

John Peter Zenger and Freedom of the Press

Overview:

Students read an article about the Zenger, a colonial freedom of the press case and how that case influenced later court decisions, including *New York Times v. Sullivan*. Students then participate in a role play activity as they become partners in a law firm and determine how they will handle several hypothetical libel cases.

Preparation:

- Primary Source Image: Handout A – 1 per pair of students (Adobe PDF File)
- Article and Activity: Handout B – 1 per student (At end of this document.)

You may want to provide additional background on the Zenger case and *New York Times v. Sullivan*:

Zenger: Library of Congress: <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>

Sullivan: Oyez: <https://www.oyez.org/cases/1963/39>

Primary Source Image Bibliographic:

<https://cdn.loc.gov/service/pnp/cph/3a40000/3a49000/3a49800/3a49841r.jpg>

Procedure:

I. Focus Activity: Examining a Source Document

Explain to the students that they are going to use inquiry skills to examine a source document. Distribute Handout A: Primary Source Image to pairs of students and encourage them to work together to examine the source and answer the questions.

When students have completed the activity, let them know that they will later return to their answers to see how close they came to figuring out the significance of the source.

II. Reading: John Peter Zenger and Freedom of the Press

Distribute Handout B to each student and ask them to carefully read the article.

It is up to you if you would like students to answer the discussion questions orally or in writing. (You could assign the reading as homework.)

After students have completed the reading, ask them to revisit Handout A and hold a brief class discussion using the questions from the handout about the source.

III. Activity: Hunter & Hunter, LLC

Divide the class into groups of 3-4 students and set up the role play by reminding them that they are partners in a law firm that specializes in defending media companies, journalists, and others who may be involved in libel/slander lawsuits.

Before the students start looking at the cases, ask:

- What was the significance of the Zenger case?
- What was the significance of *New York Times v. Sullivan*?

Tell the groups that they need to look at their clients' cases through the lens of *NYT v. Sullivan*, constantly asking themselves the question:

Did our client do this with knowledge that it was false or with reckless disregard of whether it was false or not.

Let the groups know how much time they have to complete the activity. When groups are finished, have different groups report on the decisions they made and share the rationale for the decisions.

IV. Assessment

- Have students provide a written response to this prompt:

Why is the First Amendment's freedom of the press clause important to our democratic republic? Provide at least two specific examples to support your opinion.

- Collect pages 5 and 6 of Handout B. Look for reasoned responses based on the First Amendment and *New York Times v. Sullivan*.

John Peter Zenger and Freedom of the Press

As early as 1275, the English Parliament had outlawed "any slanderous News" that may cause "discord" between the king and his people. Slander, however, only referred to the spoken word. Published works became a much more serious threat to kings and parliaments after the invention of printing greatly enhanced communication in the 1400s.

By the 1500s, King Henry VIII of England required all writing be censored and licensed by royal officials before being printed. Known as "prior restraint," this heavy-handed control over the printed word resulted in prosecutions of authors and printers who published unlicensed writings.

In England, a powerful royal council known as the Star Chamber controlled the licensing of printed works. (The council got its name because stars covered the ceiling of its meeting room.) The Star Chamber created a new crime regarding printed works called libel. Libel included any published material that defamed the Church of England, had obscenity that offended public morality, or attacked the reputation of private individuals.

"Seditious libel" was the most serious crime involving the printed word. Various Star Chamber rulings defined this crime as insults to the government and its laws and malicious criticism of government officials that could cause people to disrespect them. Kings and parliaments were fearful that such attacks on their reputations might lead to public disorder or even revolution.

The Star Chamber ruled that the truth of printed words did not matter. Truth was not a defense in libel cases. In fact, the Star Chamber considered truthful statements that libeled the government or its officials as even more dangerous than false ones. People would more easily dismiss false statements.

Parliament abolished the Star Chamber in 1642, and the last licensing laws expired by 1695. Even so, trial courts continued to enforce the Star Chamber libel laws and procedures. Judges decided whether printed words were libelous as a matter of law. Juries decided only if a defendant had published the words in question.

Thus, by 1700, "freedom of the press" in England only meant no government licensing ("prior restraint"). Once authors and printers had published their writing, English officials could still prosecute them for seditious libel in the courts. As for "freedom of speech," only members of Parliament had the right to speak their minds without fear of arrest by the king.

War of Words Against the Governor

The American colonies followed English law and court precedent on seditious libel. Royal governors and their councils were always on guard against insults in newspapers and political pamphlets.

In 1732, William Cosby arrived in New York as that colony's newly appointed royal governor. He was quick-tempered, arrogant, and greedy. Among his first acts was to demand half the salary paid to Rip Van Dam, the colonial official who had acted as governor when the previous one suddenly died.

When Van Dam refused to give up half his salary to Governor Cosby, Cosby decided to sue Van Dam. Fearing that jurors would find against him, Cosby wanted to avoid a jury trial. Without the approval of the colonial assembly, Cosby appointed a special court of three justices to hear the case without a jury. In April 1733, Van Dam's lawyer argued that the special court was illegal. The chief justice, Lewis Morris, agreed. But the other two justices, James DeLancey and Frederick Philipse, sided with Governor Cosby.

Cosby dismissed Morris and elevated DeLancey to chief justice. Morris along with Van Dam launched a campaign to get the governor recalled by King George II.

Among other tactics, Morris and his friends established a newspaper, *The New York Weekly Journal*, to attack Governor Cosby in print. They hired a print shop owner, John Peter Zenger, to publish their writing. Zenger operated the printing press while James Alexander, a lawyer friend of Morris, served as editor. Alexander and others belonging to the Morris faction produced all the newspaper's content.

For several months, *The New York Weekly Journal* published a wide range of materials criticizing and ridiculing Governor Cosby. These included essays by writers using the names of Roman statesmen as pen names that implied Governor Cosby was a tyrant. Morris and his friends also wrote letters to the editor (all under pseudonyms), attacking the royal governor. One excerpt from a letter became a key piece of evidence for seditious libel:

We see men's deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature, by which it seems to me trial by juries are taken away when a governor pleases. . . .

The newspaper also printed satirical drinking songs with Cosby as the target. The songs accused the governor of aiding the enemy French, depriving New Yorkers of their liberties, and plotting to reduce them to slavery. The newspaper also ran phony advertisements (an early form of political cartoons), ridiculing the governor. One described him as a monkey.

Cosby fought back. He tried to silence Zenger's press by seeking a grand jury indictment against him for seditious libel. The grand jury refused to indict Zenger.

Cosby then asked the New York colonial assembly to prosecute him. It refused. The regular courts also declined to take any action against Zenger.

In November 1734, Cosby turned to his own council, which included Chief Justice Delancey, to issue an arrest warrant against Zenger. Bail was set at an enormous amount, assuring Zenger would remain in jail pending his trial. But Zenger's wife continued to operate his press and turned out more issues of the *Weekly Journal*.

Governor Cosby still failed to get a grand jury indictment against Zenger. Cosby's attorney general, Richard Bradley, then issued an "information" against the printer. This is a way for a public prosecutor to accuse someone of a crime without a traditional grand jury indictment. Bradley charged Zenger with printing items that were "false, scandalous, malicious, and seditious."

Zenger on Trial

The only court that would try the case against Zenger was the one created by Governor Cosby and now headed by Chief Justice DeLancey. James Alexander (editor of the *Weekly Journal*) and another lawyer appeared to defend Zenger when the court convened in April 1735.

The two defense lawyers immediately claimed that the court was illegal and biased. DeLancey disbarred both lawyers for contempt of court. He appointed an inexperienced young lawyer to defend Zenger.

The clerk of the court, another Cosby ally, attempted to rig the selection of the jury members against Zenger, but Zenger's defense attorney challenged the clerk's action. Chief Justice DeLancey, confident that the case against Zenger was open and shut, ordered the normal selection process to proceed, which resulted in an impartial jury.

When Zenger's trial finally began in August 1735, he had been in jail nine months. Attorney General Bradley in his opening statement accused Zenger of being "a seditious person" who had printed "a certain false, malicious, seditious, scandalous libel entitled *The New York Weekly Journal*." He had done this, said Bradley, "to the great disturbance of the peace." Bradley presented various issues of the newspaper as evidence of seditious libel against Governor Cosby.

Under English court precedent, all Bradley had to prove to the jury was that Zenger printed the newspaper. Chief Justice DeLancey would then decide if it was libelous.

Then, the unexpected happened. From the audience rose Andrew Hamilton, the most famous trial lawyer in the American colonies. The disbarred defense lawyers had arranged for him to take over the case. Zenger's youthful appointed attorney quickly withdrew.

Starting with legal arguments developed by James Alexander, Hamilton admitted that Zenger had printed *The New York Weekly Journal*. But Hamilton went on to argue that Zenger had the right to do this as long as the publication "can be supported with truth."

Hamilton pointed to the charges against Zenger accusing him of printing things that were "false." Hamilton said that if Attorney General Bradley could prove the printed words were not true, Hamilton would agree they were libelous.

Shocked at this "truth defense," Chief Justice DeLancey said Hamilton could not continue with it. Under English law, said DeLancey, the truth did not matter in libel cases. "No, Mr. Hamilton," DeLancey ruled, "the jury may find that Zenger printed and published these papers, and leave it to the court to judge whether they are libelous."

Hamilton, however, ignored the chief justice and boldly made his arguments directly to the members of the jury. He asked them, "Are we to believe that truth is a greater sin than falsehood?" If we leave the matter of libelous words up to judges, he continued, this would "render juries useless."

Hamilton told the jurors, "it is you that we must now appeal for witness to the truth." Foreshadowing the American Revolution, Hamilton argued that telling the truth did not cause governments to fall. Rather, he argued, "abuse of power" caused governments to fall.

Hamilton concluded by telling the jurors that if Zenger printed the truth, no libel had taken place, and they should find him not guilty. "Truth ought to govern the whole affair of libels," he said.

But Chief Justice DeLancey instructed the jury only to decide if Zenger printed the newspaper. Whether it contained libels, he told the jurors, would be a matter for the judges to decide.

Twelve men deliberated a short time and then announced Zenger was not guilty of printing and publishing libels. Thus, they went over the head of DeLancey and decided for themselves that there was truth in what Zenger had printed. The crowd in the courtroom cheered as Chief Justice DeLancey left in disgust.

Freedom of the Press in the U.S.

The Zenger jury verdict did not establish a court precedent since only the rulings of judges do that. But accounts of the trial were widely published in the colonies and England. On both sides of the Atlantic, the trial sparked debates about the meaning of freedom of the press.

After the trial, royal officials in the colonies brought few seditious libel prosecutions. They were afraid that juries would refuse to convict. Colonial assemblies, however, continued with prosecutions.

After the American Revolution and the writing of the Constitution, the Bill of Rights was adopted. The First Amendment to the Constitution guaranteed that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Yet Congress in 1798 passed the Sedition Act, which prohibited printing most criticism of the U.S. government or its elected leaders. This law expired in 1801, and its constitutionality was never tested in court.

But even the Sedition Act deferred to the Zenger decision. If the printed words were true or were without malice, the law enabled juries to decide in favor of the defendant.

Prosecutions for seditious libel by government officials eventually died out in the United States. Today, Americans consider it a basic right to be able to criticize government officials without fear of punishment. The U.S. Supreme Court cited the Zenger case in its landmark 1964 free-press decision of *New York Times v. Sullivan*: "The American Colonists were not willing, nor should we be, to take the risk that '[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.'"

For Discussion and Writing

1. What was seditious libel? What was its purpose? Why did English law say that the truth did not matter in prosecutions for seditious libel?
2. What did "freedom of the press" mean under English law in 1700? Do you think English law protected freedom of the press? Why or why not?
3. What did the Zenger case decide? Why was the case important?
4. What does the quote at the end of the article mean? Do you agree with it? Explain.
5. Today some people argue that elected government officials should never be able to sue for libel even in cases where false information about them is published intentionally and maliciously. Do you agree or disagree? Why?

Activity: What Is Libel Today?

Today in the United States, the crime of seditious libel is gone. But government officials can file lawsuits for libel against individuals and win money damages. These lawsuits, however, can only succeed when someone publishes something about an official with "actual malice." Actual malice in this context does not mean ill-will. It means the libelous statement was published "**with knowledge that it was false or with reckless disregard of whether it was false or not.**" This rule was set forth in the 1964 case of *New York Times v. Sullivan*.

The court in *Sullivan* explained that it was not enough to allow truth as a defense to libel cases involving public officials. Proving the truth of statements is difficult and expensive. If defendants had to prove their statements were true, many people would refrain from criticizing officials even though their criticism "is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Requiring defendants to prove the truth of their statements "thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

You are a partner in the law firm Hunter & Hunter which specializes in defending media outlets, radio/television personalities, and individual reporters and journalists. You are in a partner meeting where you and the other partners at the firm decide what to do about your clients' cases.

If you think your client did no wrong, then you want to defend your client in court. If you think your client may have committed libel with actual malice, you want to settle the case quickly and not put your time and resources into going to court.

Case #1: Client: *Celebrity Magazine*

Rumors were circulating that State Senator Megan Moore committed child endangerment by leaving her toddler alone in a locked vehicle with the windows rolled-up. *Celebrity Magazine* prints this story based on one anonymous source who, days after the rumors started, claimed to have seen the child in the car and did not see Moore around. Later, it turns out the rumor was false. Megan sues *Celebrity Magazine*.

How will you advise your client?

_____ Defend the case in court. _____ Try to settle the case quickly.

Reasons for your decision:

Case #2. Client: J.D. Lewis, Musician

A very popular musician and rapper, J.D. Lewis, has a website with millions of visitors. J.D. posted on his site an accusation that a congresswoman took bribes from a chemical company. She admits accepting campaign contributions from the company, but says this did not affect her vote against a clean water bill. J.D. was in favor of the new law and held free concerts to try to get people to write letters to congress in support of the bill. J.D. never spoke with anyone from the chemical company, nor has he ever had any communication with the congresswoman. The congresswoman has filed a lawsuit against Lewis.

How will you advise your client?

_____ Defend the case in court. _____ Try to settle the case quickly.

Reasons for your decision:

Case #3. Client: Central Heights Times (a city newspaper)

The newspaper is being sued by the Department of Sanitation. The paper published a story that accused several officials in the Department of Sanitation of running a “trash scam”. According to the story, these officials directed several drivers of city recycling trucks to take their loads to a private recycling company instead of the city-operated recycling center. The private company would pay the drivers for the recycled trash and the drivers would then keep a cut and give the rest of the money to the officials. The paper accused the officials and the drivers of stealing from the city, since normally the city would receive the funds from the recycled trash. The newspaper used several anonymous sources to get the story.

The paper named three officials in the article and claimed that the Department of Sanitation was “corrupt from the top down”. After further investigation by the city, it was found that only two of the officials were involved.

How will you advise your client?

_____ Defend the case in court. _____ Try to settle the case quickly.

Reasons for your decision:

Case #4: Client: Politispace (a website)

Jesse Collins runs a popular website called Politispace and publishes up-to-the-minute stories about politics. Politispace is being sued by a senator for posting an article that said the senator was being investigated for committing a hit-and-run accident that occurred the night before. Jesse ran the story after it was already spreading on social media. Jesse says that his staff simply looked at what was being said on several social media platforms and developed the article based on what was already being published on Flitter, Spacebook, and other sites. Politispace staff did not reach out to the senator or law enforcement because they were simply reporting on “what was trending” and not on whether or not “what was trending was true”.

How will you advise your client?

_____ Defend the case in court. _____ Try to settle the case quickly.

Reasons for your decision: