

By Jeffery A. Smith

A Reappraisal of Legislative Privilege And American Colonial Journalism

*Use of legislative privilege
against colonial press
was sporadic and ineffective.*

Legal historians have differed substantially on the question of what the term "freedom of the press" meant in the century that produced the First Amendment. Some have argued that a free press was perceived to be a necessary check on government.¹ Others—most notably Leonard W. Levy—have contended that the 18th century understanding of the concept rarely extended beyond the position taken in Blackstone's *Commentaries*, that press freedom meant the absence of prior restraints and that criticism of government tended to undermine authority and should therefore be subject to legal action.² It has been generally agreed, however, that court trials for seditious libel were not a signifi-

¹ See, in particular, Irving Brant, *The Bill of Rights, Its Origin and Meaning* (Indianapolis: Bobbs-Merrill Co., 1965). See also Vincent Blasi, "The Checking Value in First Amendment Theory," 1977 *A.B.F. Res. J.* 521 (Summer 1977); Thomas I. Emerson, "Colonial Intentions and Current Realities of the First Amendment," 125 *U. Pa. L. Rev.* 737 (1977); Stephen Gard, "The Absoluteness of the First Amendment," 58 *Neb. L. Rev.* 1053 (1979).

² Leonard W. Levy, *Legacy of Suppression, Freedom of Speech and Press in Early American History* (Cambridge: The Belknap Press of Harvard University Press, 1960); William Blackstone, *Commentaries on the Laws of England* (London, 1765-1769), Book 4, Chapter 11, pp. 151-154. See also, Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, Inc., 1976), pp. 80-146; Philip B. Kurland, "The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses," 29 *Drake L. Rev.* 1 (1979-1980).

³ Stanley N. Katz, ed., *A Brief Narrative of the Case and Trial of John Peter Zenger . . .* (Cambridge: The Belknap Press of Harvard University Press, 1963), p. 30; Levy, *Legacy of Suppression*, pp. 19-21; Harold L. Nelson, "Seditious Libel in Colonial America," 3 *Am. J. Legal Hist.* 160 (1959). For the developments in English and American law which led to the Zenger decision, see Clifton O. Lawhorne, *Defamation and Public Officials, The Evolving Law of Libel* (Carbondale: Southern Illinois University Press, 1971), pp. 1-37.

cant threat to American colonists after the Zenger prosecution in 1735 and that the main obstacle to unfettered publication prior to the Revolution was the ability of provincial legislatures to punish offending printers and writers for "contempt" or "breach of legislative privilege."³ Since even mild observations could be branded as seditious and could, at least theoretically, lead to imprisonment as long as the assemblies remained in session, any attempt to understand the context of the First Amendment would be incomplete without an examination of the defenses used by colonial publishers in such cases and at least some determination of the extent to which legislative restraint was considered legitimate and effective.

Modelled on British Practice

The privileges claimed by provincial assemblies were modelled on those which had been developing for centuries in England—particularly in the House of Commons. Parliamentary privilege was intended to protect members from injury and intimidation and included protection from arrest, freedom of speech and the right to decide election disputes. As such, the rights of representatives were closely identified with the liberties of the people, but privilege was also wielded against individuals responsible for affronts to the dignity of one of the houses. With Parliament considered the highest court of the realm and each house the judge of its own privileges, such contempts could be treated with

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dispatch.⁴ In the 17th and 18th centuries, writers and publishers were continually brought before parliament to be summarily accused, questioned, and sentenced.⁵ In 18th century America, legislatures acted in more than 20 cases involving the colonial press.⁶

The outlines of the defenses which would be used in both Great Britain and the colonies were apparent at least by the English Revolution as Parliament began exercising unprecedented authority in the religious and secular affairs of the nation. Among those imprisoned by Parliament in this period were articulate and outspoken leaders of the Leveller movement—including Richard Overton and John Lilburne—who argued that the proceedings against them and others violated defendant rights and imposed ex-post-facto law. "The high Court of Parliament," Overton wrote in a pamphlet published in 1647, should not have the power to deny due process or to "commit any free man of England to prison upon any pretended contempts, as is frequent in these days, but only for transgression and breach of known laws of the land."⁷ Lilburne, who was, like Overton, imprisoned by the House of Lords, publicly campaigned for an open press so that, as he said in an address presented in person to the House of Commons, "all treacherous and tyrannical designs may be the easier discovered, and so prevented, which is a liberty of greatest concernment to the Commonwealth, and which such only as intend a tyranny are engaged to prohibit."⁸

The use of these arguments against breach of legislative privilege was well-established by the early 18th century when America's first newspapers appeared. One of the initial cases involving a colonial newspaper occurred in 1722 when James Franklin, publisher of the *New England Courant*, was imprisoned for a month for printing a satirical news item suggesting Massachusetts authorities were slow in taking action against coastal pirates. Franklin's newspaper, the fourth to be established in the colonies and the third in Boston, had existed for less than a year, but had already carried out crusades

attacking the city's clergy for advocating smallpox inoculation and blasting colony politicians for improprieties in the spring 1722 election.⁹ When the Council summoned Franklin for the pirate article and failed to intimidate him, the members called in his 16-year-old brother and apprentice, Benjamin, who later recalled in his autobiography that he too refused to give them "any satisfaction." When both houses of the General Court agreed to jail James Franklin for the remainder of the session, Benjamin, as he remembered it, resented the action "a good deal" and "made bold to give our rulers some rubs" while he temporarily took charge of the *Courant* in his brother's absence. The future Founding Father, however, did little more than reprint an essay of "Cato," the pen name of radical whig writers John Trenchard and Thomas Gordon, which argued that the only limit on an individual's speech should be where it is seen to "hurt or control the right of another," that governors were no more than "the trustees of the people," and the silencing of complaints was "only the prerogative and felicity of tyranny." In the same issue, the *Courant* reported that "pirates still continue on this coast."¹⁰

⁴ Carl Wittke, *The History of English Parliamentary Privilege* (Columbus: Ohio State University, 1921); Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven: Yale University Press, 1943).

⁵ Fredrick S. Siebert, *Freedom of the Press in England, 1476-1776* (Urbana: University of Illinois Press, 1952), pp. 112-116, 179-201, 275-288, 368-374.

⁶ See Levy, *Legacy of Suppression*, pp. 34-87; Clarke, *Parliamentary Privilege in the American Colonies*, pp. 125-127.

⁷ Richard Overton, "Certain Articles," in G.E. Aylmer, ed., *The Levellers in the English Revolution* (Ithaca, N.Y.: Cornell University Press, 1975), pp. 84-85. Spelling and capitalization have been modernized here and throughout.

⁸ John Lilburne, *Englands New Chains Discovered*, in William Haller and Godfrey Davies, eds., *The Leveller Tracts, 1647-1653* (New York: Columbia University Press, 1944), p. 167. For other relevant statements by Levellers, see Aylmer, ed., *The Levellers in the English Revolution*, pp. 56-58, 63-67, 79, 165, 166.

⁹ See Arthur Bernon Tourtellot, *Benjamin Franklin, The Shaping of Genius, The Boston Years* (Garden City, N.Y.: Doubleday and Company, Inc., 1977), pp. 233-310. The pirate news item appeared in the *New England Courant*, June 11, 1722.

¹⁰ Leonard W. Labaree et al. eds., *The Autobiography of Benjamin Franklin* (New Haven: Yale University Press, 1964), p. 69; *New England Courant*, July 9, 1722. For this case and the refusal of the lower house to place Franklin under prior restraint, see *Journals of the House of Representatives of Massachusetts, 1722-1723* (Boston: Massachusetts Historical Society, 1923) (Footnote Continued)

In his first issue after being released from jail, James Franklin began an extended effort to articulate his defense and discredit the General Court's action against him. He printed a letter and poem purportedly by some of his "most eminent friends" who said he was a "sower of sedition" who published "scandalous defamatory libel" that was "praised and prized by some above the Bible." The editor, the letter said, could have "no punishment severe enough" to match his "numerous and heinous" crimes. Franklin responded by asking if they were saying it was "a greater crime in some men to discover a fault, than for others to commit it." He said he did not know "the power of a general assembly in his Majesty's plantations, nor whether an Englishman may have liberty to answer for himself before the legislative power," but he referred his readers to a statement made a year before by John Aislable, a former chancellor of the exchequer, when he was called before the House of Lords to be questioned on his role in the South Sea Bubble financial panic. Aislable, who had already been committed to the Tower by the House of Commons, was quoted as saying that the proceedings against him were an unprecedented violation of the right to present a proper defense and that Parliament's actions in the matter seemed to "threaten our Constitution, and shake even Magna Carta itself."¹¹ The *Courant* two weeks later reprinted a section of Henry Care's *English Liberties*, a popular legal handbook which Franklin had republished in its fifth edition the year before, to show that the Magna Carta, according to Edward Coke's explication, provided for due process and a trial by a jury of one's peers before anyone could be condemned. "No

man ought to be put from his livelihood without answer," Coke asserted. The *Courant* then pointed out that the colony's charter gave the judiciary authority for conducting trials.¹² In other issues, Franklin printed an essay of his brother's and verse of his own denouncing the Boston oligarchy as an oppressive mixture of church and state where justice was denied to those who protested. In James Franklin's poem, which was a parody of his appearance before the Council, he wrote:

And truly 'tis a fatal omen,
When knowledge, which belongs to no men
But to the clergy and the judges,
Gets in the heads of common drudges.¹³

Franklin did not have to wait long for the General Court to act again. On January 14, 1723, Franklin published an essay on religious hypocrisy and letters on the lower house's sour relations with Governor Samuel Shute. The next day both houses voted to forbid James Franklin to "print or publish the *New England Courant*, or any other pamphlet or paper of the like nature, except it be first supervised by the secretary of the province." When Franklin ignored the command and launched another editorial campaign portraying himself as a martyr, the Council ordered his arrest. Franklin, however, left Boston before he could be seized. The *Courant*, meanwhile, published a satirical letter on how to avoid giving offense to the authorities and another which noted that in "old King Alfred's days," judges were hanged for condemning persons "without action or answer" or "where there was no law provided." The latter correspondent presented a letter "found in the street" which said that the legislature was imposing ex-post-facto law and which noted that Judge Samuel Sewell, a member of the Council who had taken a leading role against Franklin, had years earlier been forced to apologize for his part in the Salem witchcraft hysteria. "If this printer has transgressed any law," the letter said, "he ought to have been presented by a grand jury, and a fair trial brought on." Franklin reappeared and the case was turned over to a grand jury which refused to indict him, thus ending the Gen-

Society, 1923), pp. 23, 31, 35, 72. For a discussion of the Franklin case in the context of other efforts to restrain the colony's presses at this time, see Clyde A. Duniway, *The Development of Freedom of the Press in Massachusetts* (New York: Longmans, Green and Co., 1906; reprint ed., New York: Burt Franklin, 1969), pp. 83-103. Documents related to the case are reprinted in *ibid.*, pp. 163-164.

¹¹ *New England Courant*, July 16, 1722. For Aislable's original statement, see *The History and Proceedings of the House of Lords* . . . , 8 vols. (London, 1742-1743), 8:151-169.

¹² *New England Courant*, July 30, 1722. See also, *ibid.*, August 27, 1722. For the section quoted, see Henry Care, *English Liberties*, 5th ed., (Boston: James Franklin, 1721), pp. 22-27.

¹³ *New England Courant*, July 23, Sept. 17, 1722.

eral Court's attempts to control his press. Immediately before the grand jury decision, however, Franklin published a sweeping rehearsal of the arguments advanced on his behalf in a letter covering three pages of his newspaper. The correspondent discussed due process, found fault in the wording of the General Court's order and compared Franklin's situation to that of the victims of the Spanish Inquisition. "It is a vulgar error which some have entertained, and which it concerns every true Englishman to obviate," the letter said, "that there must be no complaint made of the proceedings of the legislative power."¹⁴

The only colonial newspaper then outside of Boston, Andrew Bradford's *American Weekly Mercury* founded in Philadelphia in 1719, came to Franklin's defense early in 1723 saying that the Massachusetts legislators appeared to be "oppressors and bigots." Bradford, who had experienced his own problems with the Pennsylvania Council, echoed the position taken in Boston. "My Lord Coke observes, that to punish first and then enquire, the law abhors," Bradford wrote in the *Mercury*, "but here Mr. Franklin has a severe sentence passed upon him even to taking away part of his livelihood, without being called to make an answer." Franklin's experience may have had some influence on what appears to have been a growing assertiveness on Bradford's part after an early encounter with the Council in 1722. On that occasion Bradford denied printing a pamphlet on the "sunk credit" of the colony and said that a news item published in the *Mercury* on the same subject had been inserted by his journeyman without his knowledge. Bradford gave an apology and was dismissed with instructions to obtain official approval "for the time being" before publishing articles on the affairs of any British colony—an injunction which was evidently ignored in his comments about Massachusetts.¹⁵ Bradford was summoned to the Council again in 1729 for printing a pre-election essay advocating rotation in office as a means of preserving liberty. Bradford once more feigned ignorance, but this time was briefly

jailed. The essay in question was one of the "Busy-Body" series initiated by Benjamin Franklin—who was by then in Philadelphia—and carried on by others. The series continued in the next issue with a brief reference to Bradford's arrest and further recommendations for voters. In the following decade, the *Mercury* presented a number of essays on the role of the press in detecting government abuses and corruption.¹⁶

Actions in Other Colonies

The statements and actions of Bradford and Franklin, the editors of the third and fourth newspapers established in America, indicate that even at an early point in the development of colonial journalism, the use of legislative privilege was questioned with regard to procedural safeguards and freedom of expression and was effectively challenged in practice. Indeed, in several instances, disagreement existed within provincial governments. In 1734, New York's Assembly refused to approve Council action against John Peter Zenger prior to the printer's arrest and famous trial.¹⁷ Thirteen years later, citing the preservation of "liberty of the press" and "the undoubted right of the people of this colony to know the proceedings of their representatives," the New York Assembly voted to order their official printer, James Parker, editor of the *New York Weekly Post Boy*, to print a lower house remonstrance against Governor George Clinton, a document Clinton had expressly forbidden Parker to publish. After the protest

¹⁴ *House of Representatives of Massachusetts, 1722-1723*, pp. 205, 208-209; Duniway, *The Development of Freedom of the Press in Massachusetts*, pp. 100-103, 164-166; *New England Courant*, Jan. 21, Jan. 28, Feb. 4, May 6, 13, 1723.

¹⁵ *American Weekly Mercury*, Feb. 26, 1723; *Minutes of the Provincial Council of Pennsylvania*, 16 vols., (Philadelphia and Harrisburg: Severns & Co. and Fenn & Co., 1851-1853), 3:143, 145. For the article and pamphlet, see *American Weekly Mercury*, Jan. 2, 1722; /Francis Rawle/, *Some Remedies Proposed* (/Philadelphia, 1721/).

¹⁶ *Minutes of the Provincial Council of Pennsylvania*, 3: 369-370; *American Weekly Mercury*, Sept. 18, 25, 1729. On Bradford's relations with the Council at this time, see Anna J. DeArmond, *Andrew Bradford, Colonial Journalist* (Newark, Del.: University of Delaware Press, 1949), pp. 12-19. For later essays on press freedom, see, for example, *American Weekly Mercury*, March 28, April 25, 1734.

¹⁷ *Journal of the Votes and Proceedings of the General Assembly of New York*, 2 vols., (New York: Printed by Hugh Gainé, 1766), 1:671-672.

was printed and ten copies distributed to each member, Clinton prorogued the Assembly with a scolding speech on the abuse of press freedom.¹⁸ Liberty of the press and the right to know, however, did not prevent New York's lower house from issuing a reprimand to Hugh Gaine, editor of the New York *Mercury*, for publishing an extract of the house votes in 1753 or from jailing Parker and his partner William Weyman for 10 days in 1756 after they printed a letter critical of the Assembly's response to Indian attacks. Gaine defended himself by saying, not without reason, that he did not know permission was required to print Assembly votes. Parker, who was a zealous advocate of the right of the press to scrutinize government actions, was found guilty of contempt in abstentia while conducting business in New Jersey, but Weyman, as had Gaine, readily testified on the facts of publication. In both

instances, the printers provided expected apologies, paid costs, and apparently let the matter drop as quickly as it had arisen.¹⁹

New York was not the only colony where turnabouts occurred. In 1742 the Massachusetts Council ordered the attorney general to prosecute Thomas Fleet, editor of the Boston *Evening Post*, for publishing a story that preparations were being made in England for the arrest of Robert Walpole. Fleet's source, a ship captain named Daniel Gibbs, denied having supplied the report, but Fleet produced five witnesses who said they heard him give it. In his paper, Fleet suggested that Gibbs was trying to "save his bacon" and excused himself in part by saying his business was to gather and publish news "in the utmost hurry." The case seems to have been dropped—perhaps because the account turned out to be essentially correct.²⁰

Daniel Fowle, another Boston printer, was less fortunate in 1754 when the Massachusetts House suspected he was responsible for the publication of *The Monster of Monsters*, a pamphlet critical of a bitterly contested excise tax measure. The lower house ordered the pamphlet burned by the common hangman and then summoned, questioned, and jailed the printer. Released after five days of confinement, Fowle published *A Total Eclipse of Liberty*, a pamphlet that gave a theatrical account of his experience and used, as James Franklin had thirty years before, Coke, Care, and other legal authorities to argue that the House's proceedings against him were a violation of the due process of law. Fowle doggedly pursued his argument for 12 years and, in the wake of the John Wilkes affair in England and the Stamp Act crisis, the General Court was finally inclined to agree with him. Having already provided payment of his expenses in 1764, both houses voted in 1766 to award Fowle £20 in damages.²¹

A decision with more potential impact was reached in 1759 when the Privy Council ruled that the "inferior" legislatures of America should not compare their powers to the Commons of Britain and that one assembly could not punish the authors of

¹⁸ *Ibid.*, 2:191-193, 198, 202.

¹⁹ *Ibid.*, 2:358-359, 487-488, 489. For the political context of Gaine's appearance before the Assembly, see Alfred L. Lorenz, *Hugh Gaine, A Colonial Printer-Editor's Odyssey to Loyalty*. (Carbondale: Southern Illinois University Press, 1972), pp. 18-20. For examples of Parker's statements on press freedom, see *New York Weekly Post Boy*, Jan. 6, 1755, Nov. 8, 1756. On Parker's career and confrontations with New York authorities, see Alan Frank Dyer, "James Parker, Colonial Printer, 1715-1770" (Ph.D. dissertation, University of Michigan, 1977). In a number of cases—including those of William Smith, Alexander McDougall and Thomas Powell discussed below—the legislatures involved were anxious to simplify matters by coaxing apologies which the defendants adamantly refused to furnish. Press freedom was clearly involved in the Gaine and Parker cases, but was apparently not raised as an issue. Discussion of press freedom also seems to have failed to materialize in several incidents where it was clearly a secondary matter. For episodes involving William Parks in Virginia (1749), William Weyman in New York (1766), James Pride in Virginia (1767), and Herman Husband in North Carolina (1770), see H. R. McIlwaine, ed., *Journals of the House of Burgesses of Virginia, 1742-1747, 1748-1749* (Richmond, Va. 1909) pp. 401-404; Isaiah Thomas, *The History of Printing in America* (New York: Weathervane Books, 1970), pp. 498-500; John Pendleton Kennedy, ed., *Journals of the House of Burgesses of Virginia, 1766-1769* (Richmond, Va., 1906), pp. 91, 97, 98-99, 100, 103, 110, 120-121, 125; William L. Saunders, ed. *The Colonial Records of North Carolina*, 10 vols. (Raleigh, N.C.: P.M. Hale, Josephus Daniels, 1886-1890), 8:330-331.

²⁰ *Boston Evening Post*, March 8, 15, 1742; Thomas, *The History of Printing in America*, pp. 251-252; Duniway, *The Development of Freedom of the Press in Massachusetts*, pp. 114-115.

²¹ *Journals of the House of Representatives of Massachusetts, 1754-1755* (Boston: Massachusetts Historical Society, 1956), pp. 63-64, 67, 72; Duniway, *The Development of Freedom of the Press in Massachusetts*, pp. 115-119, 171-173; Thomas, *The History of Printing in America*, pp. 127-132. For background, see Paul S. Boyer, "Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754," *William and Mary Quarterly*, 3rd ser., 21 (July 1964):328-351.

comments made on its predecessors. The ruling came in an appeal brought by William Smith, provost of the College and Academy of Pennsylvania and perennial critic of the Pennsylvania Assembly. Over his strenuous objections to procedural aspects of the action taken against him, Smith had been convicted and jailed by the lower house for assisting in the publication of a judge's protest against Assembly efforts to remove him from the bench, a document which had already appeared in two Pennsylvania newspapers. Smith used the *American Magazine*, which he edited, and the *Pennsylvania Journal* to portray the incident as a violation of defendant rights and liberty of the press.²²

If the use of legislative privilege suffered yet another setback with Smith's vindication in England, it showed signs of reviving and again prompting discussions on press freedom in the turmoil which preceded the American Revolution. When the New York Assembly and Council took steps in 1770 to punish Alexander McDougall, a patriot leader, for a broadside he had written denouncing the lower house's financial support of royal troops, James Parker's *Post-Boy* bristled with letters condemning the use of oppressive "Star Chamber" law and arguing that press freedom was essential for countering government wrongdoing. Hugh Gainé's more conservative *Mercury*, meanwhile provided a forum for a friend of the Assembly leaders to present a twelve-part "Dougliad" series espousing Blackstonian doctrine on press freedom and painting McDougall as a dangerous incendiary.²³ After a common law prosecution against him sputtered to a halt, McDougall, who was being toasted at patriot gatherings as "America's Wilkes," was brought before the Assembly. His insistence on the right not to incriminate himself and his questioning of the lower house's jurisdiction resulted in a majority of the members finding him guilty of contempt and ordering him to jail where he remained for nearly three months before his lawyers could free him.²⁴

McDougall's well-publicized experience may help to explain why Isaiah Thomas, when summoned to appear before the

Massachusetts Council a year later, told the messenger who brought the order that he was "busily employed in his office, and could not wait upon his excellency and their honors." Prompted to act by an essay in Thomas's *Massachusetts Spy* which portrayed Governor Thomas Hutchinson as a "usurper," the Council twice sent the messenger back only to have Thomas again decline to attend. The Council, unsure of its own authority in the matter, instructed the attorney general to prosecute Thomas for seditious libel, but a grand jury refused to indict the printer. The Council once more proposed seeking an indictment in 1772 when Thomas published a vitriolic attack on the King, but Hutchinson, advised by the ministry that prosecutions were useless, decided not to proceed with the case. Thomas and his fellow patriots blasted the attempts to silence the *Spy* as a plot to prevent criticism of government.²⁵

The political climate was no less radical in South Carolina where, in 1769, the Commons House of Assembly voted to send £1500 to England to assist the cause of

²² W.L. Grant and James Munro, eds., *Acts of the Privy Council. Colonial Series*, 6 vols. (London: His Majesty's Stationery Office, 1908-1912), 4:375-385; Ralph L. Ketcham, "Benjamin Franklin and William Smith: New Light on an Old Philadelphia Quarrel," *Pennsylvania Magazine of History and Biography* 88 (April 1964): 142-163; Leonard W. Labaree et al., eds., *The Papers of Benjamin Franklin* (New Haven: Yale University Press, 1959-), 8:28-51; *American Magazine* 1 (1757-1758): 184-185, 199-200, 210-227, 308; *Pennsylvania Journal*, February 23, 1758; Gertrude MacKinney and Charles F. Hoban, eds., *Pennsylvania Archives*, 8th ser., 8 vols. (n.p., 1931-1935), 6: 4677-4716, 5091-5092. For examples of the Pennsylvania Assembly either supporting or failing to actually punish printers or writers, see *ibid.*, 5: 3864-3865, 4273-4274; 8: 6683-6684.

²³ See, for example *Post-Boy*, March 19, 26, 1770. For the Dougliad series, see *New York Mercury*, April 9 - June 25, 1770.

²⁴ On McDougall's case and career, see Roger J. Champagne, *Alexander McDougall and the American Revolution in New York* (Schenectady, N.Y.: The New York State American Revolution Bicentennial Commission in conjunction with Union College Press, 1975). See also, Dorothy R. Dillon, *The New York Triumvirate* (New York: Columbia University Press, 1949), pp. 106-123; Arthur M. Schlesinger, *Prelude to Independence, the Newspaper War on Britain, 1764-1776* (New York: Alfred A. Knopf, 1958), pp. 114-116; Thomas, *The History of Printing in America*, pp. 466-470.

²⁵ Schlesinger, *Prelude to Independence*, pp. 140-142, 147-148; Thomas, *The History of Printing in America*, 165-168, 174-175, 267-272; *Massachusetts Spy*, Nov. 14, 1771. In 1768, the lower house had cited liberty of the press in refusing to follow Governor Francis Bernard and the Council in taking action against the *Boston Gazette. Journals of the House of Representatives of Massachusetts, 1767-1768* (Boston: Massachusetts Historical Society, 1975), pp. 206-207, 210-211; Schlesinger, *Prelude to Independence*, pp. 96-97.

the popular hero John Wilkes who had been charged with libelling the government and other offenses. When the colony's upper house refused to support the decision, a controversy developed which all but paralyzed legislative business in the province until the Revolutionary War. As part of its treatment of the contest of wills, the *South Carolina Gazette* in 1773 printed a protest reflecting on the Council's actions which was written by one of its own members, William Henry Drayton. The *Gazette's* editor, Thomas Powell, was declared guilty of a breach of privilege by the upper house and was imprisoned, but was released shortly thereafter on a writ of habeas corpus issued by two members of the lower house acting as justices of the peace. When the Council demanded satisfaction, the Commons House of Assembly supported their two members saying that the jailing of the editor was "unprecedented, unconstitutional and oppressive." The case went to England, but was not resolved before the outbreak of the war. Powell was unsuccessful in suing for damages, but he and his partner, Peter Timothy, were made the lower house's official printers. The *Gazette* depicted the episode as "the most violent attempt that ever had been made in this province upon the liberty of the subject" and added that a free press was "the best alarm to rouse us against the attacks of arbitrary power."²⁶

Later in 1773, patriots demonstrated that they also knew how to use legislative weapons for political purposes when the Rhode Island Assembly summoned a particularly troublesome Tory, George Rome. Rome, who had made himself obnoxious to Rhode Islanders as a collector of debts for London firms, had written a letter to a

friend in 1767 complaining about how the colony's laws and "iniquitous courts of justice" were being used to frustrate his efforts to obtain money owed to his clients. Rome's letter was passed on to the ministry in London where Benjamin Franklin saw it and then sent it to Boston along with letters by Governor Hutchinson of Massachusetts. Once a copy reached Rhode Island, Rome was menaced with twelve actions for defamation—each set at £290 to fall under the amount which would allow him to appeal to Britain. The Assembly, however, took up the matter and when Rome appeared, he was asked if he had written the letter. "I do not think, upon the privilege of an Englishman, that the question is fairly stated," Rome replied, "because I do not consider I am to be called here to accuse myself." Rome's assertion of the right to remain silent brought a quick end to the proceedings. The *Providence Gazette*, which had earlier printed his letter, reported that the house found Rome's response to be "evasive, and a contempt." He was briefly jailed until the Assembly rose. Rome, who was suspected of being a British intelligence agent, continued to annoy the residents of Rhode Island and was about to be seized by Newport's Committee of Safety in 1775 when he took refuge aboard a British ship.²⁷

Conclusions

Although Levy and other legal historians have contended that colonial legislatures presented a serious threat to press freedom in early America, even a brief review of cases indicates that the use of legislative privilege was sporadic, inconsistent and largely ineffectual. Colonial journalists and publishers were typically prepared to stand on what they perceived to be their rights to due process and freedom of the press—often to prevail in the end. The repeated failure of legislators to silence or convert critics suggests that they were less interested in protecting the security of government than in finding a pretext for abusing political opponents. With the discrediting of court trials for criticism of

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²⁶ *South Carolina Gazette*, Sept. 2, 6, 13, 15, 1773. For background, see Jack P. Greene, "Bride to Revolution: The Wilkes Fund Controversy in South Carolina, 1769-1775," *Journal of Southern History* 29 (February 1963): 19-52.

²⁷ Wilkins Updike, *History of the Episcopal Church in Narragansett, Rhode Island* (New York: Henry M. Onderdonk, 1847), pp. 333-341; Franklin Bowditch Dexter, ed., *The Literary Diary of Ezra Stiles*, 3 vols. (New York: Charles Scribner's Sons, 1901), 1: 65, 387, 566, 630; *Providence Gazette*, Nov. 6, 1773; David S. Lovejoy, *Rhode Island Politics and the American Revolution, 1760-1776* (Providence, R.I.: Brown University Press, 1958), pp. 174-176, 188. For an account of the Rhode Island Assembly's refusal to take action against the author and printer of the famous *Halifax Letter* in 1765, see *ibid.*, p. 80.

simply given up, stopped trying. They've become hacks, and their work reflects it."²¹ Others blamed the newspaper's editors for "buying this syndicated crap"²² while others, like Herbert Block and Tom Little, saw the problem as a combination of factors. Block felt that there were too few "fighting cartoonists" working in the 1950s,²³ and traced this lack to an unwillingness on the part of newspapers to purchase controversial cartoons.

British cartoonist David Low put the problem in a cultural perspective when he said that he had always insisted on his independence and refused to sacrifice autonomy for success or money, implying that American cartoonists and the papers for which they worked had perhaps compromised high standards for popularity or monetary gain.²⁴ Ronald Searle's statement confirmed Low's: "Sometimes I get the impression that the American cartoonist is out to please too many people—both in and out of the office."²⁵

Those who studied cartoonists in the 1950s also blamed syndication for the decline in the vigor of cartoons. As J.D. Weaver put it, "A passionate commitment to a host of complex issues is not easily

spread across two or three hundred editorial pages reflecting varying degrees of conservatism."²⁶ Smith indicated syndication by pointing to a larger social phenomenon: "It was the standardization of the press—the same standardization that affected many aspects of our lives—that sped the decline of the cartoon artist."²⁷

Conclusion

Political cartoonists of the 1950s saw themselves as a lively and ornery group, and they saw their duty, in the tradition of early cartoon "heroes" like Thomas Nast, as the tearing down and shaking up of the opposition. But they had a hard time of it; they feared that the forces of society, in which conformity (incarnate in the spectre of syndication) played a major part, would force them to abandon controversy and anger—the mainstays of their art—in favor of bland drawings palatable to a wide variety of papers.

Although cartoonists of the 1950s proclaimed that they were not afraid to stand up for their vision of democracy as a blending of many voices, many truths, it seems that they themselves became victims of the very anxiety and ambivalence that they recognized. Fearful themselves, they reflected (if perhaps in a clouded mirror) the general atmosphere of fear which prevailed in the 1950s. That they felt their art was suffering because of an uncontrollable social phenomenon might indicate the force of that phenomenon.

²¹ Weaver, p. 101.

²² *Ibid.*

²³ National Cartoonist Society Tapes.

²⁴ *Ibid.*

²⁵ Osborn, p. 16.

²⁶ Weaver, p. 101.

²⁷ Smith, p. 28.

LEGISLATIVE PRIVILEGE

(Continued from page 103)

government, the dismal record of legislative privilege, and the clear establishment

²⁸ On the incompatibility of popular sovereignty and seditious libel, see James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca, N.Y.: Cornell University Press, 1956; Cornell Paperbacks ed., Ithaca, N.Y.: Cornell University Press, 1966), pp. ix-xv.

of popular sovereignty in the Constitution, little was left of the concept of seditious libel by the time of the First Amendment except—as the Sedition Act of 1798 subsequently demonstrated—the occasional desire to use it.²⁸