of the crime of seditious libel was compatible with freedom of the press was Henry Schoenfield's essay "Freedom of the Press in the United States" originally published in 1914. Shoenfield challenged the contemporary view that freedom of the press had always been a cherished tenet of the Founding Fathers and the Framers of the Constitution. He reminded his readers that freedom from prior restraint of publication, which served as censorship, was the freedom the Bill of Rights granted the press in the first amendment.[5] Schoenfield concurred with the view he quoted of Sir James Stephens, author of History of Criminal Law in England, who based his discussion of sedition in two views of government. In one, the ruler is sovereign, and not subject to criticism by his subjects; in the other, the

government is servant to the sovereign people, and is accountable to them. Therefore, in such a government,

> there can be no such offense as sedition. There may be indeed be breaches of the peace which may destroy or endanger life, limb or property, and there may be incitements to such offences, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal.[6]

This view was not a generally accepted one, as two seminal legal articles, a court decision, and a book suggest.

Justice Holmes' enunciation of the limits of permissible speech in Schenck v. United States (1919) spurred thought, and some discussion, in the legal press. W.R. Vance, in his article "Freedom of Speech and of the Press" explores the meaning of the First Amemdment and seeks the "scope and extent of the exising right of free publication...at the time." He looks to the common law rules of 1789, and the later Sedition Act of 1798, and demonstrates that restrictions accompanied declarations of support for liberty of the press in state constitutions, as well as the federal constitution. "It is difficult to determine how to draw the line just at the place" between liberty and licentiousness, but Vance draws that line between resistance to the law, or breach of the peace, and "all other utterances, however vextatious or harmful." Vance's view supports Holmes' dictum that liberty of the press is not absolute, and accepts "the general rule that

this constitutional provision affords no protection for acts which at common law were crimes." Vance rejects Schoenfield's radical position, and finds it perfectly proper that the state may defend itself through prosecutions of seditious libel. However, he believes that judges who prosecuted seditious libel cases were carrying out existing law, and Schoenfield believes that those same judges ignored the law, particularly provisions of the Sedition Act that protected the defendant. This opposing position of two legal scholars embodies the tension between law as it exists on the books, and law in actual practice. It is a distinction that trips up many a historian. The law's existence in statute or common-law form is no guarantee that it will be enforced as intended, or indeed enforced at all. As Vance himself concludes, law "supported by public sentiment" will be enforceable," whereas one violating the public sense of justice and freedom" will result in acquittal.[7]

Thomas Carroll turns to consideration of the Sedition Act itself, and comes to the conclusion that the First Amendment was a Blackstonian prohibition, and was referring to prior restraint. Therefore, the Sedition Act was constitutional, an advance over the common law tenets that limited the jury and prohibited truth as a defense, and would actually have expanded freedom of the press. However, the attitude of the courts impaired the value of the

Sedition Act by employing it as a tool to suppress political opponents.[8]

Zechariah Chaffee,jr., in Free Speech in the United States, is concerned with the immediate breach of the peace mentioned in Stephen, and seeks a test for criminality of an utterance. Chaffee is sanguine, however, regarding the wisdom of the Supreme Court and rests his confidence in Justice Holmes. "The principle thus enforced by the Constitution is the interest of the community in the discovery and dissemination of truth." [9]

There is, however, no test for truth, and this is one of the subthemes of the great trilogy born of the McCarthy era: Crisis in Freedom, Freedom's Fetters, and Legacy of Suppression. One man's truth is another man's treason, and John C. Miller demonstrated in Crisis in Freedom that the Federalists viewed opposition as treason, and used the Sedition Act to suppress dissent. Miller sees the Sedition Act as a repudiation of French revolutionary ideas, and designed to protect Americans from the infection of French democracy. However, Miller also states "it was generally believed that in the United States the freedom of the press was virtually unlimited" and comes to the conclusion that the Alien and Sedition Acts were the final nail in the Federalist coffin, because "their disregard of the basic freedoms of Americans...cost them the confidence and respect of the people." [10]

James Morton Smith confesses that he found "more and more modern parallels" but has "resisted any attempt to belabor them" in his detailed study of Sedition Act prosecution in Freedom's Fetters. Smith states that "The evidence is conclusive that the Sedition Law, as enforced, reduced the limits of speech and press in the United States to those set by the English common law in the days before the American Revolution." Smith further argues that the actual practice of the press in the United States went much further than the pre-revolutionary common law rule, and that resistance to the Sedition Act helped to shape "the American tradition of civil liberties."[11]

Leonard Levy subscribes to Smith's sentiment but disputes the theory in Legacy of Suppression. Levy argues that, contrary to the assumptions of Chaffee, Miller and Smith, the extension of liberty to the opposition press was non-existent in the early Republic, and that Sedition Act prosecutions forced an formulation of libertarian theory. In his later volume, Emergence of a Free Press, Levy conscientiously responds to criticism of Legacy of Suppression and revises his picture of press freedom in the early national period, acknowledging that practice far outran theory. It is the theory Levy is interested in, and he does not revise his earlier conclusion that the concept of seditious libel cannot exist in a democracy, and that a government cannot "be criminally assaulted by mere

words."[12]

An essay critiquing Levy's work makes a point applicable to all three of the masterful tomes mentioned above. David Rabban accuses Levy of imposing twentieth century libertarian views on an earlier era. "Levy fails to recognize that it was possible for the framers of the first amendment...to expand the protection for freedom of expression well beyond the narrow boundaries of the English common law while retaining some conception of seditious libel." Rabban's article, "The Ahistorical Historian," emphasizes that "Levy's refusal to reflect on the paradoxes between practice and theory constitutes a basic weakness of his analysis." Rabban argues that it is possible to discern a theory of freedom of expression that allows criticism of the government without total abolition of seditious libel in the early years of the Republic. Rabban holds that the Constitution and the First Amendment were the culmination of a tradition engaging both the Radical Whig influences in the American Revolution and democratic movements in the 1790s triggered by the French Revolution. He regards Levy's standard of total rejection of seditious libel as one of unwarranted rigor for libertarian theory and practice, both in England and the colonies before the Revolution.[13]

There was a societal consensus for the concept of seditious libel, as the arguments against the Sedition Act demonstrate. Despite their stirring econiums on freedom of

the press, the Republican opposition merely resisted jurisdiction of the disputed law. Republican opposition centered around federal, rather than state, prosecutions of seditious libel. A few radicals bruited the idea that political speech cannot be limited after the expiration of the Sedition Act, but government officials did not consider it seriously, as evidenced by continuing prosecutions in state courts under the Republican aegis. Rabban has a legitimate point--it is immaterial whether contemporary belief endorses the libertarian view; courts, legislatures, executives, and the newspapers themselves agreed that, at the turn of the nineteenth century, there were limits to liberty, and a line needed to be drawn between liberty and licentiousness.[14]

The line that satisfied society was drawn in 1804 in a New York case of seditious libel. People v. Croswell is not unknown to legal historians or historians of journalism. It is a particular joy to legal scholars, for the many procedural and technical oddities that Croswell features. Journalists cite it as a marker on the road to a untrammeled press. Every biographer of Alexander Hamilton mentions it as his last great contribution to American law. From all these perspectives, the question rarely arises, why Harry Croswell? How did Alexander Hamilton come to defend a truly minor prosecution of a truly minor paper? Croswell was not a cause celebre; its timing was very unfortunate. Newpapers

outside New York State took no note of the lengthy indictment process in January 1803, when Harry Croswell was first bound over for trial, and the arguments of his defense first advanced. The trial itself took place during the excitement over the Louisiana Purchase, and the Louisiana Purchase was a much bigger story. The Gazette of the United States was the only paper outside New York to give Croswell's trial extended (if belated) coverage, and merely reprinted the account printed in Croswell's own paper. It is likely that Croswell knew someone at the Gazette, as they had also reprinted contributions from his deplorable Wasp.

Croswell finally attracted attention when Alexander Hamilton undertook the appeal for a new trial, because his definition of seditious libel and freedom of the press were incorporated first into New York State law, then the state constitution, and copied by other states, in their laws and constitutions. Croswell achieved its fame in Hamilton's arguments, which have a surprisingly contemporary air.[15]

Harry Croswell became a symbol for freedom of the press not because his cause was just, or his tenets admirable, but because he lived in Hudson, New York. The political relationships that connected the participants in the Croswell case are rarely regarded. A petty parochial feud was the impetus for the Croswell case, and only Hamilton's participation catapulted Croswell into history.

ENDNOTES

1. Hamilton's quote from James Kent, Croswell ads the People (MS) New York Public Library, 61, as quoted in Ju Goebel, jr., ed., The Law Practice of Alexander Hamilton Documents and Commentary (New York: Columbia University Press, 1964), 839. For impact of Croswell case in accou of freedom of the press, see Frank Luther Mott, American Journalism: A History of Newspapers in the United State through 260 Years: 1690-1950 revised edition, (New York The Macmillan Co., 1950), 169-171; Donna L. Dickerson, Course of Tolerance: Freedom of the Press in the Ninete Century America (Westport, CT: Greenwood Press, 1990), 31. For legal historians, see Morris Forkosch, "Freedom the Press: Croswell's Case" Fordham Law Review 33 (1965 415-448, and Goebel, The Law Practice of Alexander Hamil 775-848. For students of Hamilton see Clinton Rossiter, Alexander Hamilton and the Constitution (New York: Harcourt, Brace and World, Inc., 1964), 102-106; Broadus Mitchell, Alexander Hamilton: The National Adventure, 1 1804 (New York: The Macmillan Co., 1962), 503-508.

2. Kyo Ho Youm, "The Legacy of People v.s. Croswell on Libel Law," Journalism Monographs 113 (June 1989), 8-15.

3. See Bernard Bailyn and John B. Hench, eds. The Press the American Revolution: (Worcester, MA: The American Antiquarian Society, 1980), and Donald H. Stewart, The Opposition Press in the Federalist Period (Albany: State University of New York Press, 1967).

4. Quote from William Blackstone, Commentaries on the La of England, William Draper Lewis, ed. 4 vols. (Philadelphia: Rees Welsh & Co., 1898), 4:151.

5. Henry Schofield, "Free Speech in the United States," Essays in Constitutional Law and Equity, vol. 2 (Boston: Chipman Law Publishing Co., 1921), 510-571.

Prior restraint is defined as "the imposition of a restraint on a publication before it is published." Henr Campbell Black, Black's Law Dictionary, 5th ed. (St. Paul MN: West Publishing Co., 1979), 1074. In England during the Tudor and Stuart periods, prior restraint took the fc of requiring printers to obtain a license from the government before publication. The government could refu a license to publish material it deemed objectionable, thereby exercising censorship. Phillip Hamburger, "The Development of Seditious Libel and Control of the Press" Stanford Law Review 37 (February 1985), 671-691.

6. Sir James Fitzjames Stephen, History of the Criminal Law in England, 2:299 as quoted in Schoenfield, "Freedom of the Press," 520.

7. Justice Holmes' famous remark, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic" is from Schenk v. United States 209 U.S. 47 (1919) as quoted in Zechariah Chaffee, jr., Free Speech in the United States (Cambridge, MA: Harvard University Press, 1949), 15. W.R. Vance, "Freedom of Speech and of the Press," Minnesota Law Review 2 (March 1918), 242, 240, 259, 251, 260.

8. Thomas F. Carroll, "Freedom of Speech and of the Press in the Federalist Period: The Sedition Act," Michigan Law Review 18 (May 1920), 615-651.

9. Zechariah Chaffee, jr., Free Speech, 23, 509.

10. John C. Miller, Crisis in Freedom: The Alien and Sedition Acts (Boston: Little, Brown & Co., 1951), 83, 230.

11. James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and Civil Liberties (Ithaca, NY: Cornell University Press, 1956), x, 424, 425-430.

12. Leonard W. Levy, Emergence of a Free Press, (New York: Oxford University Press, 1985), xxi. See also Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (Cambridge, MA: The Belknap Press, 1960), x.

13. David M. Rabban, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," Stanford Law Review 37 (February 1985), 796, 800, 801.

14. For an excellent exposition of the circumstances of the press and debates surrounding the passage of the Sedition Act, see Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel (Chapel Hill, NC: University of North Carolina Press, 1986), 40-100. For radical thought, see Levy, "The Emergence of an American Libertarian Theory" in Emergence, 309-349.

15. Kyu Ho Youm, "The Impact of People v. Croswell on Libel Law," 8-15.

CHAPTER TWO

A SURVEY OF SEDITIOUS LIBEL

The charge of seditious libel was created in a decision of the Star Chamber in 1605, and was described in De Libellis Famosis in Sir Edward Coke's Reports in 1606. The concept of criminal defamation of a public official had originated in the medieval statute Scandalum Magnatum, forbidding the spread of "false news" regarding the great men of the realm. The law was a response to the political unrest following the baronial wars of the 1260s, and its purpose was to encourage barons to press criminal charges rather than resort to duelling in a quarrel. Recompense for injured honor could be obtained in a civil suit for defamation--the criminal charge was to prevent violence. Yet true accusations of wrongdoing were not defamatory, so truth was a defense in this statute.[1]

With the advent of the printing press, supression of criticism of the government became a major objective of the Court of Star Chamber, which was charged with the preservation of order in the realm. Printers were required to obtain a license (i.e. authority from the crown), to publish, and were liable for defamation suits or prosecutions for seditious libel after publication. Phillip Hamburger, associate professor at the University of Connecticut Law School, emphasizes that use of the word

"libel" misleads many historians. "Libel" not only refers to a "technical, legal term for a written defamation" but also defined any pamphlet or small book, despite its content.[2] The term "seditous libel" was used indiscriminately in criminal prosecutions. An unlicensed writing, or even an anti-government pamphlet, is not the same as a written defamation of a government personage; thus not all trials for seditious libel in the seventeenth century were necessarily for the written defamation we understand as seditious libel. The concept of seditious libel was devised to control the press and provide the government with the means to defend itself against political dissent.[3]

There was little precedent in existing common law to satisfy a government seeking to suppress printed dissent. In 1606, Star Chamber, charged with the preservation of order and peace in the realm, issued a decision in a case of criminal libel which altered the application of Scandalum Magnatum and the essence of defamation. Colin Rhys Lovell, professor of history at University of Southern California, clarifies further, "the personnel and the overriding view of the court made it view any criticism of the government as a wrong to be punished...no defense was possible for a political libel." Therefore, in 1606, the crime of seditious libel--"publications defamatory of existing public officers, of government, institutions or law"--was defined

by Edward Coke in his report of De Libellis Famosis.[4]

Lewis Pickeringe was convicted in the Star Chamber Court for a written rhyme lampooning the late Archbishop of Canterbury.[5] Coke himself best expressed the alteration to the law of libel. A written libel of a private person was now criminal. The harm of libel no longer lay in damage to reputation; the harm was the incitement to revenge;

> and so tends to...to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience: **if it be against a magistrate, or other public person, it is a greater offence;** for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the State cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.[6]

Coke further pronounced that the charge of libel could be made even if the subject was dead, because the tendency to breach the peace remained, and in the case of a dead public official "the libeller traduces and slanders the State and Government, which dies not." Scandalum Magnatum did not offer the sufficient protection of all government officials that this new law did. In a departure from both existing statutory and common law, truth of the libel was no defense; the crime lay in the tendency to break the peace, not in demonstrable falsehood. This comprehensive decision included pictures, signs and songs, and defined publication

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as passing the libel to any other party. Indictments could be handed down by a grand jury, or by information (complaint) to the attorney general. The punishments included fines, imprisonment, and in extreme cases, the pillory and loss of ears. The crime itself was a misdemeanor, but was treated as a treason.[7]

In this decision, Star Chamber was creating a law that had no precedent, upon which the common law depended. This would generate problems when common law tried to absorb the crime of seditious libel into the existing precedents of defamation. It was a polite legal fiction that judges "discovered" the common law in previous decisions, but in actuality, common law was judge-made law. As one of the judges of the Star Chamber, Coke had made this law, and its contradiction of previous law of defamation was a never-ending source of conflict. This pronouncement of Coke's was specifically aimed at defamation of officials; it was not yet broadened to include libels of government, but only individuals in the government. The expansion of this doctrine to include all criticism of government developed concurrently with the attempt to control the press throughout the seventeenth century.[8]

In 1641, Parliament abolished Star Chamber. The defense of truth in defamation migrated to the common law in civil suits only, for oral slander as well as written defamation. The doctrines laid down in De Libellis Famosis

were absorbed in criminal common law. [9]

Throughout the turbulent events of the civil war, Commonwealth, Protectorate, and Restoration, licensing of the press and supression of governmental criticism by prosecutions for seditious libel were points of agreement for all sides. Licensing of the press expired after the Glorious Revolution, but continuous trials for seditious libel refined the doctrines of De Libellis Famosis and limned the boundaries of press freedom. By the eighteenth century, the options of a printer accused of seditious libel were limited indeed. The costs of defense, even in an acquittal, which was rare, were enough to satisfactorily suppress criticism of the existing government.[10]

In a series of trials after the Restoration, the common law incorporated the elements of seditious libel. Most of these elements had been established in Star Chamber actions, but trials before judge and jury did not alter them. The jury actually posed problems for seditious libel prosecutions, as they could not be trusted to acquiesce in the political objectives of the court. Therefore, as judges instructed juries in this new law, these common law judges found it necessary to define elements to support practices established by Star Chamber. Those elements included the determination of the defamatory nature of the libel, the publication, or intention to publish, to a third party, and the malice, or bad intent, of the libel. This last

sometimes is known as the "bad tendency," i.e. the tendency of the libel to incite violence in the third party, or audience to whom it was published. A libel's bad tendency not only applied to the libelled party, but also to those who read it, thereby making the accused responsible for the actions of other parties. The inclusion of printers and booksellers as parties to the libel, extension of seditious libel to the government in general and not just individual public officials, and the inclusion of the audience for a libel, not just the libelled party, had all been established in Star Chamber, and trials between 1663 and 1688 confirmed them. In the earliest trial, in 1663, the jury asked for the statute of seditious libel, and the judge had to admit there was none, that it existed in common law. In 1670, the jury confirmed its right, in Rex v. Bushell, to return a verdict against the judge's instruction, which indicated that the jury would remain a complication in attempts to convict for seditious libel.[11]

In Bear's Case (1696), writing a libel, not publishing it, was deemed sufficient for conviction, and the dictum that the government had the right to defend itself and keep society safe, first entered the precedents. The judge also claimed for himself the power to determine if the material was libellous. In 1706, in Regina v. Browne, the jury was permitted to decide the innuendo, which means that they could identify the subject of the libel, sometimes disguised

in irony or satire.[12]

By this point, the law of libel of magistrates outlined in De Libellis Famosis had sufficiently departed from its defamation ancestry to possess its own precedents. However, rejection of the concepts that juries were only to determine the fact of publication, and that truth provided no defense, continued as avenues of resistance to the law. The jury's refusal to convict in the celebrated Zenger case in colonial New York in 1735, despite the fact that it could not be used as precedent, inspired increasing discussion of, and actual practice of, freedom in the press.[13]

As the press grew more obstreperous on both sides of the Atlantic, legal authorities cast about for more convincing arguments to enforce the law. The desirable objectives behind the concept of seditious libel, to preserve the peace and reputation of government, were insufficient to answer the objections to its elements of enforcement.

As Leonard Levy has pointed out, writers, printers, and defense attorneys concentrated their struggle for freedom of the press on two points: the limits placed on the jury, which was only allowed to decide the fact of publication, and the denial of truth as a defense. During the middle of the eighteenth century, English courts established the principle of "the greater the truth, the greater the libel," reasoning that if the libel were true, incitement to

violence was that much greater. To the ordinary Englishman who comprised juries, this concept was absurd. In a series of trials from 1770, juries refused to convict, or returned partial or incorrect verdicts. In Rex v. Dean of St. Asaph in 1784, the court was adamant that the province of the jury was to decide on the facts alone--the fact of publication and the meaning of the innuendo, i.e. if the parties named in the indictment were the parties libelled. The court would rule on the law--intent of the libeller (malice) and whether the material was libellous. As Zechariah Chaffee demonstrates in his discussion on seditious libel, there were really three issues in debate : "questions of law; questions of fact; questions of the application of a legal standard to the facts." And he continues, "the definition of the crime of sedition was accepted for the time being by all concerned." The law was not in dispute; juries rarely denied that the king referred to in a libel was the king, or the man identified as the author of a libel was himself. Those were facts. But the judge reserved application of a legal standard to the facts to himself alone, and juries resented it.[14]

There were no seditious libel convictions after 1745 in the American colonies (despite regular attempts), yet such liberality did not curb the tumult of political discussion which led to revolt thirty years later. In 1765, William Blackstone issued his Commentaries on the Laws of England.

A comprehensive discussion of common law precepts in four volumes, "the Commentaries had a tremendous sale [in America and]...served as the principal means of the state of English law in general." It was by such means as Blackstone that the colonists demanded their rights as Englishmen, based on their natural rights in common law.

> However, this clamor for the application of English legal principles to the colonial situation was not based on a love for the technicalities, niceties and fictions of the common-law system, but rather on an appeal to the common law as an embodiment of natural law principles of individual rights and personal liberty.

Having argued themselves out of the British empire, the former colonists took the common law with them. Most states passed a declaration stating that the laws in force at the time of the Revolution would remain law, including the common law. New York was among these.[15]

Among the many issues in common law was the problem of seditious libel. There was little objection to the concept of a government defending itself against vituperative journalists, and American newspapers and broadsides were candid to the point of savagery. Blackstone's Commentaries offered cold comfort to a new country seeking to defend itself from a rowdy and untrammelled press. Blackstone defined freedom of the press only as freedom from licensing laws, and warned a licentious press that it would have to suffer the consequences of its criticsm. As licensing laws had been defunct for almost a century, no guidance would be

had from Blackstone. Blackstone also recited the chapter and verse of seditious libel; the essence of the crime was not the defamation but the "bad tendency" (breach of the peace), truth was no defense and the jury could only determine the fact of publication and confirm the innuendo. The new American states were left to control their presses as best they could.[16]

Unfortunately, the statute which was to answer these objections to seditious libel was not implemented as designed. The Sedition Act, the most liberal legislation regarding seditious libel in the eighteenth century, was instigated by the usual motives of a government suffering stinging rebuke. Federalists argued for its passage as an emergency measure. War with France seemed imminent; criticism of the government under such stress was unjustified, unpatriotic, bordering on treason. The principle enunciated in Bear's Case one hundred years before was brought forward in support; the government had a right to self-preservation, and that included the right to defend itself against treasonous attacks. In the words of Marshall Smelser, "The anti-Federalist press seemed to exist only to misinform, to scandalize and, ultimately, to overthrow the government." Therefore, a sedition law to suppress opposition papers seemed thoroughly justified. The Federalists' Sedition Act carried two safeguards that had been denied since Coke's time; the jury would decide the law

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as well as the fact, and truth would be considered in defense.[17]

Federalists were righteously indignant when the opposition furiously attacked their munificent measure. Republicans conceded the right of the government to self-defense. They did not deny the concept of seditious libel. But they bitterly opposed the capacity of the federal government to legislate for the states. Criminal common law was the province of the states, and the federal government had no jurisdiction in state courts. Republicans vigorously denied that state presses came under Federal control.[18]

The Sedition Act passed. The Kentucky and Virginia Resolutions, denying the power of the federal government to legislate for the states, were not taken up by the other states. But the political nature inherent in the criminal charge of seditious libel doomed any advancement of reform the Sedition Act might represent.

Enforcement followed the sorry, predictable path. Smelser remarks that "the administration of the law showed its purpose." According to James Morton Smith, there were fourteen indictments, eleven trials, and only one acquittal under the Sedition Act. None of the innovative provisions had prevented the classic political prosecution of the charge. "The clause on truth was nullified by the courts; the right of the jury to decide the criminality of the writing was usurped by the presiding judges; and the test of

intent was reduced to the seventeenth-century common law test of bad tendency." Despite the advances in seditious libel law secured by the Sedition Act, the enforcement of the act was so brazenly unfair as to provoke resistance and protest. Historians concur that the Sedition Act contributed to the Federalist defeat in the election of 1800.[19]

In any case, the Act was designed to expire in 1801, and prosecutions for seditious libel were left to the states. Because American law was in the process of testing which portions of the common law were applicable to the United States and which were not, there was considerable confusion over which provisions of seditious libel law were in force. The extreme partisanship of the nation's newspapers, and the political motivation behind a seditious libel charge obscured a shared aversion to the tenor of printed discourse. As the new century opened under a new administration, government officials were avid to curb press criticism while preserving the ideal of press freedom.[20]

ENDNOTES

1. Phillip Hamburger, " The Development of the Law of Seditious Libel and the Control of the Press," Stanford Law Review, 37 (February 1985), 668; Colin Rhys Lovell, "The `Reception' of Defamation by the Common Law," Vanderbilt Law Review 15 (October 1962), 1055.

2. Hamburger, "Seditious Libel," 663. This position is supported by the definition of "libel" in Latin; "Libellus--small book, pamphlet; writing, diary, journal, note book, memorandum; memorial; petition; public notice, handbill, placard; letter; libel, lampoon; indictment, accusation; legal brief." from Edwin B. Levine, et al., eds., Latin Dictionary (Chicago: Follett Publishing Co., 1967), 196.

3. Hamburger, "Seditious Libel," 662-665.

4. Quote, Lovell, "Reception," 1061; definition of seditious libel from Henry Shoenfield, "Freedom of the Press in the United States from Essays on Constitutional Law and Equity (Boston: Chipman Law Publishing Co., 1921), 2:514 ; John Kelly, "Criminal Libel and Free Speech," University of Kansas Law Review 6 (October 1957), 300; Irving Brant, "Seditious Libel; Myth and Reality," New York University Law Review 39 (January 1964), 5.

5. Hamburger, "Seditious Libel," 692-694.

6. Coke, Edward, De Libillis Famosis, 5 Co. Rep. 125b, in The English Reports, vol. 78, King's Bench Division 6, containing Coke, Parts 5 to 13 (Boston: Boston Book Co., 1907), 251.

7. Ibid.

8. A.K.R. Kiralfy, Potter's Historical Introduction to English Law and its Institutions, 4th ed. (London: Sweet & Maxwell, Ltd., 1958), 3-4, 139-145, 287; also, see Brant, "Seditious Libel: Myth or Reality?" 13.

13. Kiralfy, Potter's Historical Introduction, 151, 215; Lovell, "Reception," 1067.

10. Lovell, "Reception," 1068-1069; Hamburger, "Seditious Libel," 717; Leonard L. Levy, Emergence of a Free Press (New York: Oxford University Press, 1985), 9-10.

11. Hamburger, "Seditious Libel," 700-713.

12. Ibid., 729-43.

13. Leonard W. Levy, "Did the Zenger Case Really Matter? Freedom of the Press in Colonial New York," William and Mary Quarterly 17 (January 1960), 36.

14. Bernard L Shientag, "From Seditious Libel to Freedom of the Press," Brooklyn Law Review 11 (April 1942), 138; Zechariah Chaffee, jr., Free Speech in the United States, (Cambridge, MA: Harvard University Press, 1948), 499-502. In footnote 5, on 501-502, Chaffee gives credit for the third category to Roscoe Pound.

15. Levy, "Zenger Case," 38; Blackstone in America and quote, Plucknett, Concise History, 287; Ford W. Hall, "The Common Law: An Account of its Reception in the United States," Vanderbilt Law Review 4 (June 1951), indented quote, 797; common law declarations in the states, 798-800.

16. Bernard Schwartz, The Law In America: A History (New York: McGraw-Hill, 1974), 2-6, 13; William Blackstone, Commentaries on the Laws of England, 4 vols. William Draper Lewis, ed. (Philadelphia: Rees Welsh & Co., 1898), 4: 150-153.

17. Norman L. Rosenberg, Protecting the Best Men: An Interpretive History of the Law of Libel (Chapel Hill, NC: University of North Carolina Press, 1986), 40-115; Marshall Smelser, "The Jacobin Phrenzy: Federalism and the Menace of Liberty, Equality and Fraternity," Review of Politics 13 (October 1951), 451.

18. Walter Berns, "Freedom of the Press and the Alien and Sedition Laws: A Reappraisal," Supreme Court Review 109 (1970), 120-125.

19. Smelser, "The Jacobin Phrenzy," 480; figures on Sedition Act indictments, see James Morton Smith, Freedom's Fetters: The Alien and Sedition Acts and Civil Liberties (Ithaca, NY: Cornell University Press, 1956), 185; quote, 424.

20. James Morton Smith describes Charles Francis Adams as conceding the contribution of the Sedition Acts to the Federalist defeat in 1800 in Freedom's Fetters, 431. John

Kelly dryly remarks that "the Alien and Sedition Acts were exceedingly unpopular, though in view of Jefferson's narrow victory in 1800 it can hardly be said that the people rose up in righteous wrath against the despoilers of liberty." See Kelly, "Criminal Libel," 315.

CHAPTER THREE

THE TRIAL

> On the 11th day of January, 1803, Harry Croswell, the junior editor of the Balance was taken by an officer on a bench warrant and carried before the court of Sessions of Columbia County, then sitting in Claverack. Two indictments were then read to him...[1]

As Harry Croswell was indicted for seditious libel, men with close personal, professional, and political ties surrounded him. All of the judges on the bench were Republican, and three who would eventually sit in judgment of his cause owed their positions to the prosecuting attorney. Croswell's defense team was a triumvirate of leading young Federalists, personal as well as political friends, residing in nearby Hudson, where Croswell had published the items under indictment.[2]

The prosecuting attorney was not, as might be expected, the district attorney for Columbia County. He was Ambrose Spencer, Attorney General for the State of New York, political powerhouse and crony of DeWitt Clinton, nephew of the sitting governor. In their notorious tenure on the Council of Appointment the year before, Clinton and Spencer had scandalized opponent and sympathizer alike by their wholesale distribution of political spoils.[3]

After the Republican electoral victory of 1800, the political arrangements of New York state, already complex, became even more complicated. The outlines of alliance that had prevailed since the ratification of the Constitution in 1787 were radically shifted. Previously, Parton's famous quote summed up the main divisions: "The Clintons had power, the Livingstons had numbers, and the Schuylers had Hamilton."[4] The Clintons and the Livingstons had combined to rout the Hamilton adherents, who espoused the Federalist cause. George Clinton, multi-termed governor, had led the state throughout the Revolution and Confederation, spearheaded the fight against ratification of the Constitution, and had become the natural leader of the opposition to the Federalists in New York state. The Livingstons, a large, wealthy and politically prominent clan, had withdrawn their support of Federalists during the initial organization of the new government, when not one Livingston received a federal appointment. Growing displeasure with Federalist financial and foreign policy solidified their estrangement.[5]

Livingstons were divided among themselves; the "upper manor" Livingstons were wealthier, bitterly jealous of Schuyler influence, and not as politically active as, but equally hostile to, the "lower manor" Livingstons, their influential and more numerous cousins. The "upper manor" and "lower manor" Livingstons did not speak to each other,

yet sporadically would join in support for a Clintonian candidate over a Federalist one. Their alliance with Clinton was not a fervent one, nor was it monolithic, as the "upper manor" branches of the clan, founders of Columbia County, occasionally allied with the Federalists in order to curb Clintonian power and squelch their activist cousins. The more powerful "lower manor" Livingstons were more inclined to Republican positions, but "their chief interest in politics, as always, remained the Livingstons."[6]

The disputed presidential election of 1800 rent the successful New York Republicans into three factions: the Clintonites, who had supported Jefferson over Burr; the omnipresent Livingstons, stashing cousins and in-laws into every available office as reward for their support; and the Burrites, retainers of the new vice president, who were squeezed out of positions of power by the other two factions. Burr bided his time and maintained his "Little Band" of faithful adherents and an extensive, if small, party organization. The defeated Federalists divided, and would wander from one faction to another, thereby influencing the balance of power and appointment at any given moment. But the Council of Appointment in 1801 was beholden to nobody, and its two dominant members were the governor's nephew, DeWitt Clinton, and his faithful crony, the apostate Federalist, Ambrose Spencer.[7]

By all accounts, that Council of Appointment was

ruthless in its sweep of state offices. Spencer and Clinton removed every Federalist, no matter the length of his tenure or the eligibility of his successor. This was still a new practice in American politics, where the ideal of civil service was to exempt some officeholders from the consequences of elections. There was certainly some practice of rewarding partisans with appointments, but the blatant approach taken by Clinton and Spencer was considered outrageously cold-blooded, with no pretensions to merit.[8] Therefore, when the indictments were read that January of 1803 in the Court of General Sessions, Harry Croswell faced a panel of local judges, reputedly all Republican; a jury of "twelve notoriously violent party men, and all of that side of politics opposed to the defendant"; and his accuser was "he man known to hold the political power in the state."[9]

Of the three defense attorneys, William Van Ness had been dismissed as surrogate for Columbia County by Ambrose Spencer; Jacob R. van Renssaler was of a family long allied, politically and personally, with the Schuyler-Hamilton Federalists; and Elisha Williams, also a staunch Federalist, had a personal interest in defending the charge. The libel that had brought Harry Croswell to the Claverack court house was actually written by Williams' young brother-in-law, Thomas Grosvenor, who was reading law in Williams' office. A criminal conviction is not an auspicious beginning to a budding legal career, so Grosvenor's undisclosed involvement

was a contributing factor to Williams' participation.[10]

The case had originated in the summer of 1802, when the newspapers of the United States were zestfully disseminating the acid accusations of James T. Callender. Callender was the author of two scurrilous screeds, A History of the United States for the Year 1796, and The Prospect Before Us, political tracts that lambasted Federalist leaders and policies with a spleen unmatched in a journalistic era noted for its excesses. Callender had been tried and convicted in 1800 under the Sedition Act in a trial renowned for its partisan unfairness.[11] When his patron, Thomas Jefferson, became the President of the United States, all editors convicted under the Sedition Act were pardoned and their fines returned, as the Sedition Act itself expired in 1801. For Callender this clemency was not enough, and when denied a political post by Jefferson, he turned on his former sponsor with the vindictiveness which made him notorious. In a series of letters printed in the Richmond Register, of which he was then editor, Callender revealed that, among other items, that Jefferson had read, approved, and financially supported The Prospect Before Us prior to publication. Federalist newspapers seized upon these disclosures with delight; Republican newspapers reviewed these charges with chagrin; and newspapers throughout the country repeated, with appropriate remark, Callender's scandalous revelations.[12]

A primary expositor was, of course, the New York Evening Post. As a leading Federalist newspaper, it would naturally follow Callender's expose with breathless interest and scathing commentary. It was the Post's series "Jefferson and Callender," running in the summer of 1802, that the upstate tabloid the Wasp would seize upon, thus making its editor liable to arrest.[13]

It was a common practice, then as now, for newspapers to repeat features from other papers throughout the country, so it was quite natural for the Columbian Balance and Expository of Hudson, New York to reprint some of the Post's sensational series. However, the Balance took its title seriously, and was unwilling to carry remonstrances to the extreme deemed appropriate by its junior editor, Harry Croswell. Under the pseudonym of "Robert Rusticoat, esq." as editor, Croswell initiated publication of the Wasp, a small tabloid "in the Garret over the Balance Office, where Communications, Advertisements and Subscriptions, will be thankfully received" in that summer of 1802.[14]

Croswell was anticipating the relocation of a Republican newspaper, the Bee, from New London, Connecticut. Its editor, Charles Holt, was convicted of seditious libel in 1800, and had finally wearied of upholding the Republican cause in a Federalist state, and considered Hudson a more receptive locale. Holt had reason to expect a cordial climate in Hudson, because it was also the home of Ambrose

Spencer, presently Attorney General of the State of New York.

Ambrose Spencer had reason to welcome a Republican organ in his own political base, as he was subject to far greater abuse than other Republican politicians. Until 1797, Spencer pursued his budding political career under the Federalist aegis. Spencer had acquired experience as assistant attorney general under John Jay's first term as governor, gained a place on the Council of Appointment, served both in the Assembly and the State Senate, and was viewed as a rising star in Federalist circles. Suddenly, during the debates in the New York Assembly over the Alien and Sedition Acts, Spencer had allied himself with the Republican opposition.[15]

Several reasons are posited for this change of allegiance. D. A. Alexander, a political historian of the early twentieth century, suggests that Spencer was moved by anger when denied the office of comptroller. Jabez Hammond, author of the earliest account of New York state politics, disputes this account and suggests that Spencer thought that Robert R. Livingston would win the 1798 gubernatorial race actually won by Jay; Peyton Miller, chronicler of Columbia County, does not mention the switching of sides but discreetly mentions the close friendship formed by Spencer and DeWitt Clinton in 1797.[16] Yet none of these explanations ever attempts to present Spencer's conversion

as prompted by any other cause than that of political advantage. Political historians of every stripe concede that Spencer's prime political motivation was ambition.[17]

Hudson was the trading center of Columbia County, and a Federalist islet in a Republican sea. It was a young town, established in 1784, becoming a port of entry by 1790 and had become "a location of consequence" by 1804.[18] It was not unnatural that, as a commercial center, Hudson would be predominantly Federalist in its political sympathies, and indeed, it was the home of what Progressive historian Dixon Ryan Fox termed "the Columbia Junto."[19] This consisted of a trio of young lawyers with either forensic flair or family connections: Elisha Williams, Jacob Rutsen van Rensselaer and William W. Van Ness (not to be confused with his cousin, William P. Van Ness, who was a close associate of Aaron Burr).[20] It may be presumed that these political activists were amused by the Wasp's relentless stings. It may also be presumed that they were startled when Harry Croswell was indicted and arrested for seditious libel the following winter.[21]

It was not surprising that, despite their vociferous outcry over the Sedition Act, the Republicans had instituted prosecutions in various states against Federalist papers once the Republicans had achieved power. The Republicans had not disputed the concept of seditious libel, but had denied the federal government's authority to initiate

prosecutions. Opponents of the law insisted that prosecutions belonged in state courts. Despite the Sedition Act's merit as an improvement in seditious libel law, partisan Federalist judges had perverted and abused the law as a political tool in federal courts. The Act itself had lapsed in 1801, and prosecutions had proceeded properly (according to Republican views) in state courts, under varying state laws. The calumny heaped on Jefferson after Callender's sensational series would certainly merit a seditious libel prosecution, as there was still general acceptance of the principle of seditious libel. But it was most peculiar that the State of New York would indict the editor of a publication that was little more than a broadside, with limited circulation in an upstate town. The Wasp would not appear to have the exposure to bring the President of the United States into "great hatred, contempt and disgrace...not only with the people of the State of New York, and the said people of the United States, but also with the citizens and subjects of other nations."[22] If Spencer were prompted by party loyalty or a desire to defend the president, the Evening Post was a more obvious choice, as its comments and editorials were distributed throughout the country. The Wasp's little buzz could barely penetrate beyond Columbia County.[23]

The criticism of Spencer in other New York papers, despite the level of invective customary at the time, was on

a more adult level, decrying his actions or his words. The Wasp was unmistakably a puerile production, using an **ad hominem** approach with labored ripostes of the republican press, ham-handed lampoons and inane doggerel. It is surely unpleasant for any politician to face the opposition press, but the venom of the Wasp was unendurable. Perhaps that is why Spencer attempted to disguise his purpose of suppressing the Wasp in a charge of seditious libel, rather than just suing for defamation (which he later did, when Harry Croswell refused to be subdued). A criminal charge was far more likely to bankrupt a paper than a civil suit, as it involved jail sentences and bonds for subsequent good behavior, as well as fines. Spencer may have been attempting to divert attention from his personal animosity with a cloak of party loyalty.[24]

The articles indicted were from two different issues of the Wasp; the first item was entitled "A Few Squally Facts" and appeared on August 12, 1802:

> Mr. Jefferson wrote a letter to Mazzei, in which he plainly declared that he detested our constitution and that he and his friends would break its "Lilliputian ties." Mr. Jefferson was too weak in his nerves, **openly** to stem the popular current, setting so strongly in favor of the constitution, he therefore insidiously, determined to gratify his hatred, by endeavoring covertly to undermine it---
>
> For this purpose,
>
> 1st. He employed Freneau and paid him, for writing the grossest lies and most scandalous calumnies against all its friends and supporters--
>
> 2nd. He covertly, encouraged every

other, who would prostitute his pen, in an attempt to destroy the character and influence of Washington and his associates--Witness his friendly invitation to Tom Paine, immediately after that infidel had written his villainous libel on our beloved Washington--Witness his encourgaement and even writing in that sink of filth the Aurora--Witness him short his whole conduct and policy--

3rd. He paid out of his own pocket one hundred dollars to Callender, a drunken Scotchman, for writing "the Prospect before us"--A production than which, none more malignant, more false, more indecent and more truly hellish, ever issued from the head and heart, even of a professed jacobin. Nay! [more scandalous still] he wrote part of that very book--and perhaps that very part, in which Washington is called in effect a corrupted villain and a traitor.

4th. He, from his own pocket, mostly defrayed the expences of publishing Callender's history of the United States for 1796--a compleat counterpart of the Prospect before us--a thing similar to the suppressed history of Wood--and stuffed as full of falsehood and slander as to disgust even almost every faction in this country.

By these acts, with a thousand others, equally vile and despicable Mr Jefferson became constitutionally* President; since which he has proceeded more openly in his attacks upon the Constitution. As

1st. He ordered money to be paid out of the treasury to repair the Burceau, contrary to the clause in the constitution which gives the sole power of appropriating money to Congress.

2nd. He has displaced the honest patriots of this country and appointed to succeed them foreigners and flatterers, who have always shewn themselves hostile to it; one of whom+ was prime agent, in raising an insurrection to oppose the constituted authorities.

3rd. He planned and directed the attack on the constitution last winter, by which the independence of the judiciary was destroyed and our constitution marred and mangled.

4th. He has remitted a fine to a criminal++after the fine was collected;

against the express provision of the constitution.

5th. He released Duane from a prosecution, instituted for a libel on the Senate, without the least authority from the constitution, or any law--only, because Duane had contributed his share to lie him into office. It would be an endless task to enumerate the many acts, in direct hostility to common sense and the constitution of which this "man of the people" has been guilty--These are facts, and I now ask his friends and foes--every American--do you not blush, for your country and your President?--Do you not in all this plainly perceive the little arts--the very little arts, of a very little mind-- "Alas! what will the world think of the fold if such is the shepherd."

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* I say "constitutionally" for Mr. Jefferson had not a majority of the freemen in his favor.--It is capable of mathematical demonstration that, with out the assistance of the slaves in his own state and others to the southward, Jefferson could never have been President.

+Albert Gallatin, Secretary of the Treasury.

++Callender.

The other item, from the September 9, 1802 issue ran as follows:

> Holt says, the burden of the federal song is, that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false. The charge is explicitly this:--Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer--For calling Adams, a hoary headed incendiary; and for most grossly slandering the private characters of men, who, he well knew were virtuous. These charges, not a democratic editor has yet dared, or ever will dare to meet in open and manly discussion.[25]

The tactics employed by the defense team immediately

revealed its strategy of delay. First, the defense requested copies of the lengthy indictments before entering a plea. This request, blocked by Spencer's objection, "with great warmth" was denied. Then the defense "suggested" that, due to the complexity and confusion surrounding current libel law, that the court refer the trial to the Oyer and Terminer Court, in order to obtain a justice from the Supreme Court to assist. Spencer objected--the court ruled in his favor. Then the defense asked for postponement to obtain witnesses to testify to the truth of the articles under indictment, and the battle was joined. Spencer rejected the idea that truth could be admitted in evidence, and insisted that Croswell be tried under common law, where the only question to be decided was whether the defendant had published the libels. To reinforce his argument, Spencer then stood on a procedural point--"an affidavit stating the grounds of application" was required in a motion for postponement--verbal argument was unacceptable.[26]

After an impassioned plea by the defense, "this could not be the law in our country" and urging that such an important question not be hastily decided, Spencer agreed to postpone one count for the Court of Oyer and Terminer, but insisted upon immediate trial for the other. "A majority of the court decided the trial not be postponed" and trial was set for the following day.[27]

At the end of the next day, the defense submitted the

required affidavit requesting postponement, and stating the intention of the defense to prove the truth of the article in the issue of September 9th, 1802. Spencer agreed to postponement to the next Court of Sessions, and to send the lengthier indictment, of the article entitled "A Few Squally Facts," to the Court of Oyer and Terminer.[28]

As the affidavit was not submitted until evening, and Spencer dropped his opposition to postponement at that point, we can only assume that negotiations were going on during the day. What made Spencer change his mind? He had "the thing well cut and dried" according to the Centinel.[29] The reasoning behind Spencer's reversal can only be surmised. It appears that the referral of the one indictment to the next Oyer and Terminer was the equivalent of dropping that charge, because it was never tried. And yet it incorporated the same libel Spencer was insisting on trying separately. Had he pursued the trial of "A Few Squally Facts" he could have included the offensive paragraph repeated in the September 9 issue. It would have been harder for the defense to argue the truth of all five items in that article, particularly that Jefferson had himself authored part of The Prospect before Us. Much of the rest of the article was opinion, and the serious constitutional charges were simply not provable, as the doctrine of judicial review was not yet established. Nobody in the United States at that time was an accepted authority

to state definitively what was and what was not constitutional. So Spencer effectively dismissed the more easily convictable of the indictments and retained the more difficult. Was a personal interest in that particular issue of the Wasp impairing his legal strategy?

The bench, despite its initial support of his case, denied Spencer's request for a performance bond, apparently agreeing with the indignant defense that "it was a direct attack on the freedom of the press" and that, even under common law, prior restraint was no longer acceptable in American practice. The Balance noted that, despite the political complexion of the General Sessions Court, the judges' decision to deny a performance bond was "almost unanimous." A lone holdout, Justice Hogeboom, supported Spencer. The court moved Harry Croswell's trial to the next General Sessions term.[30]

Of the many accounts of this case, few scholars even wonder why an example was made, as John Miller puts it, of an obscure editor in an upstate town.[31] Legal historian Julius Goebel offers an explanation not only plausible, but compelling.

> This may be accounted for by the fact that Columbia County was Spencer's political stronghold, and Hudson the locale of his early career...this made him an irresistible target for Croswell's pen...it may be surmised that this...contributed to the relentless, if not rancorous, spirit which Spencer displayed in the case. It may also explain why an "obscure" upstate printer was singled out for prosecution rather than some

other and more influential Federalist editor.[32]

Some indication that Goebel's surmise is correct may be discovered in the issues in which the indicted articles appeared. The list of charges in "A Few Squally Facts" are far more serious, both legally and in their implications. "A Few Squally Facts" were conceivably impeachable charges against Jefferson, if proven to be true, and should be harder for the defense to prove as true. The paragraph "Holt says" repeated one of the charges in "A Few Squally Facts" and was merely replying to a salvo of the Bee. Yet this was the libel Spencer chose to pursue. It may be that Spencer was more confident of conviction in a local court; it is not unimaginable that he wished to bury the more politically explosive charge. If so, Spencer was successful, because the indictment for "A Few Squally Facts" disappeared into the Oyer and Terminer Court and was never tried.[33]

There was an additional factor in Spencer's choice to pursue prosecution for the later issue of the Wasp. That issue also contained a juvenile but offensive jingle called "The Fellow Laborers." The Gazette of the United States had picked up and reprinted it on the front page of the September 28, 1802 issue. So the Wasp's venom was actually ranging well beyond the borders of New York State, for the Gazette was circulated from Philadelphia.

Th'Attorney-General chance'd, one day to meet

A Dirty ragged fellow in the street--
    A noisy swagg'ring beast
    With rum, half drunk, at least;
Th'Attorney too, was drunk--but not with grog
Power and pride had set his head agog.

"The Fellow Laborers" continues in the same crude humor, but it incorporated a suggested remedy to the incensed Attorney General:

" We've wrote the cursed fed'rals down,
In spite of their sedition laws." [34]

Spencer could squash the Wasp and its vicious personal stings under the guise of defending the President of the United States. Harry Croswell stood trial for the seditious libel in the paragraph beginning "Holt says," which issue also contained the obnoxious "Fellow Laborers." The indictment for the potentially explosive "A Few Squally Facts" was postponed, at Spencer's insistence, and was not heard again.[35]

Before the next General Sessions Court, the defense team trumped Spencer and transferred the trial to the Oyer and Terminer Court by obtaining a writ of certiorari from Supreme Court Justice James Kent, a steadfast Federalist.[36] The trial of Harry Croswell for seditious libel finally commenced before Chief Justice Morgan Lewis, on circuit, July 12, 1803.[37]

The trial itself was brief. The arguments over the necessity of postponement to obtain evidence for the defense, the admissibility of that evidence, the jurisdiction of the court, and which law governed the

indictment, were all explored by an augmented defense before the jury was seated. Spencer was joined by the Columbia County district attorney, a man confusingly named Ebenezer Foote.[38]

Abraham Van Vechten of Albany and James Scott Smith of New York joined the defense team for the trial. Williams and Van Ness continued valiantly to hold up the Hudson connection.[39] Smith opened by requesting postponement to obtain witnesses to the truth of the libel. Anticipating the prosecution's objection, Smith emphasized the necessary difference between American and English common law. In English monarchy, the chief magistrate was the sovereign, and "**could do no wrong**"; but in the American system, the people were sovereign, and the chief magistrate was accountable to them. To give the jury truth in evidence was necessary, due to the difference in the two constitutions. Postponement was necessary to obtain witnesses who could testify to the truth.[40]

Chief Justice Lewis responded that postponement was dependent on the legality of this evidence. "He understood the law to be settled" that truth could not be given to the jury as justification.[41] Elisha Williams then brought out a weakness in the prosecution's case. An offense against the federal government was being tried in a state court; and, in a reference to the Attorney General "whose process, he must have well known, could not reach" the necessary

witnesses, implied that the state jurisdiction was insufficient for the charge.[42]

The defense then offered the argument that New York constitutional pronouncement on the common law rested in the constitution itself, which declared that laws "REPUGNANT TO THIS CONSTITUTION be, and they hereby are, ABROGATED AND REJECTED" and among them were the old law of seditious libel, which did not admit truth as a defense. Expanding on the difference between the English and American constitutions, the defense emphasized the constitutional necessity of open discussion in the press, and argued that English common law was repugnant to the constitution of New York. "They contended, that the only line which could be drawn between the liberty and licentiouness of the press, was the great line which separates truth from falsehood. This was the line marked by the law called the Sedition Law."[43]

These brilliant arguments were to no avail. The Chief Justice ruled against giving truth in evidence, and professed himself "astonished at this application...I therefore pronounce this to be the law--that the defendant, if he thinks proper, may bring up the question before the Supreme Court." Court was adjourned for the evening, with the trial itself to commence the next day.[44]

The trial began the next morning without further ado. Testimony was taken that this libel had indeed been

published by Harry Croswell, and the persons mentioned were indeed understood to be Washington, Adams, and the President of the United States Thomas Jefferson. Van Ness argued vigorously for the right of the jury to decide the law as well as the fact; that there could be no malice when the item in question did not originate with the Wasp; that the Wasp was merely correcting a publication of the Bee. Spencer's closing argument included selected readings from the Wasp which included issues not under indictment, to demonstrate malice. The defense strenuously objected. Lewis then instructed the jury that they were to find only on the foregoing testimony--they were to decide on the fact, and he would decide the law. It was all very **pro forma**.[45]

Yet the case began to carom out of control at this point. The jury, twelve good Republicans and true, took twelve hours to reach the simple and forgone verdict. The Chief Justice, too, seemed uneasy in his mind. For no sooner was the verdict of guilty handed down, than the defense moved for an arrest of judgment until the Supreme Court could hear the case **en banc** (all justices present) and Lewis promptly agreed. He conferred with the attorneys as to the best form the appeal should take, and remanded it to the next session of the Supreme Court of Judicature.[46]

Lewis may have been a reliable Republican, and had performed as was expected of him, but he had to have been aware that this case was laying precedents that might prove

untenable in future. Bringing it to the entire Court of Judicature was juridically prudent. It would also prove to be politically disastrous, for Croswell acquired two new attorneys for his appeal. One of them was Alexander Hamilton.[47]

ENDNOTES

1. The Balance (Hudson, NY), 25 January 1803.

2. For the political composition of the General Sessions Court, see the Centinel (Albany, NY), 14 January 1803; for the association of the defense team, see Dixon Ryan Fox, The Decline of Aristocracy in the Politics of New York (New York: Longmans, Green & Co., 1919), 40-45.

3. The Council of Appointment was comprised of four state senators and the governor, and was responsible for the appointment of all non-elective state officers for the term of one year, and hence a great source of political patronage. After an epic struggle with Governor Jay over the right of nomination, the Convention of 1801 amended the state constitution to permit nomination by members of the Council, as well as the governor. Spencer and Clinton's use of this power of appointment was a departure from previous practice, and occasioned great controversy. DeAlva Stanwood Alexander, A Political History of the State of New York, 2 vols. (New York: Henry Holt and Co., 1906), 1:116-117; Fox, The Decline of Aristocracy, 5 n.1, 58; Jabez D. Hammond, A History of Political Parties in the State of New York, 2 vols. (Albany: C. Van Benthuysen, 1842), 1:173-181.

4. James Parton, Life of Aaron Burr, 1:169, as quoted in Alexander, Political History, 1:47.

5. Alfred F. Young, The Democratic Republicans in New York: the Origins, 1763-1797 (Chapel Hill, NC: University of North Carolina Press, 1967), 213-218, 571-572, 563-567.

6. Ibid., 71-72, 190, 213-218, 571-572; quote, 72.

7. Hammond, Political Parties , 1:172.

8. Ibid., 1:171-181; Alexander, Political History, 1:116-120; Fox, Decline, 58-60; Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840 (Berkeley, CA: University of California Press, 1969), 156-158.

9. Evening Post (New York, NY), 19 January 1803; "No man in the State of New York ever wielded a political power more absolute than that which was possessed by Judge Spencer." Franklin Ellis, History of Columbia County: Illustrations and Biographical Sketches (Philadelphia: Evarts and Ewing, 1878), 91. "The influence he exercised in the political

world was most potent." Peyton F. Miller, A Group of Great Lawyers of Columbia County, New York (n.p: 1904), 109.

10. For Van Ness see Hammond, Political Parties, 1:201; for Jacob R. Van Rensselaer, see Miller, Great Lawyers, 115-117; see the connection of Elisha Williams and Thomas Grosvenor in Julius Goebel, jr., ed., The Law Practice of Alexander Hamilton: Documents and Commentary (New York: Columbia University Press, 1964), 775-848, which offers the most thorough and reliable account of the Croswell case. " A MS. account of the authorship of this paragraph [the indictment for which Croswell actually stood trial] is attached to the file of The Wasp in the NYHS [New York Historical Society]. This account (unsigned and not dated but from internal evidence undoubtedly written by Harry Croswell) states that the paragraph was written by Thomas P. Grosvenor but that Croswell did not wish to reveal the true authorship at the time of his indictment and trial." n.9, 777-778.

11. John C. Miller, Crisis in Freedom: The Alien and Sedition Acts (Boston: Little, Brown and Co., 1951), 217-219. A fuller account is found in James Morton Smith, "Sedition in the Old Dominion: James T. Callender and The Prospect Before Us" in Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca, NY: Cornell University Press, 1956), 334-358.

12. The Evening Post (New York, NY) ran a series of ten letters entitled "Jefferson and Callender" commencing July 1802, which was disputed in the August 1802 issues of the American Citizen (New York, NY) and the Aurora (Philadelphia, PA). The Gazette of the United States (Philadelphia, PA) reprinted the series in its issues of 16 August 1802 to 3 September 1802. The Gazette was still debating with "Mr. Jefferson's friends" in its issue of 22 October 1802.

13. The Wasp (Hudson, NY), 31 July 1802, 7 August 1802, 31 August 1802, 9 September 1802.

14. Ibid., 7 July 1802.

15. Alexander, Political History, 1:87-88.

16. Ibid., 1:87-88; Hammond, Political Parties, 1:177-178; Miller, Great Lawyers, 109.

17. Miller, Great Lawyers, 104; Alexander, Political History, 1:117; Henry Adams, History of the United States of American during the First Administration of Thomas Jefferson 2 vols. (New York: Charles Scribner's Sons, 1931), 1:109; Howard Lee McBain, Dewitt Clinton and the Spoils System in

New York (New York: AMS Press, Inc., 1967), 87-88.

18. Ellis, History of Columbia County, 153, 160.

19. Fox, Decline, 40.

20. For William P. Van Ness, see Allen Johnson and Dumas Malone, eds., Dictionary of American Biography, 22 vols. (New York: Charles Scribners' Sons, 1929-1941), 19:202.

21. The Balance (Hudson, NY), 25 January 1803.

22. Quote from indictment of Harry Croswell, Johnson's Cases 3:338 in Edwin Burrett Smith and Ernest Hitchcock, Reports of Cases Adjudged and Determined by the Supreme Court of Judicature and Court for the Trial of Impeachments and Corrections of Errors of the State of New York (Newark, Wayne County, NY: The Lawyers' Co-operative Publishing Co., 1883), 717.

23. The Wasp's run was about three hundred copies. The Wasp (Hudson, NY), 31 July 1802. Donald H. Stewart makes the point that subsriptions were often shared, copies were passed from hand to hand or left on a coffeehouse table, and copies were sent to newspapers in other cities as well, so estimating circulation from copies printed is difficult. Donald H. Stewart, The Opposition Press of the Federalist Period, (Albany, NY: State Univerity of New York Press, 1969) 16-17.

24. For the burden imposed by seditious libel prosecutions, see Stewart, The Opposition Press, 477; James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca, NY: Cornell University Press, 1956), 177-181, 186-189, 385. Charles Holt's newspaper did not fail for two years after his conviction for seditious libel, but it certainly shortened his tenure in Connecticut. See the Wasp (Hudson, NY), 17 July 1802, 2 November, 1802.

25. The Wasp (Hudson, NY), 12 August 1802, 9 September 1802.

26. The Balance (Hudson, NY), 25 January 1803.

27. Ibid.

28. Account of trial from the Balance (Hudson, NY), 25 January 1803, 8 February 1803, 15 February 1803. The Court of Oyer and Terminer actually functioned as a circuit court, not a court of last resort. The official final court was the Court for Correction of Errors, which was rarely used. Appeals usually were heard by the Supreme Court of

Judicature **en banc**, that is, the justices hearing the disputed case together. Ellis, History of Columbia County, 56-58; David McAdam et al., eds., History of the Bench and Bar in New York, 2 vols. (New York: New York History Co., 1897), 1:94-95, 102, 106-107, 115-116, 121-125.

29. Quote from the Centinel (Albany, NY) 14 January 1803.

30. From the Balance (Hudson, NY), 15 February 1803. The performance bond "to keep the peace" demanded by Spencer was not always required after conviction, and Croswell had not yet been tried. The demand seems purely vindictive. Editor Sampson of the Balance had expressed his discomfort with the Wasp in print the previous November, and the next issue of the Wasp repeated a disavowal of his participation. Apparently, the entire situation was more than Sampson could bear; Sampson, Chittenden, and Croswell dissolved their partnership, and Harry Croswell became "sole proprietor, publisher and editor of the Balance" as of January 3, 1803, and the Wasp ceased publication after a particularly vituperative issue January 26, 1803.

His appearance in court did not appear to have chastened Harry Croswell, but a performance bond would have silenced the Wasp and the Balance as well, thereby depriving Croswell of any work at all. Spencer had to be aware of this--hence the indignation on the part of the defense. It would be unfair, however, to conclude that the impending trial was responsible for the demise of the Wasp; Croswell more likely could not manage both papers at once. Balance (Hudson, NY), 16 November 1802; Wasp (Hudson, NY), 25 November 1802; Balance (Hudson, NY), 3 January 1803.

31. John C. Miller, Alexander Hamilton: Portrait in Paradox (New York: Harper & Row, 1959), 533.

32. Goebel, Law Practice, 778.

33. If an indictment is not prosecuted, it is eventually dismissed. Goebel cited the MS. Mins Ct. of Oyer and Terminer, 1778-1830 from the Columbia County Court House in 1964 because "some minutes from the General Sessions Court proceedings were entered in this minute book. As the MS. Mins General Sessions of the Peace, Book A, 1787-1818 of the Columbia County Court House are not paginated, the entries in the Oyer and Terminer Book are used for citation." Goebel, Law Practice, 779, n.14. However, at the time of this writing, both the MS Mins. Ct of Oyer and Terminer and Book A of the MS Mins General Session of the Peace are no longer at the Columbia Court House, and cannot be located, according to the Columbia County Historian, Mrs. Mary Howell. Letter from Mrs. Mary Howell to P. D. Swiney October 18, 1995 and telephone conversation, January 24,

1996.

34. The Wasp (Hudson, NY), 9 September 1802, reprinted in the Gazette of the United States (Philadelphia, PA), 28 September 1802.

35. The Balance (Hudson, NY), 23 August 1803.

36. Ibid., 14 June 1803.

37. Ibid., 19 July 1803.

38. Ibid., 23 August 1803, 30 August 1803. Foote initially appeared a surprising participant, in that Spencer had conducted a stinging correspondence in the Albany papers with Ebenezer Foote eighteen months before. That Ebenezer Foote was known as Judge Foote, a stout Federalist and founder of Delaware County. The Ebenezer Foote at Croswell's trial was known as Spencer's Foot, a fellow apostate who followed Spencer to the Republicans. For the controversy between Spencer and Judge Foote, see Hammond, Political History, 1:176-77; for "Spencer's Foot" see the biographical sketch in David Hackett Fischer, The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy (New York: Harper & Row, 1965), 313.

Harry Croswell confusingly discussed both Footes, referring to one as "Judge Foote" and then "Spencer's Foote" in the same fulmination in the last issue of the Wasp, 26 January 1803.

39. The Balance (Hudson, NY), 19 July 1803. For backgrounds of Abraham Van Vechten and James Scott Smith, see Alexander, Political Parties, 168-169; Fox, Decline, 33-35; Ellis, History of Columbia County, 60.

40. The Balance (Hudson, NY), 23 August 1803.

41. Ibid.

42. Ibid.

43. Ibid.

44. Ibid.

45. Ibid.

46. Ibid., 6 September 1803; 205 Coleman and Caines, Book 1, in Smith and Hitchcock, Reports of Cases Adjudged, 124.

47. Evening Post (New York, NY), 18 February 1804.

CHAPTER FOUR

THE APPEAL

Principle, as well as political considerations, influenced Alexander Hamilton's participation in Harry Croswell's appeal. Despite his involvement in the prosection of two seditious libel cases himself (one a state prosecution in New York against the Argus, and the other in Connecticut, against Charles Holt, of the then New London, later the Hudson, NY Bee) Hamilton's position was consistent in all three cases. His biographer Forrest McDonald points out that Hamilton wanted to use truth as a defense in evidence, and was willing to leave it to a jury to decide what was libel.[1] As those arguments had already been rejected in Croswell's trial, in the appeal Hamilton would attempt an extraordinary maneuver--he would **redefine** the law. The Croswell case provided Hamilton with an opportunity to secure a political victory on the basis of a a deeply held principle:

> I never did think the truth was a crime; I am glad the day is come in which it is to be decided; for my soul has ever abhorred the thought, that a free man dared not speak the truth; I have ever rejoiced when this question has been brought forward.[2]

Hamilton had followed Croswell's case, as had most

Federalists in New York state; the Evening Post reprinted the Balance's account of the arraignment in January 1803, and the addition of two attorneys at the trial itself in July was probably due to Hamilton-Schuyler influence. All that the Balance told of James Scott Smith was that he was from New York City; but Abraham Van Vechten was a political force in Albany, of the old Dutch stock and firmly Federalist. He and Phillip Schuyler were kindred spirits and political associates. It is likely that Schuyler urged Van Vechten's participation, and Smith may have responded to Schuyler's plea to his son-in-law. On June 23, two weeks before Croswell's trial, Schuyler wrote his daughter Eliza Hamilton:

> I have had about a dozen Federalists with me, intreating [sic] me to write your General. If possible to attend on the 7th of next month at Claverack as Counsel to the Federal printer there who is to be tried on an indictment for a libel against that Jefferson, who disgraces not only the place he fills but produces immorality by his pernicious example. To these applications I have answered that the Sittings at New York would extend to all the first week in July and that I believe it would not be possible for him to be at Claverack. I was however entreated to mention it to him.[3]

Hamilton obviously was occupied elsewhere; but he did write a lawyer in Philadelphia who had defended William Duane of the Aurora, asking for advice. The lawyer did not

reply until a month after the trial was over, so Hamilton did the next best thing. He sent a substitute. It is likely he encouraged an available attorney in New York City to attend the July trial. Thus James Scott Smith made his brief appearance in history, then retreated to obscurity.[4]

At all events, Hamilton was prepared to undertake the appeal for a new trial for Harry Croswell at the next session of Oyer and Terminer.[5] As it happened, the court moved the appeal to the February 1804 session in Albany. Hamilton brought with him Richard Harison of New York, and joined forces with the constant William Van Ness.[6]

The array of legal talent that gathered at Harry Croswell's appeal can be found in the rolls of losers and winners in the 1801 office stakes, orchestrated by Ambrose Spencer. Richard Harison lost the place of recorder of the Mayor's court in New York; William W. Van Ness was dismissed as surrogate of Columbia County; William Coleman, who publicized the case for the Evening Post, had lost his job as court clerk in New York, and Hamilton and John Jay subsequently set Coleman up as editor of the Post.[7]

The winners were almost all on the bench, and were predominantly Livingston connections. Brockholst Livingston ascended to the Supreme Court of Judicature, where his cousin by marriage, Morgan Lewis, had become Chief Justice. Morgan Lewis was brother-in-law of Chancellor Robert R. Livingston, head of the "lower manor" Livingstons. Smith

Thompson had studied law under James Kent, but the law firm broke up over political differences, and Thompson not only stayed with Gilbert Livingston, the erstwhile partner, but married his daughter as well. (Gilbert was brother of Robert R. Livingston). Thompson served as liason between the Livingston contingent and Clintonian faction, and for his services in the election of George Clinton, received reward by a seat on the Supreme Court. Brockholst was the son of William Livingston of New Jersey, and therefore cousin to Robert R. and Gilbert. Brockholst was also brother-in-law to John Jay. Hamilton had lived with the New Jersey Livingstons, when he arrived in the American colonies in 1774. Brockholst was a former Federalist, but had turned against Hamilton's financial policies when he lost a significant amount of money in 1795, and had broken with his brother-in-law over Jay's Treaty. The lone Federalist remaining on the bench, James Kent, had been an acquaintance of Hamilton's since 1787 and a friend and associate since 1795, and was an unabashed admirer. The court was short one justice, as the latest appointee declined to take his place on the bench. Instead, Ambrose Spencer chose to continue as prosecuting attorney in the Croswell case, now up on appeal before these very judges. Three of them owed their appointments to him. Spencer saw no impropriety in pleading before his soon-to-be brethren. George Caines, shortly to be appointed the first court

reporter for the State of New York, assisted Spencer.[8]

The issue, as presented by the record of the case, was "On an indictment for libel, can the defendant give the truth in evidence? And are the jury to decide both on the law and the fact?"[9] The arguments in favor of the motion for a new trial were 1) that the trial should have been put off in order to obtain testimony supporting the truth of the item under indictment; 2) that the piece read into evidence, from Number 7 of the Wasp, was "materially and substantially different" from the item in the indictment, and the piece in evidence was not libellous; 3) that the judge misdirected the jury, by instructing them that they were only to decide the fact of publication, and reserving decision on the intent and libellous content to the judge, and resting this direction on the pronouncement that the law stated in the case of Rex v. Dean of St. Asaph had been received into New York common law.[10]

The arguments at the appeal followed much the same lines as those of the arraignment and the trial.[11] Van Ness opened for the defense, maintaining that the judge (Morgan Lewis, sitting as Chief Justice in this hearing) had erred in denying the admission of evidence to prove the truth of the alleged libel, and denying the jury the right to decide the law as well as the fact. Van Ness was referring to the jury's right to decide if the publication was indeed libel, as well as the fact of its publication.

Van Ness brought forward multiple citations from the English common law in support of Scandululm Magnatum to demonstrate that falsehood was a necessary element for libel in ancient English law, and that Coke himself had argued truth as a justification for libel before the issuance of De Libellis Famosis. "Thus the common law, as previously established, was trampled underfoot by the most corrupt court that ever existed in England"--by the Star Chamber's ruling in De Libellis Famosis that truth was irrelevant in libel. Van Ness also claimed that Congress, "the supreme legislature" had, through the Sedition Act, made truth a justification--that the Sedition Act was declaratory of the common law--and that "this is an authority pure and unadulterated; above all, it is American."[12]

Van Ness demonstrated his vaunted skill with juries with this argument. It was logical, it seemed based in ancient precedent, it appealed to the emotions. Tainting the ancestry of the point he was contesting, by stressing its origin in the Star Chamber, symbol of monarchial tyranny was not only clever, it happened to be true. But declaring the Sedition Act declaratory of common law by presenting Congress as the supreme legislature, capable of dictating state law, was touching on a hotly contested divergencve between Federalist and Republican viewpoints. Van Ness therefore made a stirring appeal to patriotism--the suggestion he made as to Congress' authority was above all,

American authority, not the tyrannical English Star Chamber. Unfortunately, Van Ness was not speaking to a jury, but a panel of judges of predominantly Republican sentiment, which had not only deplored the Sedition Act, but had done so on the grounds that Congress could not legislate for the states. It is possible that Van Ness was making this argument not to the judges, but to the spectators. The New York legislature was not only in session, but was apparently in the courtroom, as two bills to revise the libel law and admit truth in evidence had been presented on February 4. The Hudson Bee reported that "during the argument, the chambers of the Senate and assembly were almost abandoned and the forum was crowded with an audience that could appreciate the importance of the arguments and talents of the orators."[13]

Van Ness then turned to citations that would support the rights of the jury "to show the general sense of this country in favor of the common law right of the jury to judge of the criminal intent, and of the law as well as the fact."[14] He was referring to the right of the jury to decide whether the material was libellous, and whether the intent was to wantonly defame, making the libel criminal. Yet the most important part of his sentence was the phrase, "the general sense of this country." Almost unconsciously, Van Ness was touching on the momentous issue facing all American courts in this period. How much English common law

was to be received into American law, and how to determine the boundaries, was an overwhelming task. Given the nature of common law, judge-made rules on previous precedents, and the assumptions underlying common law, that it was based on self-evident reason, a concept equivalent to common sense, the emphasis on "the general sense of this country" recalled Van Ness's earlier wild appeal during Croswell's arraignment in January of 1803--"This cannot be the law in our country."[15] In his insistence that truth had formerly been a justification for defamation, of which libel was a written form, Van Ness was on solid precedental ground. In rejecting that truth was immaterial in a defense for seditious libel, Van Ness was making an appeal to the legislators and judges who made the law, not to enshrine a law repugnant to common sense, or self-evident reason. To claim injury because the truth was written was repugnant to the American polity, which had justified itself on self-evident truths.

Van Ness also urged the necessity of a jury to avoid political persecutions, making acid allusions to the motives of the prosecution and on the provenance of the judges. This appears a little reckless, unless Van Ness was putting little hope in a victory in the courtroom, and was seeking to make his points to the men who could change the law, even in the face of an unsatisfactory ruling from the judges. He himself had entered a bill in the current session of the

legislature to modify the libel law, and wished to remind his audience of the relentlessness of the Attorney-General and his appointees on the bench in political matters.[16]

Van Ness also made the point that the court should not have allowed Spencer to read issues of the Wasp to the jury when they were not admitted in evidence, as "the charge and the evidence varied substantially." The libels enunciated in the indictment left out the crucial words, "**Holt says.**" Therefore the indictment listed the aspersions cast by James Callender, as if Harry Croswell had merely repeated them in the Wasp. The paragraph as actually printed in the Wasp was arguably not libellous. After some rhetorical flourishes, Van Ness retired in favor of George Caines.[17]

Caines appeared unnerved by the company and the arguments. He first acknowledged that he had prepared replies to arguments that had not been made, and then proceeded to offer those rebuttals. He then expressed his regret at his position in oppositon to Hamilton, and made excessively graceful remarks as to Hamilton's virtue, and his admiration thereof. Caines then revisited the familiar ground of seditious libel tenets; that a publication should be judged, not by its truth, but by its tendency to breach the peace, and that it had been received common law "for ages." At one point Caines actually stated, "I really feel at a loss to argue in support of what is so manifest, and pervading every page of our books," yet he went on to do so

for sixteen more carefully documented pages.[18]

Spencer rose to "argue this cause on authority; not on speculative theories of what ought, or not ought to be, the law. On these points, the two Houses now sitting, both above, and below us, are the only persons to dictate."[19] Spencer averred that the defense had not manifested due diligence in procuring the desired witness from January to July, nor did the defense demonstrate that the witness would appear at the desired [later] date; and that the testimony from the witness was inadmissible anyway. Spencer then reiterated Lord Mansfield's pronouncements in the Dean of St. Asaph case, which supported "opinions adopted and acquiesced in for more than a century" and further quoted Mansfield on the dangers of letting a jury decide the law when "they have no rule to go by, but their passions and wishes."[20]

Spencer then attempted to defend his choice of libel and printer. Croswell was indicted, not because he responded to a charge of Holt's, but because he repeated it --"every new publisher makes the crime his own." Then Spencer tried to justify his choice of Croswell in particular "a man who starts the enemy of our whole republican administration, professedly as he states it, to `whip the rascals naked through the land'" (quoting the slogan of the Wasp). Besides, Croswell was attacking "the head of the nation." Spencer then launched into an

impassioned tirade on the limits of liberty and its infringements on the happiness of others. He denied that any court of law would entertain an argument "founded on the idea of...a Judge's attempting to deny justice." He had read additional issues of the Wasp "merely...to satisfy the Jury. I have not attempted to embellish or adorn what I have had to advance. The points raised must stand or fall according to the law." It is an unconvincing and peculiar argument. Spencer did not need to satisfy the jury as to the malice expressed in the Wasp; they were not permitted, in Spencer's argument, to determine intent anyway. In the position Spencer took throughout the case, the jury was merely to pronounce on the fact of publication; did Harry Croswell publish the disputed piece? For Spencer to read additional, unindicted items leaves himself open to charges of malice. By his feeble response, Spencer left to speculation why he really took particular umbrage at Harry Croswell's puerile paper. It suggests that this was truly a personal animosity that singled out Croswell and the miniscule Wasp, rather than the Evening Post, or even the Balance, which was no friend to Ambrose Spencer. The stongest position Spencer took was that the defense was not arguing the law as it stood. Yet under the vagaries of common law, the law meant what judges (and juries) said it meant. Ambrose Spencer was finding, to his cost, that all the political power in the world did not always lend itself

to manipulation of the law, and that a blatant exercise of political power in the courtroom could often backfire. The Federalists comprising the defense team had already been instructed in this painful lesson.[21]

Richard Harison repeated the defense's contention that falsehood was a necessary component to libel in ancient common law, and emphasized the unsavoury origin of the prosecution's argument. To enforce the provisions of seditious libel "recourse was had to the Star Chamber, and not to the common law. It was from that time, from that ominous era that we are to date the modern decisions, that truth is not material in questions of libel." Harison was unequivocal about the necessary course of action for American courts: "when decisions are seen to be repugnant to the common law, they ought to be treated as usurpations of power and thrown aside."

Harison responded scornfully to Spencer's explanation for reading additional issues of the Wasp. His point was difficult to refute--"if the intent was not to be taken into consideration, the restraint ought to have been on the prosecution as much as the defendant ...in every view it must have been improper...allowing evidence to convict, when the same evidence to acquit, was denied." This scathing pronouncment delineated for the spectators, if not for the judges, the determination on Spencer's part to discredit Harry Croswell.[22]

Up to this point, the attorneys for the prosecution and defense were arguing different interpretations of common law, and how much of that common law was received into American law at the time of the Revolution. As judicial precedent is the basis of common law, the question of a polluted stream of precedents was an important one. But that common law provided all necessary definitions of the issues raised in the Croswell case appears as an accepted principle by both prosecution and defense. As Alexander Hamilton rose to speak, the complexion of the debate changed, because Hamilton offered his own definitions, not only of the issues, but of the common law itself.

Hamilton opened by acknowledging the importance of the issues and arguments before the court to the head of the nation, the components of the government, the authority of the law, and the rights of the citizens. He then commenced, as any good lawyer would, by defining his terms. "The Liberty of the Press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect on government, on magistrates, or individuals." This simple statement, repeated throughout his lengthy argument, must have echoed hypnotically in the ears of his legislative audience. It was the core of the revised law of libel, finally passed and approved fifteen months later. The New York state constitution, revised in 1821, incorporated the same concise sentence. Eventually twenty -

three states adopted this construct in statutes and constitutions.[23]

Hamilton was not content to leave his definition ringing through the courtroom. He proceeded to dissect it phrase by phrase. To criticize measures while indemnifying the unfit men who made or executed them would solidify their power; freedom of the press to publish truth regarding magistrates and individuals, as well as government, is a check on that power. Justifiable ends, then, call those in power to account. It is "the office of a free press...to give us early alarm and put us on our guard against the encroachments of power." Yet Hamilton would not have "unbridled licence"; good motives he considered essential, because truth is not a justification for libel in all cases:

> Personal defects can be made public only to make a man disliked. Here then it will not be excused...if he uses the weapon of truth wantonly; if for the purpose of disturbing the peace of families; if for relating that which does not appertain to official conduct, so far we say the doctrine of our opponents is correct...that libellers may be punished though the matter contained in the libel be true, in these I agree.[24]

Hamilton did not deny that "libelling shall continue to be a crime" and offered "with all diffidence" his own addition to the classic definition--"I would call it a slanderous or ridiculous writing picture or sign, with a malicious or mischievous design or intent, towards

government, magistrates or individuals...[but] if it have good intent, then it ought not to be a libel"[25] Emphasis on the slander and malice in this definition of libel evokes the elements of defamation, from which seditious libel had been parted in De Libellis Famosis. To wed defamation to seditious libel would necessitate admitting truth as a justification, as truth was a mitigating factor, and allowable in defense of defamation in common law. To use intent to mitigate the malice brought Hamilton and his audience to the essential question of who was to decide intent--judge or jury?

Hamilton gently reminded his hearers that, despite the best intention of judges, the temptation to side with the administration of which they were a part was overwhelming. "Ask any man, however ignorant of principles of government, who constitute the judicial? he will tell you the favorites of those at the head of affairs." It was lost on no one present that he was addressing a bench of precisely that descripton, and therefore a jury, **chosen by lot,** balanced such a bench. When he asserted that the jury must decide intent, he described a safeguard against political oppression. Desseminating a defendant's chances among twelve judges, rather than one, obviously improved them.[26]

Hamilton then pointed out that the "tendency to provoke," the "bad tendency" of the prosecution's case, was an essential component of the malice inherent in libel, and

that even Coke concurred that malice and intent must be shown, and Hamilton emphasized that "the breach of the peace is not made the sole, but only one of the qualities. The question is not on the breaking of the peace, but depends on time, manner, and circumstances, which must ever be questions of fact for jury determination."[27]

For the jury to exclude truth as immaterial, however, Hamilton maintained was unacceptable. "No tribunal, no codes, no systems can repeal or impair the law of God, for by his eternal laws it [truth] is inherent in the nature of things." The conflicting precedents cited by both prosecution and defense indicated that the law was not settled, and that "truth may be given in evidence". It is "contrary to the common law; to the principles of justice, and of truth" to deny juries all material facts, and among those is the truth of the disputed libel. It is against reason, and Hamilton defined common law as "Natural law and natural reason applied to the purposes of Society."[28]

Having rephrased the questions at issue, offered an original definition of liberty of the press, and refined the definition of libel, Hamilton returned to first principles in his discussion of common law. Henry of Bracton, earliest of the cited authorities, defined natural law as God's law, written on the human heart and taught to all living things. Long usage and consensus comprised the common law, according to Bracton, and Hamilton recalled to his hearers, in this

reference, the heritage they all shared. Natural law and natural reason required the consideration of truth, in the jury's determination of intent, which indicates whether a libel exists. Liberty for the press demands that truth, with impunity, for good motives and justifiable ends, be allowed to guard against the encroachments of power.[29]

Hamilton concluded his plea with the admonition that "it is only by the abuse of the forms of justice that we can be enslaved...it is to be subverted only by a pretence of adhering to all the forms of law, and yet by breaking down the substance of our liberties."[30] In explaining what he meant by liberty of the press, and redefining the first principles of common law in association with that explanation, Hamilton subtly shifted the grounds of debate, and returned the tenets of common law to a more flexible, and acceptable, interpretation, by wedding common law to common sense. He then characterized it not only as the authentic, but the American common law.

Hamilton placed before the court the questions: whether truth shall be given in evidence, and whether the Court (the judge) has exclusive right to decide the intent (i.e., was the publication intended as libel). By rephrasing the issues, Hamilton was avoiding the idea that the jury decides the law, and emphasizing that intent makes the libel, as intent makes the crime. Thus, he deftly deflected any unease that a jury could rewrite or distort

the law through ignorance, and overcame the objection that laymen have no business deciding points of law. It was the intent the jury had the right to consider, because intent was the necessary ingredient to the criminality of an act. Hamilton explained that "the criminality of the act is a matter of fact and law combined" and then he quoted Lord Mansfield supporting this statement in the very opinion (Dean of St. Asaph) whose authority was disputed throughout the Croswell affair! Hamilton further demonstrated that Mansfield had contradicted himself in that same opinion, and regretfully remarked, "we see the hardship into which the best of men are driven, when compelled to support a paradox."[31]

Hamilton's original contribution, however, lay in his characterization of liberty of the press: to publish with impunity, truth, but only with good motives and for justifiable ends. It gained quick and widespread acceptance because it satisfied a perceived need for a proper balance between liberty and licentiousness in the press. Hamilton was not pressing for an absolute right; under his doctrine, truth was not admissible under every circumstance. If there be "design to injure another," or straying beyond the bounds of the public domain, truth was no shield to Hamilton. Personal attacks and private vices were not the public's concern. In this he concurred, surprisingly, with elements of the prosecution's argument. Spencer, in an impulse from

his Federalist past, had urged that "Liberty consists not in doing what we like, but in doing at our will and pleasure those things only, which infringe not on the happiness or properties of others." Hamilton's limits on liberty would blend well with such a distinction. Caines, in a surprisingly sophisticated proposition, contended that "the private virtues of a public officer, are to the people of no kind of importance." He went on to say that public duties of an official were so clear and confined that "his moral qualities can be detrimental only to himself" and equated moral scrutiny with a religious test, strictly forbidden by the state constitution. "Why should we require a test in morals, when we admit of none in religion?" A public official, concluded Caines, is not subject to a printer's moral standard.[32]

They had all had enough. Public men had been through two revolutions--one of separation from Great Britain, and the other a peaceful transfer of power after a bitterly contested election. The press had participated prominently in each. Now it became apparent in a courtroom in Albany, after two-and-a-half days of argument, that both sides of the political divide were ready to agree on limits for public discourse.

But not yet. In April, 1804 the Supreme Court **en banc** denied the appeal for a new trial. Morgan Lewis was not prepared to reverse himself; indeed, in his opinion, he

declared that "truth may be as dangerous as falsehood" and was unmoved by innovative arguments; James Kent, still overcome with admiration for Hamilton's performance thirty years later, wrote an opinion in favor of the defense. Had the judges gone strictly on party lines, Smith Thompson would not have sided with Kent; but he did. According to Kent, Brockholst Livingston concurred with the argument for the rights of the jury, and told Kent he would vote for a new trial. Yet when the day came to hand down the decision, Livingston sent word to his cousin by marriage that he would vote with Lewis, but would not attend court, pleading illness. Kent always believed Brockholst's indisposition was a reluctance to face him.[33]

Because the judges were evenly divided, the conviction stood. Ambrose Spencer did not attempt to vote as justice while prosecuting as attorney general. An arrest of judgment was granted, because the revised law of libel had incorporated Hamilton's proviso that truth was not justification in itself, but was published "for good motives and for justifiable ends." The law had made its painful way through the New York Assembly, and was awaiting approval from the Council of Revision, which consisted of the Supreme Court Justices, the Chancellor and the Governor.[34] The Council of Revision modified the law further, sent it back to the legislature in November 1804 for further polishing, and it became law in April of 1805. Harry Croswell never

served time or paid a fine; he continued to publish the Balance, with impunity. Spencer and Foote instituted a civil suit against Croswell for defamation. Spencer was awarded one hundred and twenty dollars in damages. Ebenezer Foote was awarded six cents. Ambrose Spencer ascended the Supreme Court bench, and had an honorable career as judge, and satisfying career as party boss. Morgan Lewis became governor of New York that same spring. Brockholst Livingston became a Supreme Court justice for the United States. The Columbia junto--Elisha Williams, Jacob R. van Rennselaer and William W. Van Ness--remained the core of Federalism in Columbia county, and Van Ness eventually joined Spencer on the New York Supreme Court. Alexander Hamilton was murdered six months after the appeal by the vice president of the United States.[35]

ENDNOTES

1. Forrest McDonald, Alexander Hamilton: A Biography (New York: W. W. Norton, 1979), 359, 448 n.11.

2. [George Caines], The Speeches at Full Length of Mr. Van Ness, Mr. Caines, the Attorney General, Mr. Harrison, and General Hamilton, in the Great Cause of the People against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States (New York: G. & R. Waite, 1804), 72.

3. For Abraham van Vechten, see Alexander, Political History, 168-169, Fox, Decline of the Aristocracy, 33-35; Letter from General Phillip Schuyler to Elizabeth Schuyler Hamilton, June 23, 1803, as quoted from Julius Goebel, Law Practice 784-785 n.38.

4. William Rawles, reply to Alexander Hamilton, June 27, 1803 (not mailed until July 29, 1803). Syrett, ed., Hamilton Papers, 28:128. The connection of James Scott Smith to the case is more elusive. A James S. Smith was admitted to the bar in the Court of Common Pleas in Hudson in 1788, in the company of Ambrose Spencer (Franklin Ellis, History of Columbia County, 60). Howard McBain quotes James Cheetham in "A Reply to Aristides" as including James Scott Smith in a list of disappointed office seekers and associates of Aaron Burr (McBain, Dewitt Clinton and the Spoils System in New York, 13), but Cheetham may not be particularly reliable in this instance. Hammond describes Cheetham as "a political writer sometimes too regardless of truth" (Hammond, Political Parties, 185). If Smith came up from New York City to assist in the case, it indicates that his sympathies were Federalist; if he was the James S. Smith admitted to the Columbia bar in 1788, it is likely that he knew Spencer personally, which might account for his willingness to participate in the defense, albeit briefly. There is no conclusive evidence, but the coincidence is suggestive.

5. According to Goebel, Hamilton appeared at the November 1803 session of the Court of Oyer and Terminer to defend yet another Federalist editor, Samuel Freer of the Ulster, New York, Gazette, against a contempt charge for remarking on the Croswell case while it was still **sub judice**. Julius Goebel, Law Practice , 801 n.77. Freer was found guilty, and fined ten dollars at the February session, when Croswell's appeal was heard. Evening Post (New York, NY),

24 February 1804.

6. Evening Post (New York, NY), 18 February 1804.

7. Sidney Pomerantz, New York: An American City 1783-1803; A Study of Urban Life (New York: Columbia University Press, 1938) 91, 107, 124; Hammond, Political Parties, 175-176, 201.

8. For political appointments and loss of office, see Hammond, Political Parties, 175-176, 180; for Livingston relationships and Brockholst's disaffection, see Alfred Young, Democratic Republicans of New York: The Origins 1763-1797 (Chapel Hill, NC: University of North Carolina Press, 1967), 283, 298, 567; for Kent, see William Kent, Memoirs and Letters of James Kent, LLD, Late Chancellor of the State of New York (Boston: Little, Brown, and Co., 1898), 33, 283-284, 289, 321-330; for Caines, see Allan Johnson and Dumas Malone, eds., Dictionary of American Biography, 21 vols. (New York: Charles Scribner's Sons, 1928-1941), 3:404. No mention of Caines' political affiliation was found, but the Dictionary of American Biography mentions his work on merchant law, published in 1802. The most prominent practitioner of merchant law in New York was Alexander Hamilton, and he and Caines had surely crossed paths. The effusive tribute Caines gives Hamilton at the beginning of his argument indicates that the encounter was pleasant. Goebel, Law Practice, 5; Kent, ed. Memoirs of James Kent, 317; [Caines], The Speeches at Full Length, 21.

9. THE PEOPLE V. CROSWELL, Johnson's Cases 3:337, as quoted in Smith and Hitchcock, Reports of Cases Adjudged and Determined, 717.

10. Johnson's Cases 3:342, from Smith and Hancock, Reports of Cases Adjudged and Determined, 718.

11. The primary source for the appeal is The Speeches at full length of Mr. Van Ness, Mr. Caines, the Attorney General, Mr. Harrison, and General Hamilton in the Great Cause of the People against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States, which is no such thing. The Evening Post acidly observed that the only speech given at full length was that of Caines, whom the Post suspected of being the author. Hamilton's speech (which was estimated to last six hours) is truncated. A supplemental account exists from Judge Kent's notes, and the outline that the judge obtained from Hamilton of his argument. However, Judge Kent's notes merely

indicate abridgements--they do not add substantially to the argument. Evening Post June 5, 1804; "James Kent's Notes on Hamilton's Argument" from Kent, Croswell advs. the People (Ms.), New York Public Library, 41-64, as quoted in Goebel, Law Practice, 833-845, outline on 807.

12. [Caines], The Speeches at Full Length, 6-9, quotes from 9.

13. American Citizen (New York, NY), 13 February 1804, Evening Post (New York, NY), 13 February 1804, quote from the Bee (Hudson, NY), 3 March 1804.

14. Johnson's Cases 3: 348 as quoted in Smith and Hancock, Reports of Cases Adjudged and Determined, 719.

15. The Balance (Hudson, NY), 25 January, 1803.

14. Evening Post (New York, NY), 14 February 1804.

17. Johnson's cases, 3:348 as quoted in Smith and Hancock, Reports Adjudged and Determined, 720; [Caines] Speeches at Full Length, 10-12.

18. [Caines], Speeches at Full Length, 19-44, reference to Hamilton, 21, quote, 28.

19. A footnote at the bottom of page 44 of [Caines], Speeches at Full Length indicates that "the House of Assembly sits above, the Senate below the Court."

20. [Caines], Speeches at Full Length, 45-46, quotes from 48 and 50.

21. Ibid., 52-53.

22. Ibid., 55-61, quotes from 56, 57, 61.

23. Ibid., 61-62, quote 62; Laws of New York, 28th Session, XC: 450-451; Hammond, Political Parties, 1:207; Kyo Ho Youm, "The Legacy of People v.s. Croswell on Libel Law," Journalism Monographs 113 (June 1989), 10-13.

24. [Caines] Speeches at Full Length, 63-64, 77; quote, 70.

25. Ibid., 66.

26. Ibid., 64.

27. Ibid., 65.

28. Ibid., 71, 74, 71, 76.

29. Samuel Thorne, ed. Bracton on the Laws and Customs of England, 2 vols. (Cambridge, MA: The Belknap Press of Harvard University Press, 1968), 1:34, 1:19.

30. [Caines], Speeches at Full Length, 77.

31. Ibid., 67, 75.

32. Ibid., definition, 64; Hamilton's quote, 69; Spencer's quote, 53; Caines' quote, 39-40.

33. Disposition of the case and Lewis's quote, Johnson's cases 3:306, as quoted in Smith and Hancock, Reports of Cases Adjudged, 739. For Kent's view of the case thirty years later, see Kent, Memoirs and Letters of James Kent, 323. For Brockholst's wavering and eventual siding with Lewis, see "James Kent's Notes" from Kent, Croswell v.s. the People (Ms.), New York Public Library, 74-76, as quoted in Goebel, Law Practice, 843.

34. An arrest of judgment is

> The act of staying a judgment, or refusing to render judgment in an action at law and in criminal cases, after verdict, for some matter appearing on the face of the record, which would render the judgment, if given, erroneous or reversible. The court on motion of the defendant shall arrest judgment of the indictment or information does not charge an offense or if the court was without jurisdiction of the offense tried.

Henry Campbell Black, Black's Law Dictionary, 5th ed. (St. Paul, MN: West Publishing Co., 1979), 101. This was what Morgan Lewis and the defense team at the trial devised to bring the matter before the entire Supreme Court. It is indicative of his unease that Lewis was reluctant to sentence Harry Croswell in the face of Spencer's eagerness and a hand-picked courtroom in Claverack. To refuse to sentence Croswell after the conviction was upheld was a pragmatic recognition of the attention the case had attracted and the disfavor with which a sentence would be met. For Hamilton's phrase in the revised law, see Laws of New York, 28th session, XC: 451. For composition of Council of Revision, see David McAdam et. al., eds., A History of the Bench and Bar of New York, 2 vols. (New York: New York History Co., 1897), 1:131.

35. Johnson's Cases, 3:363, as quoted in Smith and Hancock, Reports of Cases Adjudged, 725; for arrest of judgment see David D. Barnard, Discourse on the Life, Character and Public Services of Ambrose Spencer, Late Chief Justice of the Supreme Court of New York (Albany: W. C. Little and Co., 1849), 29-30; for defamation damages, see the Balance (Hudson, NY) 24 July 1804, 31 July 1804. For Lewis's election, Livingston's elevation and Van Ness' ascent to the bench, Hammond, Political Parties, 208, 207.

CHAPTER FIVE

CONCLUSION

The development of freedom of expression as an unlimited right over the course of the twentieth century obscures a clear view of the Croswell case, two hundred years later. For us to understand how Croswell advanced freedom of the press in 1804, it is necessary to move away from Leonard Levy's statement that "the concept of seditious libel and freedom of the press are incompatible." Seditious libel, the idea that "the government may be criminally assaulted by mere words" cohabited comfortably two hundred years ago with an idea of freedom of the press that was more limited than ours.[1] Indeed, the idea of absolute rights was not acceptable to the lawgivers and the lawmakers of the early nineteenth century. Ambrose Spencer was enunciating a fundamental principle of the republic when he asserted that "liberty consists not in doing what we like, but in doing at our will and pleasure those things only, which infringe not on the happiness or properties of others." Hamilton concurred in this description of limited rights when he conceded that the liberty of the press was subject to the restraints of the courts.[2] To impose a contemporary

concept of freedom of the press upon a society two hundred years past indicates that Levy is falling into the same trap he perceived in previous twentieth century scholarship. He is also grudging in his concession that "the actual freedom of the press had slight relationship to the legal conception of freedom of the press as a cluster of constraints. In short, the law threatened repression, but the press conducted itself as if the law scarcely existed."[3] Throughout his work, Levy is puzzled by the tactics employed by attorneys and critics in combatting charges of seditious libel: the attacks on the inadmissibility of truth as a defense and the limits on juries. Levy is troubled that "they failed to repudiate the concept of seditious libel."[4] Levy does not consider that there might have existed a societal consensus accepting the concept of seditious libel: that unrestrained liberty of the press was unacceptable to the society of that time. The idea that "mere words could criminally assault the government" might have held more meaning to a polity that had itself assaulted its government with mere words, and fostered a revolution.

In 1800, mere words had brought down a government of twelve years' standing. The Federalist Party had been turned out of office with mere words, and High Federalists certainly believed anarchy and revolution would follow. That a rampant freedom in practice could co-exist with strictures in law Levy himself remarks on, with the further

observation that numerically few prosecutions do not make clear the scope, meaning, or law of press freedom.[5]

The confusion in the theory of the law versus the practice of the press is traceable to the awkward origins of seditious libel. The concept of a defamation breaching the peace was centuries old, but a trial for defamation included the defense of truth and judgment by jury. Sedition is a political crime, defamation a personal one, and by combining them in seditious libel, Sir Edward Coke muddied the course the law would take for the next two centuries. As declaimed in De Libellis Famosis, the object of the law of seditious libel was to preserve the peace, thereby associating it with defamation, a misdemeanor with the same object. However, by labelling the new crime **seditious** libel, Coke combined a capital political crime with a personal defamatory misdemeanor. Coke did not attempt to make his new crime one eligible for capital punishment, possibly recognizing that "mere words" could sow disaffection, but were not an overt act of treason. Yet Coke was careful not to let juries pronounce upon the content of a seditious libel, but only decide on the evidence of publication. As breach of the peace was the ostensible object of this charge, the truth of the libel was immaterial; indeed, the legal aphorism, "the greater the truth, the greater the libel" proceeds from the notion that truth would provoke a greater breach of the peace. The real

object of the law was obvious from the beginning; scholar after scholar has demonstrated that the charge of seditious libel served to suppress dissent. It was singularly unsuccessful. Within ninety years of its appearance in the Star Chamber, three successive governments in England were overthrown.[6]

After the abolition of the Star Chamber, absorption of the charge of seditious libel into common law procedures confused the jury. In 1663, a jury asked upon what statute this charge was founded, and the judge answered that it was common law. In 1803, the New York Evening Post echoed the question--"By the way, we would like to know under what statute this prosecution is commenced?" The bewilderment stemmed from the fact that juries decided intent in criminal common law; but they were not to so decide under this particular criminal charge. In defamation actions, truth was a justification, but was not permitted in this particular defamation. Defamation had originated as a breach of the peace by making a false statement; when truth could not be used as a defense, juries were left without the crime as they understood it. By divorcing defamation jurisprudence from the charge of seditious libel, English jurists left their juries with nothing but a political charge (sedition) for political purposes (suppression of dissent). Therefore, James Morton Smith could truly make the statement that "all sedition cases were political trials

from start to finish." Yet the phenomenon noted by Levy persisted; attacks on the law were aimed at the limitation of the jury and the denial of truth as a defense. This leaves us with the conclusion that the failure to attack the concept of seditious libel lay in the societal consensus that subscribed to it--there **should** be limits on the liberty of the press; the government **can** be criminally assaulted with mere words. We need not agree with these strictures to recognize that they existed.[7]

The difficulty for early American society in implementing this consensus lay in the early development of the law of seditious libel, which excluded truth as a defense. A law was necessary that could reconcile seditious libel with the familiar principles of defamation. The Sedition Act of 1798 offered the necessary elements to provide the balance between liberty of the press and licentiousness. The jury was to decide intent as well as the fact of publication; the Act also permitted truth as a defense. The political motivation inherent in seditious libel quickly asserted itself in the administration of the Sedition Act. Federalist judges distorted the law to an extreme; instead of a safeguard to the press, it was used as a cudgel in the hands of Federalist judges determined to employ it in the suppression of Republican dissent. The Sedition Act was a prime example of an advancement in law destroyed by bad intent and bad enforcement.

When Jefferson announced that "error of opinion may be tolerated where reason is left free to combat it," Republican guardianship of the press seemed assured. However, Jefferson was merely moving prosecution of seditious libel to the state courts where he believed they belonged. He wrote the governors of Pennsylvania and Connecticut, encouraging them to initiate prosecutions for seditious libel that maligned him. Levy remarks that it would not be surprising to find a similar letter to George Clinton of New York urging the instigation of prosecutions for seditious libel in New York. The home of Hamilton's New York Evening Post was an obvious venue, and Levy is reasonable to expect such a discovery.[8]

That there was in fact a prosecution for seditious libel in New York had little, if anything, to do with Thomas Jefferson. The man indicted for seditious libel, Harry Croswell, was a junior editor of an upstate paper. The paper that attracted the attention of the Attorney General was Croswell's personal project, a publication barely dignified by the term tabloid. The items indicted were not original. Harry Croswell was actually arrested for affronting Ambrose Spencer. Spencer decided to use his considerable political power to squash the Wasp, and instead stirred up a hornet's nest.

That Spencer was using the charge of seditious libel in time-honored fashion to suppress Harry Croswell's deplorable

paper seems obvious from his approach to the court proceedings. He fought furiously to keep the case in an inferior court where he reputedly hand-picked judges and jury. He flatly refused to admit evidence of truth as a defense, and most curiously, he pursued the weaker of the two libels against the president. The issue of the Wasp which contained that libel was particularly offensive to Ambrose Spencer. Most telling of all, he demanded a performance bond to prevent further publishing by Harry Croswell until trial, a demand the court denied.

Spencer's major miscalculation was in assuming that Croswell was defenseless. He could not have known that the author of one of the indicted items was a young law student clerking for his brother-in-law, the formidable Elisha Williams, and would bring not only Williams, but his two closest friends and political associates into the case. Spencer did not anticipate the defense team's talent for delay, which gave them time to enlist statewide Federalist support. Luck was with him in the timing of the trial; the Louisiana Purchase kept publicity to a minimum. Spencer's luck ran out in the appeal.

Upstate Federalists apparently had intended to engage Alexander Hamilton at an early stage, which may explain the defense's penchant for delay. They had to proceed without him for the trial. When Hamilton was finally free to take the case to appeal, the defense had already offered the

obvious arguments against seditious libel tenets and in favor of the innovations contained in the expired Sedition Act. Hamilton went beyond this line of reasoning and offered the definition of liberty of the press that subseqently was to prove satisfactory to twenty-three states. Hamilton, by redefining the law, transcended the political aspects of the trial and created an enduring and acceptable test--intent of the libel's author, rather than previous "bad tendency" test which measured the effect on the audience. The federal government has not initiated a seditious libel prosecution since expiration of the Sedition Act. According to Michael Gibson, assistant professor of law at Oklahoma City University, only eleven defamation cases reached the Supreme Court by 1917. What Gibson describes as "the last gasp of seditious libel" occurred when Theodore Roosevelt attempted to prosecute the New York World and the Indianapolis News for allegations that friends of the president had profited from the Panama Canal purchase. Federal officials in Indianapolis refused to co-operate, and Joseph Pulitzer, publisher of the World, urged pursuit of the case to the Supreme Court, despite lower federal courts dismissing the charges for lack of jurisdiction. The Supreme Court affirmed that seditious libel cases had no standing in federal courts. The outcry against Roosevelt's action appeared, not only in the press, but significantly, in professional legal journals as well.

New York had not conducted a seditious libel case since Croswell. As the federal courts, the bar and the press joined in accord, it would indicate that by 1911, the consensus for seditious libel had evaporated.[9]

Yet wartime measures in both World War I (the Espionage and Sedition Acts) and World War II (the Smith Act), designed to repress, instead evoked opposition, discussion, and redefinition of free speech and a free press. A new consensus, born of the McCarthy era, emerged. The decision of the Supreme Court in 1964 in New York Times Co. v. Sullivan that "a public official could not recover damages for a libel relating to his offical conduct unless he first proved actual malice" generally appears to be the replacement for Hamilton's doctrine.[10]

If Hamilton's definitions are no longer applicable to modern freedom of the press, there remains one further aspect to the Croswell case that merits notice. The Croswell case remains a virtual snapshot of the law in a moment of transformation. To be perceived as just, law must be predictable; that is, stable and consistent. Yet law rigidly construed according to precedents no longer applicable to existing circumstances can be unjust. Law must also be responsive to the needs of the society changing around it. To find the balance between flexibility and predictability is an ongoing quest for jurists.

Attorneys from both sides of the jurisprudential fence

tried the Croswell case. Spencer attempted to preserve the old concepts of seditious libel to quash a political opponent. Hamilton's argument made clear that the old construct of the common law had, in life, if not in court, been replaced by the principles incorporated in the much-maligned Sedition Act. Hamilton provided a balance between liberty and limits for the press that was acceptable to his society.

People v. Croswell can also be a cautionary tale for those who work in the law, making or enforcing it. A good law can be undermined by bad enforcement, as in the Sedition Act; bad law can be rejected by non-compliance--a very dangerous precedent indeed. Law needs to be judged in the courts, and not in the streets, to obtain the ultimate requirement of rule by law--the consensus which grants consent.

ENDNOTES

1. Leonard W. Levy, Emergence of a Free Press (New York: Oxford University Press, 1985), xvii, xvi.

2. [George Caines], The Speeches at Full Length of Mr. Van Ness, Mr. Caines, the Attorney General, Mr. Harrison, and General Hamilton, in the Great Cause of the People against Harry Croswell, on an Indictment for a Libel on Thomas Jefferson, President of the United States (New York: G.& R. Waite, 1804), 53, 63-64.

3. Leonard Levy, "The Legacy Reexamined" Stanford Law Review 37 (February 1985), 769.

4. Ibid., 171.

5. Ibid., xv-xvi.

6. Ibid., 9; Zechariah Chaffee, jr., Free Speech in the United States (Cambridge, MA: Harvard University Press, 1948), 499; Phillip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press," Stanford Law Review 37 (February 1985), 662-663.

7. Hamburger, "Development of Seditious Libel," 681; New York Evening Post 19 January 1803; James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca, NY: Cornell University Press, 1956), 400.

8. Thomas Jefferson, First Inaugural Address as quoted in Basic Documents in American History, Richard B. Morris, ed.,(New York: D. Van Nostrand Company, Inc., 1965; reprint, Malabar, FL: E. Krieger Publishing Co., 1986), 81; Donna Lee Dickerson, The Course of Tolerance: Freedom of the Press in Nineteenth Century America (Westport, CT: Greenwood Press, 1990), 26, 29-30; Leonard Levy, Emergence of a Free Press, 340.

9. Kyu Ho Youm, "The Legacy of People v.s. Croswell on Libel Law" Journalism Monographs 113 (June 1989), 10-13; Henry Schoenfield, "Freedom of the Press in the United States" in Essays on Constituitonal Law and Equity (Boston: Chipman Law Publishing Co., 1921), 2: 546, 549, 535; Michael Gibson, "The Supreme Court and Freedom of Expression from 1791-1917," Fordham Law Review, 55 (December 1986) 279, account of U.S. v. Press Publishing Co. (1911), 290-293, oppositon of bar to same, 291, n.175, NY lack of seditious

seditious libel cases, 293, n.189.

10. New literature on freedom of the press indicated the opposition to repressive wartime measures. For World War I, see W.R. Vance, "Freedom of Speech, and of the Press," Minnesota Law Review 2 (March 1918); Thomas F. Carroll, "Freedom of Speech and Press in the Federalist Period: The Sedition Act," Michigan Law Review 18 (May 1920) and the first edition of Zechariah Chaffee jr., Freedom of Speech in the United States, which was issued in 1920. A revised edition was published in 1948, in which Chaffee devotes an entire chapter to expressing his concern regarding the Smith Act, 440-490. The appearance of John C. Miller's Crisis in Freedom in 1951, and John Morton Smith's Freedom's Fetters five years later are certainly a response to the repressions of World War II and the McCarthy era. Smith actually remarks on the modern parallels in his preface (x). For quote on New York Times Co. v. Sullivan, see Morris D. Forkosch, "Freedom of the Press: Croswell's Case," Fordham Law Review 33 (1965) 415, for agreement on impact, see Donald Roper, "James Kent and the Emergence of New York Libel Law," American Journal of Legal History 17 (1973) 230.

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