

**The Breakfast Club**  
**Constitutional Minute for 30 May 2023**  
**Right #17 (continued, again): Jury Nullification**

**“Conscience is the most sacred of all property” James Madison, 1792**

Before we move on to the right of a local trial, I want to tell you about two other famous instances of jury nullification in our history: the trials of William Penn and John Peter Zenger.

(When I say “our history,” remember that prior to 1776 “our history” was inseparable from that of England).

In 1670, William Penn had become the leader of a Christian sect called Quakers. The sect was not recognized by the government and was banned from meeting. Penn decided to hold a worship service in a quiet London street and he and fellow leader, William Mead, were arrested on a charge of disturbing the King’s peace. They were summoned to stand trial. As the two men entered the courtroom, a bailiff ordered them to replace their hats, which they had removed. When they complied, they were charged by the judge with contempt of court for being in the courtroom with their hats on. The trial went downhill from there.

Penn demanded to know under which law they were charged and the judge made a vague reference to the common law. When Penn protested the lack of a specific indictment, he was removed to an enclosed corner of the room known as the bale-dock, where he could not confront the witnesses who accused him of public preaching.

Several witnesses testified that Penn had in fact preached to a gathering which included Mead, but one witness was unsure whether Mead had been present. The judge turned to Mead and questioned him directly. In essence, he was asking Mead if he was guilty. Mead invoked the common-law privilege against self-incrimination, which infuriated the judge, who ordered Mead to join Penn in the bale-dock. After witness testimony, the judge instructed the jury to find the defendants guilty as charged.

The jury refused to return a guilty verdict and the judge sent them away to reconsider. When they returned with the same verdict, he demanded “a verdict that the court will accept, and you shall be locked up without meat, drink, fire, and tobacco....We will have a verdict by the help of God or you will starve for it.” (Note: God was not asked His opinion in the matter).

After three more repetitions of going out and returning the same verdict, the jury refused any further deliberations. The judge fined each juror and ordered them imprisoned until their fine was paid. Penn and Mead went to prison for the contempt of court charge. A writ of habeas corpus soon got the jurors out of jail. Penn and Mead were soon released and a few years later came to America to form the colony of Pennsylvania (literally “Penn’s Woods”) after receiving a land grant from King Charles II. A [verbatim transcript](#) of the trial has been preserved.

## **“Never quarrel with a man who buys ink by the barrel.”<sup>i</sup>**

In some ways America is unwittingly reverting to the principles of the founding period. The prime example is today’s advocacy journalism. For better or worse, newspapers of the colonial period were little more than an extension of the owner/editor’s beliefs. The *profession* of journalist had yet to be invented and the idea of journalistic impartiality lay many years in the future. For instance, in the lead up to the presidential election of 1800, the country’s newspapers were almost equally divided between those which supported John Adams and those which supported Thomas Jefferson. And boy did the libelous accusations fly from both sets of newspapers!

German immigrant John Peter Zenger (1697–1746) was a New York newspaper owner/editor. The acting colonial governor of New York, William Cosby, an arrogant former Irish Brigadier-General, had gotten himself in a bit of a pickle and a lawsuit had resulted in his pay being reduced to half that of the previous acting governor. An opposition party to Cosby, the “Morrisites,”<sup>ii</sup> formed and commissioned Zenger to publish the *New York Weekly Journal*. In the *Journal*, Zenger published articles and commentary from the group which were not especially complementary of Cosby’s (at that time) short stint as Governor.<sup>iii</sup> Cosby, unable to find a grand jury willing to indict Zenger for libel, obtained an indictment through “information,” an antiquated process seldom used, and brought charges of seditious libel against Zenger. This resulted in Zenger being jailed for 8 long months awaiting trial (this was obvious prior to 1974’s Speedy Trial Act).

The case was finally heard in the New York Supreme Court, perhaps due to the seriousness of the charge. The first act of new Chief Justice James Delancy was to disbar and remove Zenger’s two attorneys after they questioned Delancy’s authority to preside. Delancy appointed a public defender for Zenger, John Chambers, who was known to support Governor Cosby. It was not looking good for Zenger at this point.

After Chambers’ opening argument, a well-known Philadelphia attorney, Andrew Hamilton (no relation to Alexander), was allowed to intervene on Zenger’s behalf. Hamilton urged the jurors to strike down the seditious libel law as unjust. The jurors dutifully ignored the judge’s instructions and acquitted Zenger, to the reported “great delight of onlookers.”

For further reading:

[The Trial of William Penn and William Mead at the Old Bailey, 1670.](#)

[Indelible Ink: The Trials of John Peter Zenger and the Birth of America's Free Press](#), by Richard Kluger, 2017

Next week: Right #18: Right to a local trial

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<sup>i</sup> A favorite saying of Republican Congressman Charles Brownson (1914- 1988) of Indiana

<sup>ii</sup> Named after former New York Supreme Court Chief Justice Lewis Morris, who Governor Cosby had improperly replaced with James Delancy.

<sup>iii</sup> Cosby would serve from 1732-1736.