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## Experiments with Suppression: The Evolution of Repressive Legality in Britain in the Revolutionary Period

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# Experiments with Suppression: The Evolution of Repressive Legality in Britain in the Revolutionary Period

BY CHRISTOPHER MICHAEL ROBERTS\*

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*Abstract:* This article is concerned with the structure of repressive governance, and how it has evolved historically. It examines this theme through an exploration of the manner which repressive laws and institutions evolved in Britain over the course of the late eighteenth century. In particular, it reviews the various measures that British authorities utilized and relied upon in order to confront a growing wave of calls for social and political reforms. These included a policy of aggressive prosecutions of dissidents; the creation of new institutions such as the Home

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Office designed to enhance the powers of the central authorities; extra-legal measures such as the creation of loyalist associations, which attempted to intimidate and attack revolutionaries; and the passage of a series of new laws aimed at closing off the space for freedom of association, assembly and expression. There was much opposition to the implementation of these measures; among other things, the period was marked by the evolution of a powerful tradition of defense lawyering, thanks to the efforts of the gifted Thomas Erskine in particular. Ultimately, however, when these four different sets of repressive measures were woven together, they proved too much for progressives to handle, choking off and driving the reform movement underground for a period of time. Along the way, the government implemented a legal and institutional template for repression, the effects of which continue to be felt to the present day.

## I. INTRODUCTION

In recent years, governments in numerous countries around the world have cracked down on pro-democracy activists. In Egypt, for example, conservative counter-reaction to the 2011 revolution has led to the passage of repressive new laws on assembly and association, together with countless prosecutions of pro-democracy organizers and human rights advocates.<sup>1</sup> In India, progressive journalists, poets, lawyers and activists have been arrested and detained, often under India's "Unlawful Activities Prevention Act," as part of the current government's crack-down on opposition voices.<sup>2</sup> In Bahrain, democratic and pro-rights ad-

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1. Declan Walsh & Nour Youssef, *As Sisi Silences Critics, Hopes Fade that Egypt's Crackdown Will Ease*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/world/middleeast/egypt-sisi-crackdown.html>; *Egypt: Events of 2018*, in *World Report 2019*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/egypt> (last visited Apr. 22, 2020); *Egypt is an 'Open-Air Prison for Critics' of Sisi's Government: Amnesty*, MIDDLE EAST EYE (Jan. 24, 2019), <https://www.middleeasteye.net/news/egypt-open-air-prison-critics-sisis-government-amnesty>; Joint Press Release, EuroMed Rights, International Federation for Human Rights, Ligue des droits de l'Homme et du citoyen & Egyptian Human Rights Forum, *Egypt: Game Over for the Revolution* (Apr. 16, 2019), <https://euromedrights.org/publication/egypt-game-over-for-the-revolution/> [hereinafter Joint Press Release].

2. Kajal Basu, *A Crackdown on Dissent in India: What's Behind the Recent Arrest of Rights Activists*, DIPLOMAT (Aug. 31, 2018), <https://thediplomat.com/2018/08/a-crackdown-on-dissent-in-india-whats-behind-the-recent-arrests-of-rights-activists/>; Tekendra Parmar, *Modi's McCarthyist Attack on Left-Leaning Intellectuals Threatens India's Democracy*, WAGING NONVIOLENCE (Sept. 7, 2018), <https://wagingnonviolence.org/2018/09/modis-mccarthyist-attack-on-left-leaning-intellectuals-threatens-indias-democracy/>; *India: Terrorism Charges are Pretext to Silence Human Rights Defenders, Say UN Experts*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R (Oct. 5, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23686&LangID=E> [hereinafter OHCHR].

vocates have been imprisoned and assemblies violently dispersed since an upsurge of protests in 2011.<sup>3</sup> Patterns such as these—where those calling for the creation of more democratic institutions and greater space for freedom of expression, association and assembly, are met by authorities determined to suppress such calls—are such a familiar part of contemporary global affairs and of the political chronicle of the last several centuries that they often seem a timeless part of human history. It would be a mistake to imagine such political configurations as lacking a discernible origin, however. Rather, there is one specific period when such forms of tension rose to the surface and began to reconfigure numerous societies with an enhanced degree of intensity: the revolutionary period of the late eighteenth century. When scholars have examined that period, events in America and France have typically been foremost in their minds, and naturally so, given that those were the sites where dramatic revolution occurred, and where new visions of rights and governance were imagined and applied. The events that took place in other countries and locations during the same period are often lost in this context, however. Yet these events, and in particular the wave of reaction to the revolutionary activity in France in other European countries,<sup>4</sup> — where conservative forces clamped down firmly on the revolutionary threats they saw all around them—have left just as enduring a legacy as the American and French revolutions themselves.

A wave of reaction is precisely what took place in Britain. As elsewhere, the revolutionary spirit of the times inspired many, who called for more extensive rights and greater popular participation in governance. However, the reaction of the British authorities, under the leadership of Prime Minister William Pitt the Younger, was unsympathetic in the years that followed, which were marked instead by a gradual escalation of experimentation, innovation, and repressive measures.

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3. Karim Faheem, *Citing Violence, Bahrain Bans All Protests in New Crackdown*, N.Y. TIMES (Oct. 30, 2012), <https://www.nytimes.com/2012/10/31/world/middleeast/bahrain-bans-all-protests-in-new-crackdown.html>; Tor Hodenfield, *Why Bahraini Rights Activists Need International Support*, MIDDLE EAST EYE (Mar. 4, 2018), <https://www.middleeasteye.net/opinion/why-bahraini-rights-activists-need-international-support> *Bahrain: Events of 2018*, in *World Report 2019*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/bahrain> (last visited Apr. 22, 2020); *UN Watchdog Slams Detention of Bahraini Activist's Family*, AL JAZEERA (Jan. 10, 2019), <https://www.aljazeera.com/news/2019/01/watchdog-slams-detention-bahraini-activist-family-190110082412448.html>.

4. George Lefebvre, *THE FRENCH REVOLUTION: FROM ITS ORIGINS TO 1793*, at 187 (1962) (describing the effect of the French Revolution outside of France as “whenever the people happened to stir, their leaders throughout Europe agreed that they must be brought to their senses, as tradition dictated. The very success of the French Revolution provoked outside its borders a development exactly contrary to the series of events which had secured its victory in France.”).

In contrast to the steps taken by the pre-revolutionary French government, these measures were effective, allowing the British authorities to suppress those individuals and organizations pushing for a more democratic system. Along the way, British authorities developed several important legal templates for the suppression of unrest, the legacies of which continue to resonate today.

This article explores the way legal repression evolved in Britain in the revolutionary period. The initial approach of the authorities combined several different elements. First, they turned to the courts, pursuing charges of seditious libel against numerous publishers and writers, and of sedition and treason against key radical leaders. This legal strategy was complemented by other, less formal measures of suppression as well, including pressure put on landlords to refuse to allow progressive meetings to take place on their property; the employment of a large collection of informants and *agents provocateurs* to spy on and attempt to infiltrate and incriminate radical organizations; and the encouragement of loyalist organizations around the country, charged with demonstrating support for the forces of law and order, including harassing progressive assemblies, associations, and speakers where possible.

These efforts had many successes. In some cases, the government secured convictions of the accused. In others, while the prosecutions themselves were not successful, the process of being detained, and the psychological, financial, and physical tolls it inflicted, ensured that being put through the process alone constituted a serious punishment. The severity of the penalties that might be imposed should one in fact be found guilty—transportation in some cases,<sup>5</sup> a penalty many defendants did not survive, and capital punishment in others, potentially by being hung, drawn, and quartered—helped to extend the law's coercive effects. Meanwhile, the development of an extensive network of informants, and the harassing tactics of the loyalist associations, likely exerted pressure on radicals outside of the courtroom.

Despite the effectiveness of these tactics, radical activists still maintained a degree of effective resistance. Thanks to the efforts of progressive parliamentarians and defense lawyers, radicals were able to effectively fend off treason charges brought against several of their most prominent leaders in 1794. In addition to this positive outcome, the trials served both as a site in which broader political tensions could be explored, and as a means for generating wider public attention and sup-

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5. Transportation was a punishment frequently employed in early modern Britain, in which individuals were deported to one or another British colony, where they were used as a labor force; many died on route, or while working in the colonies.

port. The victories of the radicals in the treason trials, combined with popular discontent resulting from food shortages and hard economic times, led to a brief period of renewed momentum for Britain's radical movement.

The authorities were far from defeated, however. Having suffered a setback in the courts, they decided to change their tactics. Starting in 1795, and continuing through the end of the eighteenth century, the government forced into law a collection of new legislative measures that sharply diminished the space for freedom of expression, association and assembly. The measures included the Treasonable and Seditious Practices Act and the Seditious Meetings Act, known collectively as the "Gagging Acts"; the Unlawful Oaths Act; the Newspaper Publication Act; the Corresponding Societies Act; and the Combination Acts. These acts not only helped to remove the small space left for political dissent, but also extended the fight onto new terrain. In addition to repressing oppositional political forces, the authorities now had the tools to suppress attempts at labor organization as well.

The period also saw the adoption of numerous new organizational and institutional measures designed to increase the effectiveness of the national forces of law and order, enabling the more effective administration of the aforementioned acts. A new force, the yeomanry, was created in 1794; by the end of the decade, the yeomanry was complimented by a variety of other volunteer-based, quasi-military security forces. By the century's end—thanks to the on and off war with France, as well as the challenges posed by domestic unrest—the central authorities were perhaps stronger than they had ever been, possessing an extensive range of institutional and legal tools through which to crack down on internal opposition.

What was it that the authorities in Britain found so threatening? The violence taking place in France was unsettling, and they doubtless would have suggested their efforts were designed to avoid a similar course of events in Britain. Yet while the authorities made sure to constantly underscore the potential of serious, violent revolt and unrest, the aims and methods of the oppositional forces they actually faced and suppressed were markedly different from their official characterization. The radicals they opposed were principally interested in obtaining a more representative and democratic government and greater respect for the core civil and political rights of the people of Britain, and favored public speech and persuasion to armed revolt. The lie in the official line could often be seen in how they structured their prosecutions of the radicals, as they rarely targeted actual instances of civil unrest, despite their

constant invocations of the specter of such. They instead focused their energies on halting the production and dissemination of progressive ideas. The greater the popular reach of the document or association in question—and the second part of Thomas Paine's *The Rights of Man* would prove the most successful pamphlet ever produced, up to that point—the greater the authorities perceived the threat. Time and again, the authorities ended up targeting the assertion of the rights to speak, print, assemble, or associate—ultimately, in short, the right to have a say in the manner in which one's political community was governed—rather than any overt act of violence or insurrection.

Uncovering this history is important for a variety of reasons. First, many of the tools of repression used set templates which can be directly traced to contemporary forms of repressive legality. Second, the fact that these developments went hand in hand with certain developments in the structure of policing and the judiciary testifies to the underlying motivation for those latter developments—suggesting that, rather than a means of attempting to deal with some more purely interpersonal and societal problem of “crime,” they were created in an attempt to deal with challenges to the status quo, and in particular as a means of attempting to resist the construction of a more egalitarian social order. Third, close examination of the period is important relative to the history of human rights. While it has recently been in vogue to see rights advocates as opposed to progressive social forces, the history of Britain in the late eighteenth century presents a different story, as those resisting government oppression explicitly invoked “the rights of man” and foreshadowed many of today's arguments around freedom of expression—highlighting the extent to which, in contrast to the arguments of revisionists,<sup>6</sup> the histories of rights work and radical politics are closely intertwined.

## II. TURBULENCE BEFORE THE STORM

In order to properly situate the conflicts of the 1790s in Britain, it is helpful to begin with a brief exploration of some of the major tensions of the previous decade, which helped set the stage for what was to come

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6. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010). Moyn's critique, to be sure, focuses on certain components of international human rights work as it developed from the 1970s on. However, in order to launch that critique, he has to draw a firm line between post-1970 human rights work and the rights work that came before. The line becomes extremely hard to maintain when viewed from the perspective of the modes of repression rights-work has had to struggle against—which, as this article helps to explore, are not so different today from the form they took in the revolutionary period.

in numerous ways. Perhaps the single most important event was the series of clashes known as the “Gordon Riots.” In 1778, Parliament passed the Catholic Relief Act, diminishing various discriminatory restrictions placed on Catholics. However, attempts to pass a similar measure in Scotland in 1779 led to mass protests and prompted Lord George Gordon and others to organize a march on London aimed at repealing the bill. In 1780, 60,000 persons assembled; while the initial assembly was peaceful, clashes soon ensued. Troops were called in as attacks were carried out on various targets deemed Catholic or otherwise associated with the authorities. After several days of violence, martial law was declared. The military proceeded to kill some 285 persons, with capital punishment inflicted on dozens more.<sup>7</sup>

Lord George Gordon and Brackley Kennett, the Mayor of London, were among those brought up on charges after the clashes. Both were defended by Thomas Erskine, a promising young defense counsel who, as the following pages will detail, would play a central role in the legal history of the period.<sup>8</sup> Gordon was accused of having supported the riots and charged with high treason, a charge that carried the death penalty. Lord Chief Justice Mansfield, the presiding judge at the trial—who had a personal interest in the case, as his personal property had been damaged in the riots—pressed for a conviction, laying out both an extended legal definition of treason, and a restricted space for freedom of assembly.<sup>9</sup> Gordon was acquitted by the jury, however, following a spirited

7. George Rude, *The Gordon Riots: A Study of Their Rioters and Their Victims*, 6 TRANSACTIONS OF THE ROYAL HIST. SOC’Y 93, 99 (1956).

8. In addition to his defense of Gordon and Kennett, Erskine had previously defended Admiral Lord Keppel in 1779, after the admiral was tried by court martial following a naval clash with the French off Ushant. The charges against Keppel were in significant part politically motivated. LLOYD PAUL STRYKER, FOR THE DEFENSE: THOMAS ERSKINE, ONE OF THE MOST ENLIGHTENED MEN OF HIS TIMES, 1750-1823, at 65–76 (1947). More generally, the charges testified to the tendency of top-level government authorities to use criminal law to hold officials responsible when it was deemed that they had not adequately fulfilled their roles. Keppel was acquitted thanks to Erskine’s efforts, and rewarded him with a substantial sum of money. J.A. LOVAT-FRASER, ERSKINE 11 (1932).

9. JOSEPH GURNEY, THE TRIAL OF GEORGE GORDON FOR HIGH TREASON 63–64 (1781). In particular, Mansfield would declare both that

Insurrections, by force and violence, to raise the price of wages, to open all prisons . . . to resist the execution of militia laws, to throw down all inclosures, to alter the established law, to change religion, to redress grievances real or pretended, have all been held levying war [and therefore treason] . . . and that a doubt has been faintly thrown out The Bar, whether it is lawful to attend a Petition to the House of Commons with more than ten person? Upon dear-bought experience of the consequences of tumultuous assemblies, under pretense of carrying and supporting Petitions, an Act of Parliament passed in the reign of King Charles the Second, forbidding, under a penalty, more than ten persons to attend a Petition to the King, or either House of



defense by Erskine.<sup>10</sup> Unlike Gordon, who was charged with encouraging the riots, Kennett was charged with having failed to deal with the assembled crowd<sup>11</sup> in a prompt and effective manner, thereby disregarding his duty as a justice of the peace.<sup>12</sup> While Erskine had contended that the law was unclear on the powers and responsibilities of justices of the peace, Mansfield held that the law was perfectly straightforward. In particular, he held that the common law power to respond forcefully to riots had not been superseded by passage of the Riot Act.<sup>13</sup> Mansfield thus found Kennett could be found responsible for his failure to disperse the protestors, insofar as he had not acted as a man of “ordinary firmness” ought to have under the circumstances.<sup>14</sup> Kennett was convicted of both criminal and civil negligence, fined £1,000, and ordered to pay damages to several merchants whose stores were damaged.<sup>15</sup>

The Gordon Riots and the trials that took place in their aftermath played a significant role in shaping approaches to public order governance in Britain in the following years. The assertive version of the law articulated in the trial of Kennett, due to the laxity he had shown in undertaking his role as protector of the public peace, was a message to justices of the peace around the country: respond quickly and effectively to popular unrest, or you will be the one to face punishment. More gener-

Parliament; but it is said, that law is repealed by the Bill of Rights. I speak the joint opinion of us all, that the Act of Charles the Second is in full force . . .

10. GURNEY, *supra* note 9, at 65. For a description of the trial, see STRYKER, *supra* note 8, at 86–96.

11. As described by the prosecutors in the case against Kennett, the crowd was made up of “divers wicked, seditious and evil-disposed persons . . . [who] unlawfully, riotously and tumultuously assembled themselves together, to the disturbance of the public peace, tranquility, order and government of the realm.” *R v. Kennett* (1781) 172 Eng. Rep. 976; 5 Car. & P. 282. See also Sandford Nevile & William E. Manning, *Rex v. Kennett (1781)*, in 1 REPORTS OF CASES RELATING TO THE DUTY AND OFFICE OF MAGISTRATES DETERMINED IN THE COURT OF THE KING’S BENCH, AND OTHER COURTS 337 (1834).

12. Specifically, Kennett was accused of having “willfully, obstinately and contemptuously neglected, refused, and omitted” to have read the riot act, to have apprehended or restrained the rioters, and to have failed to have effectively suppressed them. Nevile & Manning, *supra* note 11, at 338–39. Testifying to the significance of public order law to British law in general, over the course of the case the Attorney-General observed that the riot act was “more universally known than perhaps any act in the statute book.” *Id.* at 339.

13. Rather, the Riot Act, Mansfield asserted, had simply authorized an additional means through which justices of the peace might respond to riots, by increasing the penalties that might be applied to those who had not dispersed within an hour of the reading of the Act. See *id.* at 348.

14. *Id.* at 349.

15. *Id.* at 344–46; JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 261–62 (Thomas A. Green et al. eds., 2004). The jury in the case attempted to find Kennett negligent, but not criminally liable; however, Mansfield refused to accept this verdict, stipulating that they might only find him guilty or not guilty, whereupon they found him guilty. Nevile & Manning, *supra* note 11, at 350. Kennett died shortly after the trial.

ally, the riots caused a steep decline in elite support for parliamentary reform. In the years prior to the Gordon Riots, there was gradually increasing pressure for expansion of suffrage and a reform of Parliament—something even the young William Pitt, at the time, supported. A bill towards such an end was put before Parliament in 1779; while there was no hope of its passage, the issue at least gained support. Nevertheless, the protests radically changed the mood among the country's governing elite, who quickly determined that a firm hand, not progressive reforms, was the best way to respond to an unruly public.<sup>16</sup>

British elites remained unsettled in the wake of the Gordon Riots, thanks to two different factors, both linked to recent events in America.<sup>17</sup> Prior to the American war of independence, transportation to America had been one of the most common penalties imposed on felons. From the moment the American War of Independence started, such transportation became impossible, and British jails began to fill up. Second, after the American victory at Yorktown, in 1781, many British soldiers and sailors were decommissioned and began to return home. Whether or not the return of soldiers in fact led to greater unrest and criminality, that was the impression of Britain's upper classes at the time, an impression which, combined with recognition of the growing prison population, left them on edge.

The government responded with multiple new measures. In 1782, what would later be termed the Home Office was created, though it was known initially as the Home Department.<sup>18</sup> The chief responsibility of this new department was keeping a lid on domestic crime and disorder. In 1785, the Home Department pushed for the passage of a new bill, titled "A Bill for the further Prevention of Crimes, and for the more speedy Detection and Punishment of Offenders against the Peace, in the Cities of London and Westminster, the Borough of Southwark, and certain Parts adjacent to them." The bill aimed at strengthening central control over London's police forces and would have also given the police extended powers of search and arrest. However, much of the magis-

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16. For more, see ADRIAN RANDALL, *RIOTOUS ASSEMBLIES: POPULAR PROTEST IN HANOVERIAN ENGLAND* 207 (2006).

17. *Id.* at 197.

18. In the years that followed, the Home Office, together with a small adjunct Alien Office, would organize and run a small but fairly effective covert service. Among other things, the Home Office spied on such subversives as William Wordsworth and Samuel Taylor Coleridge. See Clive Emsley, *The Home Office and its Sources of Information and Investigation 1791-1801*, 94 *Eng. Hist. Rev.* 532, 532-34 (1979); J. ANN HONE, *FOR THE CAUSE OF TRUTH: RADICALISM IN LONDON 1795-1803*, at 73-80 (1982); Clive Emsley, *Repression, 'Terror' and the Rule of Law in England During the Decade of the French Revolution*, 100 *ENG. HIST. REV.* 801, 821 (1985).

tracy, together with the historically independent City of London, resisted the bill, and the bill was defeated.<sup>19</sup>

The authorities displayed their new, firmer approach to dissent through more frequent prosecutions of those advancing radical, and especially republican, ideas. One such perceived radical was Sir William Jones, whose brother-in-law, William Davies Shipley, published his book, *The Principles of Government, in a Dialogue between a Gentleman and a Farmer*, in 1783. Jones' tract emphasized peoples' natural proclivity to democratic self-government and argued that the people had a right to resist oppression by non-democratic governments, including with force, where necessary. Shipley was indicted in April 1783, charged with seditious libel, and brought to trial on August 6<sup>th</sup> the following year.<sup>20</sup> Once again, Erskine was defense counsel. Traditionally, whether or not seditious libel had been committed—which is to say, whether or not particular language was seditious—was considered a legal question for the judge to determine, while the jury was strictly limited to deciding whether or not the defendant had, as a factual matter, published a particular tract. Erskine was aware that there would be no hope for his client if the judge decided the case, so he challenged the standard itself, appealing to the jury that it should be for them to deter-

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19. Despite the lack of formal agreement to create a new police force, two new services, the Foot Patrol and the Horse patrol, were created shortly thereafter in 1789; both operated under the control of the Bow Street magistrates.

20. The British government had not always dealt with publications it considered problematic in this manner. For most of the seventeenth century and before, the British government relied on licensing to control the press. From the late seventeenth century on, however, the government moved away from prior censorship and started to rely on post-publication seditious libel prosecutions instead. This was linked to a growing resistance to pre-publication censorship—known as “prior restraint”—that came to be seen as an important part of the right to freedom of the press in Britain, as recognized, for instance, by Blackstone. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 151–52 (1979). What constituted seditious libel was always vaguely defined. In essence, it was simply libel—defined by Blackstone as “malicious defamations . . . in order to provoke . . . wrath, or expose [the subject] to public hatred, contempt, and ridicule”—that was targeted against the government. *Id.* at 150. Whereas truth might be a defense to defamation claims, it was not considered a defense to libel claims, since, as Blackstone put it,

It is immaterial . . . whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be published criminally . . . In a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law.

*Id.* For more on the history of seditious libel, see Roger Manning, *The Origins of the Doctrine of Sedition*, 12 ALBION 99 (1980); Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661 (1985); Michael Lobban, *From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime 1770-1820*, 10 OXFORD J. LEGAL STUD. 307, 310–24 (1990).

mine whether the tract was seditious or not.<sup>21</sup> Erskine's arguments were successful, and the jury ultimately returned a verdict of "guilty of publishing only," the pregnant "only" suggesting the jury did not consider the tract seditious. While the judge attempted to have this result immediately thrown out, Erskine insisted it be preserved on the record.<sup>22</sup> Once again, Erskine had been effective despite clashing with the governing judge, thanks to his powerful appeal to the jury, whom he not only won over, but also convinced to take a stronger role within the judicial process. Erskine's arguments in the case were independently published in the form of a pamphlet that became popular in its own right, helping to generate broader pressure towards more formalized reform of the issue.<sup>23</sup>

Erskine was again called upon to defend a publisher from charges of seditious libel in 1789. This time, the defendant was John Stockdale, who had published a pamphlet by John Logan titled *A Review of the Principal Charges against Warren Hastings*. The pamphlet attempted to defend Warren Hastings, the head of the Supreme Council of Bengal, against impeachment charges based on allegations of corruption. In defending Hastings, Logan had suggested that Parliament was corrupt in impeaching Hastings, an assertion the prosecutors of the case suggested was libelous. Erskine advanced a collection of arguments in his defense

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21. In making this argument, Erskine was able to draw on a decades-old tradition. A similar case was argued by Serjeant Glynn when defending the publisher of John Wilkes' *North Briton* in the case of *R. v. Williams* in 1764. Unsurprisingly, it was Lord Mansfield who contradicted Glynn, insisting the question of libel was for the judge. Following that, the Wilkites argued forcefully in defense of the idea that the question of what was and was not sedition should be for the jury. In the 1770 trial of the printers of Junius's *Letter to the King*, the Wilkites were even able to get the jury to return a verdict of "guilty of printing and publishing only," foreshadowing the result in Shipley's case. For more, see John Brewer, *The Wilkites and the law, 1763-74: A Study of Radical Notions of Governance, in AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 156-67* (John Brewer & John Styles eds., 1980). The case that the question of libel should be for the jury was also made in parliament in 1770 by Alexander Wedderburn, later Lord Loughborough; Wedderburn rested his case on the fact that what should and should not constitute libel was by nature a matter of public opinion, and hence naturally a question for the jury. See TRIALS FOR TREASON AND SEDITION at xiv (John Barrell & Jon Mee eds., 2006).

22. This esoteric verdict led to a series of subsequent procedural hearings. Erskine initially asked for a new trial on the grounds of misdirection by the judge, but was denied—due in large part to the fact the claim was brought before Mansfield, who had become ill-disposed towards Erskine following their clashes during Erskine's defense of Gordon. Nonetheless, Erskine followed up with a movement for arrest of judgment, which was successful and subsequently led to Shipley's release. See J.A. LOVAT-FRASER, *Erskine 27-28* (1932); STRYKER, *supra* note 8, at 122-36.

23. Erskine's argument was issued in 1785 under the name *The Rights of Juries Vindicated*. See HELEN BRAITHWAITE, *ROMANTICISM, PUBLISHING, AND DISSENT: JOSEPH JOHNSON AND THE CAUSE OF LIBERTY 109* (2003).

of Stockdale. First, he argued that no work should be considered seditious libel based on a few passages read alone, but rather that it was necessary to look to the text as a whole, and its broader objects and purposes. In addition, Erskine pointed to the fact that the book was written in the context of a public trial, in which a great many passionate accusations had been leveled against the defendant Hastings, a context which he asserted should excuse a certain quantity and level of what might otherwise be considered overly forceful and intemperate arguments.<sup>24</sup> Finally, Erskine also suggested that in general, it was necessary to provide a degree of latitude relative to expression. In his words,

If you are firmly persuaded of the singleness and purity of the author's intentions, you are not bound to subject him to infamy because, in the zealous career of a just and animated composition, he happens to have tripped with his pen into an intemperate expression in one or two instances of a long work—if this severe duty were binding on your conscience, the liberty of the press would be an empty sound, and no man could venture to write on any subject, however pure his purpose,<sup>25</sup> without an attorney at one elbow, and a counsel at the other.<sup>26</sup>

Erskine hypothesized that should such a degree of latitude not be provided, the result would be an undermining of the vital role of an open public sphere, leading to a collapse in scientific thought and productive political deliberation.<sup>26</sup> Once again, Erskine's arguments won the day,<sup>27</sup>

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24. 22 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, 1783-1794, at 261-65 (Thomas Jones Howell ed., London, T.C. Hansard 1817) [hereinafter 22 A COMPLETE COLLECTION OF STATE TRIALS].

25. *Id.* at 281.

26. As Erskine would say:

From minds thus subdued by the terrors of punishment, there could issue no works of genius to expand the empire of human reason, nor any masterly compositions on the general nature of government, by the help of which, the great common-wealths of mankind have founded their establishments; much less any of those useful applications of them to critical conjunctures, by which, from time to time, our own constitution, by the exertion of patriot citizens, has been brought back to its standard.—Under such terrors, all the great lights of science and civilization must be extinguished: for men cannot communicate their free thoughts to one another with a lash held over their heads. It is the nature of everything that is great and useful, both in the animate and inanimate world, to be wild and irregular,—and we must be contented to take them with the alloys which belong to them, or live without them.—Genius breaks from the fetters of criticism, but its wanderings are sanctioned by its majesty and wisdom when it advances in its path;—subject it to the critic, and you tame it into dullness . . . Liberty herself, the last and best gift of God to his creatures, must be taken just as she is;—you might pare her down into bashful regularity, and shape her into a perfect model of severe scrupulous law, but she would be Liberty no longer;

and the judgment came to stand both for the principle that the salience of a work should be considered in a holistic manner, rather than on the basis of particular passages removed from their context, and for the importance of allowing enhanced latitude to political discussions.<sup>28</sup>

Just as the trials following the Gordon Riots and the creation of the Home Department helped to presage further developments in the machinery of state control and repression to come, the challenges the authorities faced in effectively prosecuting and thereby silencing progressive publishers served as an indicator of how the conflict between state prosecutors and radicals would play out over the course of the 1790s. Erskine's compelling work in defense of Shipley and Stockdale served as a warning to the authorities that utilizing judicial processes as a means of suppression would pose more challenges than they would have hoped. Most directly, clashes in the 1780s demonstrated that it was surprisingly difficult for the government to obtain convictions. The trials posed other problems as well, however. First, each trial was a public event, serving to demonstrate the repressive character of the government and thus, to vindicate and popularize the very point of view the government was seeking to suppress.

In addition, despite the authorities' attempts to keep political issues in the margins, the trials could not help but bring to the fore the contentions which had led to the prosecution of certain publishers in the first place—issues such as whether parliament was corrupt, whether a republican government would be more just than an elite and/or monarchical one, and the like. Finally, the tension between judge and jury that was drawn out and exacerbated in the cases both symbolized and constituted part of the broader tension between elite and popular governance that formed the substantive focus of the cases—serving to weaken the effectiveness of the trial as a means of suppression, while rendering the courtroom another stage on which underlying political conflicts might play out.

### III. BURKE, PAINE, AND GEARING UP FOR GREATER REPRESSION

The French Revolution began in May 1789. While Britain's radicals were sympathetic from the beginning, in the early years of the revolution tensions in Britain remained relatively subdued. Tensions, how-

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and you must be content to die under the lash of this inexorable justice which you had exchanged for the banners of Freedom.

*Id.* at 281–82.

27. For an extended description of the trial, see STRYKER, *supra* note 8, at 152–60.

28. 22 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 24, at 284–85.

ever, would ramp up rapidly from the publication of Edmund Burke's *Reflections on the Revolution in France* in November 1790 on. Burke's response to the French revolution ranged from skepticism, to scorn, to outrage. Among other things, Burke inveighed against equality;<sup>29</sup> argued that the propertied classes must be the major part of the government;<sup>30</sup> argued in favor of the existence of a nobility in general;<sup>31</sup> suggested that rights do not extend to either equality of wealth or an equal share in government;<sup>32</sup> minimized and heaped scorn on England's radicals;<sup>33</sup> castigated France's "men of letters";<sup>34</sup> and described the French

29. For instance, Burke observed:

Believe me, sir, those who attempt to level, never equalize. In all societies, consisting of various descriptions of citizens, some description must be uppermost. The levelers, therefore, only change and pervert the natural order of things; they load the edifice of society by setting up in the air what the solidity of the structure requires to be on the ground.

EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 42 (Frank Turner ed., 2003).

30. As Burke put it,

Nothing is a due and adequate representation of a state that does not represent its ability as well as its property. But as ability is a vigorous and active principle, and as property is sluggish, inert, and timid, it never can be safe from the invasion of ability unless it be, out of all proportion, predominant in the representation. It must be represented, too, in great masses of accumulation, or it is not rightly protected. The characteristic essence of property, formed out of the combined principles of its acquisition and conservation, is to be unequal. The great masses, therefore, which excite envy and tempt rapacity must be put out of the possibility of danger. Then they form a natural rampart about the lesser properties in all their gradations. The same quantity of property, which is by the natural course of things divided among many, has not the same operation. Its defensive power is weakened as it is diffused.

*Id.* at 43.

31. In Burke's words,

Nobility is a graceful ornament to the civil order. It is the Corinthian capital of polished society. *Omnes boni nobilitati semper favemus*, was the saying of a wise and good man. It is indeed one sign of a liberal and benevolent mind to incline to it with some sort of partial propensity. He feels no ennobling principle in his own heart who wishes to level all the artificial institutions which have been adopted for giving a body to opinion, and permanence to fugitive esteem. It is a sour, malignant, envious disposition, without taste for the reality or for any image or representation of virtue, that sees with joy the unmerited fall of what had long flourished in splendor and in honor.

*Id.* at 117–18.

32. According to Burke, man

has not a right to an equal dividend in the product of the joint stock; and as to the share of power, authority, and direction which each individual ought to have in the management of the state, that I must deny to be amongst the direct original rights of man in civil society.

*Id.* at 50.

33. Burke suggested that the writings of such figures

very erroneously, if they do at all, represent the opinions and dispositions generally prevalent in England. The vanity, restlessness, petulance, and spirit of intrigue, of several petty cabals, who attempt to hide their total want of consequence in bustle

“mob” as similar to “American savages,” calling them “a monstrous medley of all conditions, tongues and nations” and as a “mixed mob of ferocious men, and of women lost to shame.”<sup>35</sup> Burke’s arguments and images drew upon a long anti-democratic tradition, as he attacked the revolution on the basis of many stock tropes that had long been used to denigrate democracy.<sup>36</sup>

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and noise, and puffing, and mutual quotation of each other, makes you imagine that our contemptuous neglect of their abilities is a mark of general acquiescence in their opinions. No such thing, I assure you. Because half a dozen grasshoppers under a fern make the field ring with their importunate chink, whilst thousands of great cattle, reposed beneath the shadow of the British oak, chew the cud and are silent, pray do not imagine that those who make the noise are the only inhabitants of the field; that, of course, they are many in number, or that, after all, they are other than the little, shriveled, meager, hopping, though loud and troublesome, insects of the hour.

*Id.* at 72–73.

34. As Burke described them,

The literary cabal . . . were possessed with a spirit of proselytism in the most fanatical degree; and from thence, by an easy progress, with the spirit of persecution according to their means. What was not to be done toward their great end by any direct or immediate act might be wrought by a longer process through the medium of opinion . . . They contrived to possess themselves, with great method and perseverance, of all the avenues to literary fame . . . [they] endeavor[ed] to confine the reputation of sense, learning, and taste to themselves or their followers . . . To this system of literary monopoly was joined an unremitting industry to blacken and discredit in every way, and by every means, all those who did not hold to their faction. To those who have observed the spirit of their conduct it has long been clear that nothing was wanted but the power of carrying the intolerance of the tongue and of the pen into a persecution which would strike at property, liberty, and life.

*Id.* at 94.

35. *Id.* at 57–58.

36. This anti-democratic tradition had its sources in ancient Greek thought but was revived and given particular force in the early modern period. Examples from the sixteenth century include Thomas Elyot referring to Athenian democracy as a “monster with many heads”; Sir Thomas Smith describing it as “the usurping of the popular or rascal and viler sort, because they be more in number”; and Jean Bodin echoing Elyot’s description while added to it the images of a shepherdess flock, a mindless body and a person in the grip of a frenzy, in addition to more prosaically describing democracy as the “dominion of the mob, released from all laws” and as “the refuge of all disorderly spirits, rebels, traitors, outcasts who encourage and help the lower orders to ruin the great.” THOMAS ELYOT, 1 *THE BOKE NAMED THE GOVERNOUR* 9 (Henry Croft ed., Kegan Paul, Trench, & Co. 1883) (1583); THOMAS SMITH, *THE COMMONWEALTH OF ENGLAND* 1.3 (L. Alston et al. eds., 1906) (1583); JEAN BODIN, *METHOD FOR THE EASY COMPREHENSION OF HISTORY* 248, 267 (Beatrice Reynolds trans., 1945) (1566); JEAN BODIN, *SIX BOOKS OF A COMMONWEALTH* 530–32, 700–05 (Richard Knolles trans., London: Impensis G. Bishop 1606) (1576). In the seventeenth century, Sir Walter Raleigh referred to the populace of Athenian democracy as the “rascal multitude,” and Thomas Hobbes described the democratic Athenian state as a system only moved by “wicked men and flatterers.” SIR WALTER RALEIGH, *History of the World*, in 5 *THE WORKS OF SIR WALTER RALEIGH* 185 (Oxford Univ. Press 1829) (1617); THOMAS HOBBS, *On the Life and History of Thucydides*, in Hobbes’ *THUCYDIDES* 13 (Richard Schlatter ed., 1975) (1628). In the early eighteenth century, Jonathan Swift emphasized the “rash, jealous, and inconstant humour of the people” of Athens. JONATHAN SWIFT, *A DISCOURSE ON*



Four months later, in March 1791, Burke's *Reflections* found its most popularly successful reply through the publication of the first part of Paine's *The Rights of Man*. Paine's text was initially to be published by Joseph Johnson; Johnson, however, backed out, as his fear of prose-

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THE CONTESTS AND DISSENTIONS BETWEEN THE NOBLES AND THE COMMONS IN ATHENS AND ROME WITH THE CONSEQUENCES THEY HAD UPON BOTH THOSE STATES 97 (Frank Ellis ed., 1967) (1701). A few years before Burke's reflections, John Gillies, a Scottish historian, presented the history of Athens in his 1786 *The History of Ancient Greece* as the story of "a wild and capricious democracy," a "fierce and licentious form of government" marked by "incurable defects" and a "tyrannical spirit," largely driven by the "gross appetites" of the poor. JOHN GILLIES, THE HISTORY OF ANCIENT GREECE, ITS COLONIES, AND CONQUESTS, PART THE FIRST: FROM THE EARLIEST ACCOUNTS TILL THE DIVISION OF THE MACEDONIAN EMPIRE IN THE EAST 2.283, 3.1.13, 3.1.473, 4.1.174 (6th ed., 1820).

Several of the key figures involved in the American Revolution were skeptics of democracy and its potentials as well. James Madison, for instance, opined that "democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths"; observed that direct democracy might lead to "a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project"; and emphasized that "In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." THE FEDERALIST Nos. 10, 55 (James Madison). Madison also suggested,

In England, at this day, if elections were open to all classes of people, the property of the landed proprietors would be insecure. An agrarian law would soon take place. If these observations be just, our government ought to secure the permanent interests of the country against innovation. Landholders ought to have a share in the government, to support these invaluable interests and to balance and check the other. They ought to be so constituted as to protect the minority of the opulent against the majority.

Remarks on June 26<sup>th</sup>, 1787 during the Constitutional Convention, *quoted in* ROBERT YATES, NOTES OF THE SECRET DEBATES OF THE FEDERALIST CONVENTION OF 1787 (Wilbur Curtiss 1839) (1787). Meanwhile, John Adams observed that democracy might lead to a situation in which debts

would be abolished first; taxes laid heavy on the rich, and not at all on the others; and at last a downright equal division of everything be demanded, and voted. What would be the consequence of this? The idle, the vicious, the intemperate, would rush into the utmost extravagance of debauchery . . .

JOHN ADAMS, 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 9 (Charles F. Adams ed., Little, Brown & Co., 1851). To round the critique off, Adams described Athens as characterized "from the first to the last moment of her democratic constitution, [by] levity, gayety, dissipation, intemperance, debauchery, and a dissolution of manners." *Id.* at 100. Similar denunciations continued to be issued after Burke's *Reflections*. For instance, William Young observed that democracies allowed demagogues to enact a tyranny of the poor majority over the rich minority, while Robert Bisset castigated the "imbecility" of the Athenian "mob." See SIR WILLIAM YOUNG, THE BRITISH CONSTITUTION OF GOVERNMENT COMPARED WITH THAT OF A DEMOCRATIC REPUBLIC 10-12 (1793); ROBERT BISSET, SKETCH OF DEMOCRACY 127 (1796). For more, see JOHN McCLELLAND, THE CROWD AND THE MOB: FROM PLATO TO CANETTI (1989); JENNIFER ROBERTS, ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT (1994).

cution got the better of him.<sup>37</sup> Subsequently, another publisher, Jeremiah Jordan, stepped up and began putting out Paine's work in significant volume.

The first part of Paine's work attracted substantial attention and controversy (though not nearly the furor that would greet the work's second part). Yet the most dramatic clash between progressive and conservative forces in 1791 was not directly related to Paine. That clash took place in Birmingham over the summer. In honor of the second anniversary of the destruction of the Bastille, Joseph Priestley, a radical Unitarian minister, held a celebration with several like-minded persons at a hotel. When they left from their celebration, they were attacked by an angry crowd, who later directed their energy against the radicals' property as well. Local constabulary and magistrates did little to halt the attack; while it is impossible to establish with certainty what took place, it seems likely the protests were covertly organized by officials opposed to Priestley and his progressive advocacy.<sup>38</sup> The attacks against the progressives, which came to be known as the "Priestley Riots," only ended when soldiers arrived four days later. Although the central government eventually forced local authorities to try those who had led the attacks, little accountability ensued.<sup>39</sup>

The Priestley riots provided a small foretaste of the heightened conflict to come, with tensions increasing dramatically over the following year.<sup>40</sup> In February, the second part of Thomas Paine's *The Rights of Man* was published.<sup>41</sup> The second part of Paine's impassioned response

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37. Johnson later published the work in a more expensive edition, however. This was safer, as the authorities generally were more concerned with works put out at a lower price, on the grounds that they were available to a wider and, in the eyes of the authorities, less sophisticated, more convincing and more threatening audience. See MALCOLM THOMIS & PETER HOLT, *THREATS OF REVOLUTION IN BRITAIN, 1789-1848*, at 14-15 (1977); BRAITHWAITE, *supra* note 23, at 105-10.

38. See Robert Barrie Rose, *The Priestley Riots of 1791*, 18 *PAST & PRESENT* 68, 78-81 (1960).

39. Only three individuals were punished, and no serious effort was made to get to the bottom of the affair. *Id.* at 82. However, if the intent of the local authorities was to chill dissent their efforts may have backfired, as Lancashire magistrates observed a "general ill-humour" after the event, which they traced to "a very general spirit of combination amongst all sorts of labourers and artisans, who are in a state of disaffection to all legal control." ARTHUR ASPINALL, *THE EARLY ENGLISH TRADE UNIONS* 1 (1949).

40. The political tension of 1792 was of such a degree that one scholar would later brand it the year in which "'the people' entered politics." GWYN WILLIAMS, *ARTISANS AND SANS-CULOTTES: POPULAR MOVEMENTS IN FRANCE AND BRITAIN DURING THE FRENCH REVOLUTION* 4 (2nd ed., 1989).

41. While Paine's was among the first works to refer to the "rights of man" in English, and certainly did a great deal to popularize the phrase, it was preceded by other references, especially Mary Wollstonecraft's *A Vindication of the Rights of Men*, published in 1790 (Wollstonecraft

to Burke was even more popular than the first. Paine's work offered an impassioned defense of the ideas of rights and popular participation in government, as well as of the popular right to resist unjust governments. Had Paine's work been confined to a small and elite readership, it would doubtless not have invoked so much ire from the authorities. Paine's pamphlets were written in an accessible manner, purposefully designed to widen popular participation in political debate.<sup>42</sup> Moreover, they were cheap, and hence genuinely accessible.<sup>43</sup> It was not Paine's words alone but their accessibility which was so threatening to the authorities—who had to face up to the fact that Paine's radical point of view had been disseminated far more widely and effectively than any such similar message before.

The enthusiasm generated by Paine's texts helped draw new recruits to various radical associations that had been developing over the course of the last couple decades.<sup>44</sup> These included the London Corresponding Society, founded by the shoemaker Thomas Hardy; the Society for Constitutional Information, founded by John Cartwright, a naval officer, and later headed by John Horne Tooke, a clergyman; the more upper class Society of the Friends of the People, formed by several Whig politicians;<sup>45</sup> and numerous similar organizations in different locations around the country.<sup>46</sup> While the precise aims and strategies of

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would also publish *A Vindication of the Rights of Women* in 1792). Adding to the popularity of references to the 'rights of man,' Thomas Spence's pamphlet, *Property in Land Every One's Right*, was republished in 1792 under the name *The Real Rights of Man*.

42. See TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xiii.

43. Estimates typically suggest some 200,000 copies were sold in the years after the pamphlets' appearance, an astronomical number for the times, and doubtless a number only reflecting a portion of those who read the pamphlet; given that it was typical for such pamphlets to be frequently passed from one reader to another. See e.g., MARK PHILP, *THE FRENCH REVOLUTION AND BRITISH POPULAR POLITICS* 5 (Mark Philp ed., 1991). The ability to mass produce texts was key here; as John Gurney, one of the lawyers who would defend Thelwall, would later comment, "the invention of printing had introduced political discussion." JOHN MEE, *PRINT, PUBLICITY, AND POPULAR RADICALISM IN THE 1790S: THE LAUREL OF LIBERTY* 8 (2016).

44. Political associations, which would develop in time into both trade unions and modern political parties, rose to the fore in British society in the late eighteenth century. SEE EUGENE CHARLTON BLACK, *THE ASSOCIATION: BRITISH EXTRAPARLIAMENTARY POLITICAL ORGANIZATION, 1769-1793*, at 2 (1963). See also ALBERT GOODWIN, *THE FRIENDS OF LIBERTY: THE ENGLISH DEMOCRATIC MOVEMENTS IN THE AGE OF THE FRENCH REVOLUTION* (1979).

45. Including Erskine, who had won an election in 1790, and Charles Grey, discussed further below.

46. Including, for example, the Friends of Universal Peace and the Rights of Man, based in Stockport. For more on these associations, see Iain Hampsher-Monk, *Civic Humanism and Parliamentary Reform: The Case of the Society of the Friends of the People*, 18 J. Brit. Stud. 70 (1979); Benjamin Weinstein, *Popular Constitutionalism and the London Corresponding Society*, 34 ALBION 37 (2002); JOCELYN HUNT, *UNDERSTANDING THE LONDON CORRESPONDING SOCIETY: A BALANCING ACT BETWEEN ADVERSARIES THOMAS PAINE AND EDMUND BURKE*

these organizations differed, they were all generally committed to the cause of parliamentary reform. In addition, the societies tended to place great importance on providing accessible publications and open meetings, understanding that their success hinged on informing and mobilizing as wide a public as possible.

In response to Paine's writings and the growth of such groups, the government issued a proclamation against seditious writings on May 21<sup>st</sup>, 1792, that provided the first clear indication of the wave of suppression to come.<sup>47</sup> Among other things, the proclamation called on magistrates to

Make diligent inquiry in order to discover the Authors, and Printers . . . seditious Writings . . . take the most immediate and effectual care to suppress and prevent all Riots, Tumults and other Disorders . . . [and] to transmit to One of Our principal Secretaries of State due and full Information of . . . persons [responsible for seditious writings].<sup>48</sup>

In addition to the proclamation, the authorities passed the Middlesex Justices Act in order to attempt to strengthen the system for the administration of law and order in the capital.<sup>49</sup> The Act formed seven new "police offices" in London, all modeled after Bow Street.<sup>50</sup> Each con-

(2013). In addition to the corresponding societies there were also debating societies, which had existed for longer and were typically less directly politically engaged, and hence, less in the authorities' crosshairs. Even so, the debating societies had their critics, who were "upset by what they saw as a raggle-taggle collection of poor and uninformed folk discussing issues of the day, as though anything they would have to say could be of any interest or importance." Donna Andrew, *Popular Culture and Public Debate: London 1780*, 39 *Hist. J.* 405, 419 (1996). The presence of women at the debating societies was particularly triggering to conservatives. *See id.*

47. As Henry Dundas, the Home Secretary, would put it, the proclamation had been rendered necessary due to the manner in which great bodies of men in large manufacturing towns [had] adopted and circulated doctrines [of a very] pernicious . . . tendency. E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 108 (1963). *See also* THOMAS PAINE, *Letter Addressed to the Addressers, on the Late Proclamation*, in THOMAS PAINE: *RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS* 333–84 (Mark Philp ed., 1998) (Paine's comments on the proclamation).

48. Royal Proclamation Against Seditious Writings (May 21, 1792), *cited in* RICHARD VOGLER, *READING THE RIOT ACT: THE MAGISTRACY, THE POLICE AND THE ARMY IN CIVIL DISORDER* 20–21 (1991).

49. Middlesex Justice Act of 1792, 32 *Geo. 3 c. 53* (In full, An Act for the More Effectual Administration of the Office of a Justice of the Peace in Such Parts of the Counties of Middlesex and Surrey as Lie in or Near the metropolis, and for the More Effectual Prevention of Felonies.)

50. A court was first established at 4 Bow Street in 1740, by Colonel Sir Thomas de Veil, a Westminster magistrate. In 1747, de Veil was replaced by Henry Fielding. Henry had several constables under his command, who came to be known as the "Bow Street runners," a force commonly thought of as London's first professional police force. The Bow Street runners were not dedicated to street patrolling, but rather to serving writs and conducting arrests; the office also worked to create a database of offenders. When Henry Fielding died in 1754, his brother, John

sisted of a court, directed by three stipendiary magistrates and served by a small number of paid constables; all were under the control of the Home Office. The law also gave constables the power to arrest anyone they suspected was a thief, and, if it turned out their suspicion could not be substantiated, allowed for their prosecution under the vagrancy laws.<sup>51</sup> Those who passed the new law argued it in the collective interest, designed, among other things, to “succor the ‘indigent and the ignorant’ and to ‘serve the poor.’”<sup>52</sup> As Vogler notes, however, “it was the business community which greeted it with the most enthusiasm. In 1793, the Spitalfields manufacturers were petitioning the Home Secretary in praise of the ‘correct and regular manner’ in which the ‘Magistrates of the Police’ dealt with business.”<sup>53</sup> The law’s purpose of achieving public order by enhancing the means to control the poor may be clearly discerned from the manner in which one of the first magistrates appointed under the Act called on his fellow newly-appointed magistrates to “look with a jealous eye on the several thousand miscreants . . . which now infest London: for they too upon any fatal emergency (which God forbid!) would be equally ready as their brethren in iniquity were in Paris to repeat the same atrocities, if any opportunity offered.”<sup>54</sup>

While government repression was ramping up, progressive forces were not yet entirely on the back foot. On June 15th, Whigs in Parliament, led by Charles James Fox, managed to secure passage of what would be known as the “Fox’s Libel Act.”<sup>55</sup> The Act codified the position, tenuously produced within the case law thanks to the efforts of Erskine, that it would be for the jury to decide whether a certain statement constituted “seditious libel” or not. Far from a minor procedural matter,

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Fielding, took his place. During John Fielding’s term the office was enlarged, including through the incorporation of additional magistrates. In addition to its function as a police base, Bow Street was a site at which public trials were conducted—John Fielding in fact encouraged the London press to attend Bow Street trials and to report on the court’s activities. For the Fieldings’ own accounts of their work, see HENRY FIELDING, AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERS, WITH SOME PROPOSALS FOR REMEDYING THIS GROWING EVIL (1751); JOHN FIELDING, A PLAN FOR PREVENTING ROBBERIES WITHIN TWENTY MILES OF LONDON, WITH AN ACCOUNT OF THE RISE AND ESTABLISHMENT OF THE REAL THIEFTAKERS, TO WHICH IS ADDED, ADVICE TO PAWNBROKERS, STABLE-KEEPERS, AND PUBLICANS (1755).

51. See John Beattie, *Garrow and the Detectives: Lawyers and Policemen at the Old Bailey in the Late Eighteenth Century*, 11 CRIME, HIST. & SOCIETIES ¶ 35 (2007).

52. VOGLER, *supra* note 48, at 21.

53. *Id.*

54. VOGLER, *supra* note 48, at 19. Bow Street too began to devote increased attention to issues of public order in the period; see J.M. BEATTIE, THE FIRST ENGLISH DETECTIVES: THE BOW STREET RUNNERS AND THE POLICING OF LONDON 1750-1840, at 173 (2012).

55. Libel Act 1792, 32 Geo. 3 c. 60.

the Act would play an important role in tempering government repression in the coming years.

Passage of Fox's Libel Act was a rare progressive step in the period, however. Turmoil in France led to the arrival of increasing numbers of refugees as the year went on. This inflow made the British government nervous, not least because they feared the arrival of foreign spies and revolutionary agents,<sup>56</sup> a fear echoed in the newspapers of the time. In response, the British government passed the Aliens Act.<sup>57</sup> While the Act did not prohibit immigration, it required that the details of "aliens," including their residences, be recorded upon their arrival, and that they register with local justices of the peace. Should a migrant violate the Act, they could be deported or detained indefinitely, leading opponents of the measure to decry it as a means of suspending the *habeas corpus*.<sup>58</sup>

On November 20<sup>th</sup>, 1792, John Reeves, an arch-conservative and holder of the post of "Receiver of the Public Offices," the office with financial control over the policing of London, formed the Association for the Preservation of Liberty and Property against Republicans and Levellers.<sup>59</sup> Unlike the corresponding societies, Reeves' Association was a "loyalist" outfit, established with the aim of fighting and suppressing the radicals. As the Association itself put it, its purpose was to exercise "Vigilance and Activity in discovering and bringing to Justice all Persons who shall, either by publishing or distributing seditious Papers or Writings, or by engaging in any illegal Associations or Conspiracies, endeavor to disturb the public Peace."<sup>60</sup> In the words of Charles

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56. As J.W. Bruges, Under-Secretary of the Foreign Office, would say, "By what I can learn, the majority of these people are of a suspicious description, and very likely either to do mischief of their own accord, or to be fit tools of those who may be desirous of creating confusion." J.R. Dinwiddy, *The Use of the Crown's Power of Deportation Under the Aliens Act, 1793-1826*, at 41 BULL. INST. HIST. RES. 193, 193 (1968).

57. Aliens Act 1793, 33 Geo. 3 c. 4.

58. For more on the Act, and the uses to which it was put in the years that followed, see Dinwiddy, *supra* note 56, at 193.

59. BLACK, *supra* note 44, at 232. As Black further puts it, Reeves "was a self-appointed guardian of order and stability, one of those products of a society conscious of internal and external strain," who appealed to those "discomfited by the new age," including "the Anglican clergyman who looked with growing suspicion on the rise of dissent and free thought; the employer whose workmen turned to combination; the country gentleman who regarded Wyvill's petitioners with ill favor and his successors with distaste; [and] the evangelical anxious to demonstrate his fidelity to the constitution." *Id.* at 233. On the broader elite and governmental support for Reeves' Association, see *id.* at 234-40; TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xvii.

60. STAMFORD MERCURY (Dec. 8, 1792 & Jan. 11, 1793), cited in THOMPSON, *supra* note 47, at 113 n. 1. For more on the association, see Austin Mitchell, *The Association Movement of 1792-3*, 4 HIST. J. 56 (1961); Donald E. Ginter, *Loyalist Association Movement of 1792-3 and*

James Fox, the Association was an attempt to run the country through “the infamy of spies and intrigues.”<sup>61</sup> The Association grew rapidly, drawing in former “Church and King” groups, including local church organizations as well as various private corporations, and even came to have branches in Kingston and Grenada.<sup>62</sup> The Association immediately set about harassing, bringing charges against, and convincing the authorities to prosecute radicals, as well as conducting public displays, such as burning Thomas Paine effigies. While it is hard to measure precisely how effective Reeves’ Association was, the general consensus is that the Association’s work exerted serious pressure on the radical associations.<sup>63</sup> Further, government measures complemented the organization’s work, including a November 24<sup>th</sup> letter sent to regional government solicitors instructing them to initiate prosecutions against seditious publishers, and another royal decree calling for continued dedication to the suppression of sedition in general.<sup>64</sup>

#### IV. ATTEMPTING TO SUPPRESS RESISTANCE THROUGH THE COURTS

##### A. *Sedition Trials*

Paine was indicted on charges of seditious libel in May of 1792. However, the government was cautious in bringing Paine to trial because the trial would provide Paine a powerful public forum in which to air his radical views. Therefore, it instead pursued a policy of threatening and harassing Paine, apparently in the hopes that he might leave the country.<sup>65</sup> If that was the government’s strategy, it was a successful one, as Paine fled to France in September. Once Paine was safely out of the country, the government moved forward with his prosecution, commencing the trial of the now-absent Paine in mid-December.

Paine was defended, unsurprisingly, by Thomas Erskine. Erskine’s friends tried to talk him out of the defense, given the intense hostility of both the government and conservative forces towards Paine. Erskine,

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*British Public Opinion*, 9 Hist. J. 179 (1966); BOYD HILTON, A MAD, BAD, AND DANGEROUS PEOPLE? ENGLAND 1783-1846, at 69–70 (2006).

61. L.G. MITCHELL, CHARLES JAMES FOX 139 (1997).

62. BLACK, *supra* note 44, at 240–50.

63. For an example of the harassment committed by Reeves’ Association members, see James Epstein, *‘Equality and No King’: Sociability and Sedition: The Case of John Frost*, in *Romantic Sociability: Social Networks and Literary Culture in Britain, 1770-1840*, at 4546 (Gillian Russell & Clara Tuite, eds., 2002) [hereinafter *Romantic Sociability*]. See also TRIALS FOR TREASON AND SEDITION, *supra* note 20, at xx–xxi; HILTON, *supra* note 60, at 69.

64. BLACK, *supra* note 44, at 239.

65. TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xviii.

however, refused to be dissuaded.<sup>66</sup> The trial started with the Attorney General laying out the case against Paine. The extent of the dissemination of Paine's *Rights of Man* was central to the Attorney-General's case. As he put it, Paine's writings were

ushered into the world . . . in all shapes, in all sizes, with an industry incredible; it was either totally or partially thrust into the hands of all persons in this country, of subjects of every description . . . even children's sweet-meats were wrapped up with parts of this, and delivered into their hands, in the hope that they would read it, when all industry was used . . . in order to obtrude and force this upon that part of the public whose minds cannot be supposed to be conversant with subjects of this sort, and who cannot therefore correct as they go along . . . .<sup>67</sup>

What rendered Paine's work such a great offense, in other words, was not strictly speaking its content, but the fact that Paine had made his progressive content available to such a broad portion of the population.

Erskine, as he had done before, based his defense on broad principles; his defense of Paine was, in effect, a defense of the need to maintain a free and open public sphere in general. Erskine argued that suppressing the open exchange of ideas would exacerbate social tensions, rather than relieving them. He proclaimed:

When men can freely communicate their thoughts and sufferings, real or imaginary, their passions spend themselves in air, like gunpowder scattered upon the surface; but pent up by terrors, they work unseen like subterraneous fire, burst forth in earthquake, and destroy everything in their course. Let reason

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66. Erskine presented his rationale in the course of the defense itself, underscoring his belief in the duty of defense lawyers to take on unpopular cases. In his words,

I will forever, at all hazard, assert the dignity, independence and integrity of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court, where he daily sits to practice, from that moment the liberties of England are at an end.

This statement would go on to be widely cited, among other places in the American *Albany Law Journal* in 1875, attesting to the fact that Erskine helped to set, or at least reinforce, an important precedent in the United States as well. See *Current Topics*, 12 ALB. L.J. 113, 113 (Aug. 21, 1875).

67. TRIALS FOR TREASON AND SEDITION, *supra* note 21, at 51.



be opposed to reason, and argument to argument, and every good government will be safe.<sup>68</sup>

Erskine also attempted to defend Paine by arguing that his writings should be understood as part of an academic debate, arguing that Paine had been offering a response to Burke that should be understood as part of a long tradition of debate in Britain over issues of political philosophy.<sup>69</sup> While Erskine's arguments may have been effective had they been presented to a more sympathetic jury, the government had managed to ensure a jury favorable to their point of view: they reached a verdict of guilty without the Attorney-General having to respond to any of Erskine's points.

Shortly thereafter Erskine lost another case. In November 1792, John Frost, the secretary of the London Corresponding Society, got into an argument in a tavern, in which he was overheard to say "equality, and no king." The initial charge against Frost was advanced by private parties, but the case was later taken over by the Attorney-General.<sup>70</sup> While Frost had accompanied Paine to France, he returned in order to face the charges. Frost's trial took place on May 27<sup>th</sup>, 1793. Erskine argued Frost's statements should be discounted, as: (i) he was drunk; (ii) he was in the middle of a heated argument; and (iii) he was engaged in a private conversation, not a public one. In addition, Erskine reiterated his previous argument that Frost's comments should be understood as part of a broader philosophical debate. Unfortunately for Erskine, the judge, Lord Kenyon, summed up heavily in favor of conviction, remarking to the jury:

If you think those words were spoken in season, when seditious words might be the forerunners of seditious acts, and that men's spirits were inflamed, and might from small beginnings take fire and might be brought into action, it adds most immensely to the criminal construction you ought to put upon the words.<sup>71</sup>

In other words, Kenyon was suggesting that the jury should look to the broader social context to determine the seriousness with which to view Frost's statement—a context which recent publications, the charg-

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68. THOMAS PAINE, THE COMPLETE WORKS OF THOMAS PAINE. POLITICAL AND CONTROVERSIAL 729–30, 771–72, 789 (1875), cited in BRAITHWAITE, *supra* note 23, at 125.

69. See MEE, *supra* note 43, at 85.

70. See Epstein, *supra* note 63, at 45–46. The authorities' antipathy to Frost was inspired in part by the fact that he was a gentleman who had deigned to associate with the members of the London Corresponding Society. *Id.* at 50.

71. TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xiv.

es, and Lord Kenyon's summing up all suggested was dire. The jury found Frost guilty in short order.<sup>72</sup>

The same month Frost was convicted, Parliament resoundingly defeated a major reform bill that was proposed by Charles Grey and supported by Erskine.<sup>73</sup> The government instead instituted a new repressive law, the Traitorous Correspondence Act.<sup>74</sup> The Act made it high treason to “knowingly and willfully” supply materials to, buy land in, or lend money to a person in France without a license from the king.<sup>75</sup> Traveling to France without permission was also punishable, though not considered treason.<sup>76</sup>

While things were becoming bleaker in England, the penalties inflicted in England paled in comparison to those imposed in Scotland. In December 1792, the Scottish Society of the Friends of the People—which encompassed a much broader social base in comparison to the English Society of the Friends of the People—organized a ‘convention’ in Edinburgh. The Vice-President of the convention, Thomas Muir, enraged the authorities by reaching out to the United Irishmen and publicly reading a statement of a nationalist character that they had prepared.<sup>77</sup> Shortly after the convention, Muir was charged with sedition. Around the same time, Thomas Palmer, a Unitarian minister and a member of the Friends of Liberty at Dundee, was similarly charged with sedition, due to his support for progressive reforms. In the trials of both Muir and Palmer, the authorities made a point of emphasizing not only their personal reformist sentiments, but also their class treachery. At Muir’s trial, the Lord Advocate, Robert Dundas, emphasized that his crime was aggravated because he had fraternized with “villagers, and manufacturers, poor and ignorant, for the purpose of sowing sedition and discontent.”<sup>78</sup> Similarly, the prosecutor in Palmer’s case stressed that, despite being a

72. Frost was sentenced to six months in prison.

73. See JOHN BARRELL, *IMAGINING THE KING’S DEATH: FIGURATIVE TREASON, FANTASIES OF REGICIDE 1793-1796*, at 144–45, 186 (2000).

74. Correspondence With Enemies Act 1793, 33 Geo. 3 c. 27.

75. See *id.*

76. Clive Emsley, *As Aspect of Pitt’s ‘Terror’: Prosecutions For Sedition During the 1790s*, 6 SOC. HIST. 155, 156 (1981). At least two men were later charged with having contravened the Act and detained, though the government proved reluctant to prosecute them in open court.

77. The United Irishmen were created in 1791. They initially had the aim of expanding the franchise and ending religious discrimination. After the British government attempted to repress the association, it became more radical, eventually supporting the cause of Irish independence. For more, see SEAN CONNOLLY, *DIVIDED KINGDOM: IRELAND 1630-1800*, at 434–49, 459–84 (2008).

78. AN ACCOUNT OF THE TRIAL OF THOMAS MUIR, ESQ YOUNGER, OF HUNTERS HILL, BEFORE THE HIGH COURT OF JUSTICIARY AT EDINBURGH, ON THE 30TH AND 31ST DAYS OF AUGUST 1793, FOR SEDITION 61 (1794) [hereinafter TRIAL OF THOMAS MUIR].

“better class” of person, Palmer had fraternized with “the society of low weavers and mechanics.”<sup>79</sup> Braxfield, the Lord Justice Clerk and the presiding judge in Muir’s trial, underscored that Muir had reached out to “ignorant country people, making them forget their work,” and suggested that Muir’s political advocacy was thereby “aggravated according to the object in view . . . [that is,] creating in the lower classes of people, disloyalty, and dissatisfaction to government . . . [an act] amounting to the highest sort of sedition . . . bordering on treason.”<sup>80</sup> Both Muir and Palmer were convicted and sentenced to transportation to Australia—fourteen years in Muir’s case, seven in Palmer’s. While Whig politicians in England strenuously objected, the conservative majority in Parliament supported the harsh penalties imposed.<sup>81</sup>

Undeterred, the Scottish Friends of the People organized another convention in Edinburgh, which commenced on November 19<sup>th</sup>, 1793.<sup>82</sup> The convention was attended by two representatives from the London Corresponding Society, Joseph Gerrald and Maurice Margarot. The aim of the convention was to contemplate ways to exert greater pressure for parliamentary reform. The attendees settled on convening a “great body of the people,” a sort of popular (albeit powerless) alternative to Parliament, as a means to underscore the popular illegitimacy of Parliament. The government, however, considered this a completely unacceptable plan. Accordingly, the authorities broke up the meeting on December 5<sup>th</sup>, 1793, and charged three of the conveners—Joseph Gerrald, Maurice Margarot and William Skirving, the Secretary of the convention—with sedition.

As with the trials of Muir and Palmer, the trials of the conveners revealed the seriousness with which the authorities viewed the defend-

79. Cited in THOMIS & HOLT, *supra* note 37, at 15.

80. TRIAL OF THOMAS MUIR, *supra* note 78, at 121, 126–27. Braxfield also emphasized his emphatic rejection of the idea of the lower classes having any role in government, observing that Muir might have known that no attention could be paid to such a rabble. What right had they to representation? A Government . . . should be just like a corporation; and, in this country, it is made up of the landed interest, which alone has a right to be represented.

*Id.* at 121–22.

81. See THE ANNUAL REGISTER OF A VIEW OF THE HISTORY, POLITICS, AND LITERATURE FOR THE YEAR 1794, at 263–66 (1799) [hereinafter ANNUAL REGISTER 1794].

82. The convention was called in some haste, in part because revolutionaries in Britain feared the potential to hold the convention might shortly be foreclosed, as they had seen the government outlaw similar conventions in Ireland earlier in the year through the 1793 Convention Act (passed in April). For more, see BARRELL, *supra* note 73, at 142–50; The Convention Act, 33 Geo. 3 c. 29 (Ir.) (In full “An Act to Prevent the Election or Appointment of Unlawful Assemblies, Under Pretence of Preparing or Presenting Public Petitions, or Other Addresses to His Majesty or the Parliament 1793”).

ants' efforts to reach out to, and to associate themselves with, the masses of the people. Lord Swinton, one of the judges, observed that the defendants' appeal to the "rabble" was proof they intended violence, for the only way the rabble knew to act was "by outrage and violence."<sup>83</sup> Similarly, the prosecutors found sedition not only in the conveners' calls for universal suffrage, but also in the fact that they had sought to achieve such an end through the convening of a grand convention. As the solicitor-general put it at the trial of Skirving,

The very name of British Convention carries sedition along with it. It is assuming a title which none but the members of the established government have a right to assume. And the British Convention, associated for what? For the purpose of obtaining universal suffrage; in other words, for the purpose of subverting the government of Great Britain . . .<sup>84</sup>

However, what made guilty verdicts essentially unavoidable, was the presiding judges' application of the extremely broad and loose definition of sedition. As the chief judge, Braxfield, would say at Margarot's trial, to his mind the crime of sedition

[C]onsists in poisoning the minds of the lieges, which may naturally in the end have the tendency to promote violence against the state; and endeavoring to create a dissatisfaction in the country, which . . . will very naturally end in overt rebellion; and if it has that tendency, though not in the view of the parties at that time, yet if they have been guilty of poisoning the minds of the lieges, I apprehend that that will constitute the crime of sedition to all intents and purposes.<sup>85</sup>

Against this "poisoning of the minds" definition of sedition, there was little scope to mount a defense. All three defendants were sentenced to fourteen years' transportation and detention with hard labor at Botany Bay in Australia.<sup>86</sup> As with Muir and Palmer, Gerrald, Margarot, and

83. See BARRELL, *supra* note 73, at 159.

84. Cited in THOMIS & HOLT, *supra* note 37, at 13. Prime Minister Pitt, meanwhile, saw the convention in Scotland as an attempt to produce "a species of tyranny [based on the] voice of the people."

85. *Proceedings on the Trial of Maurice Margarot, in 23 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIME AND MISDEMEANORS, 1793 & 1794*, at 603, 766 (Thomas Jones Howell ed., London, T.C. Hansard 1817) [hereinafter 23 A COMPLETE COLLECTION OF STATE TRIALS].

86. Muir, Palmer, Skirving and Margarot all sailed to Botany Bay together, embarking in February 1794 and arriving in October. Gerrald was shipped out to Australia approximately a year after the others, but contracted tuberculosis along the way and died shortly thereafter. Skirving died of yellow fever and dysentery in early 1796. Palmer served his full sentence, then set out on a boat he had purchased with the intent of making it home; when forced to dock at

Skirving suffered from the heightened partisan nature and vindictiveness of the Scottish judges,<sup>87</sup> as well as procedural rules that prevented the formation of opposition juries in Scotland.<sup>88</sup>

Back in England, the authorities increased the intensity with which they brought sedition charges against publishers. Henry Delahoy Symonds was tried in February 1793 and sentenced to two years in prison for printing the second part of Paine's *The Rights of Man*.<sup>89</sup> James Ridgway was tried in May and sentenced to four years in prison for publishing multiple parts of *The Jockey Club* (a radical libertine novel pillorying the decadence of the aristocracy), the second part of *The Rights of Man*, and Paine's *Letter Addressed to the Addressers*.<sup>90</sup> Daniel Holt, the printer of the *Newark Herald*, was tried for sedition in August, in substantial part for re-publishing a pamphlet that had first appeared in the early 1780s, calling for parliamentary reform. Despite the fact that the pamphlet in question had not been deemed a subject for prosecution

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Guguan, an island under Spanish control, he was imprisoned—as Spain was at war with Britain—and died shortly thereafter of dysentery. Muir escaped in early 1796. He made it to Canada, then California, then Mexico, and finally Cuba. Muir was imprisoned by the Spanish in Cuba, due to suspicion that he was a spy, and loaded on a boat bound for Spain. The British navy intercepted and attacked the Spanish boat, leading to Muir being seriously wounded. After French intervention, the Spanish allowed Muir to travel to France, where he was hailed as a hero. There, Muir finally succumbed to his wounds, dying in January 1799. Margarot would last the longest out of the original five: while he was able to start a farm in Australia, his unrelenting progressive advocacy once again got him into trouble with the authorities. In 1810 he returned to England, where he died in 1815, in poverty. For more, see Michael Davis, *Joseph Gerrald (1763-1796)*; Emma Vincent Macleod, *William Skirving (d. 1796)*; A.H. Millar, revised by G.M. Ditchfield, *Thomas Fyfe Palmer (1747-1802)*; H.T. Dickinson, *Thomas Muir (1765-1799)*; Clive Emsley, *Maurice Margarot (1745-1815)*, all in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2019).

87. The vindictive nature of the judges could be seen from comments Braxfield reportedly made at a private dinner prior to the trials' commencement. In his view, as it was reported, all three defendants should be sentenced to fourteen years transportation and public whipping, adding that "the mob would be the better for the spilling of a little blood." While the accused became aware of these statements and complained, their pleas were rejected. See James Epstein, 'Our Real Constitution': *Trial Defence and Radical Memory in the Age of Revolution*, in JAMES VERNON, RE-READING THE CONSTITUTION: NEW NARRATIVES IN THE POLITICAL HISTORY OF ENGLAND'S LONG NINETEENTH CENTURY 33–38 (1996).

88. In Scotland, jurors were essentially appointed by the Lord Justice Clerk, and selected by the presiding judge, with hardly any challenges allowed. Epstein, *supra* note 87, at 34.

89. TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xx–xxii.

90. On Charles Pigott, the author of *The Jockey Club*, see Jonathan Mee, *Libertines and Radicals in the 1790s: The Strange Case of Charles Pigott I*, in LIBERTINE ENLIGHTENMENT: SEX LIBERTY AND LICENSE IN THE EIGHTEENTH CENTURY (Peter Cryle & Lisa O'Connell eds., 2003). Once imprisoned in Newgate, Symonds and Ridgway joined their businesses together, and continued to publish. See Ralph A. Manogue, *The Plight of James Ridgway, London Bookseller and Publisher, and the Newgate Radicals 1792-1797*, 27 WORDSWORTH CIRCLE 158, 158 (1996).

when it first appeared, Holt was convicted.<sup>91</sup> The printer and proprietors of the *Morning Chronicle* were charged with sedition and brought to trial in December 1793, due to their publication of *An Address of the Society for Political Information in Derby*, a text which asserted the rights to freedom of expression and association, and called for a more representative government.<sup>92</sup> These cases, and several more similar prosecutions,<sup>93</sup> were generally advanced using the ‘ex officio’ procedure. The procedure could be used whenever the underlying subject matter was one “deserv[ing] the most public animadversion”—meaning public order or national security cases, in particular cases of riot, sedition, or treason.<sup>94</sup> When the *ex officio* procedure was used, trials could be initiated without the use of a Grand Jury; there was no need for the Attorney-General to inform the accused of the charges against him; and there was no obligation for the Attorney-General to move promptly to trial.<sup>95</sup> In short, the accused might be left with the threat of trial dangling above him—or, if he could not pay bail, sitting in pre-trial detention indefinitely. Thus, the *ex officio* procedure allowed the authorities enhanced ability to charge, to detain, and to convict political dissidents. The procedure was described by one observer as “scarce less compatible with a free government, than the Star Chamber, to which it is nearly allied, and of the nature of which it partakes.”<sup>96</sup>

Thomas Briellat was also tried in December 1793, after he told a meeting at Shoreditch that there could be no reformation without a revolution, emphasized his desire that men not be ruled by kings, and expressed his wish that French soldiers would come to England to fight

91. For more, see 22 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 24, at 1189–238; C.H. TIMPERLEY, A DICTIONARY OF PRINTERS AND PRINTING, WITH THE PROGRESS OF LITERATURE, ANCIENT AND MODERN, BIBLIOGRAPHICAL ILLUSTRATIONS, ETC. ETC. 780 (1839); MEMORIALS AND CORRESPONDENCE OF CHARLES JAMES FOX (Lord John Russell ed., 1854) *cited in* Emsley, *supra* note 76, at 157 (1981); *see also* LONDON CHRONICLE (Dec. 10, 1793), *cited in* Emsley, *supra*, at 157.

92. *See* Address of the Society for Political Information, Derby (July 16, 1792); LONDON CHRONICLE, *supra* note 91, at 157. December also saw the Attorney-General bring charges against Carter, a bill sticker, for having posted a bill on behalf of the London Corresponding Society; THOMAS HARDY, MEMOIR OF THOMAS HARDY, FOUNDER OF AND SECRETARY TO THE LONDON CORRESPONDING SOCIETY 24–25 (London, James Ridgeway, Piccadilly 1832).

93. Including, for instance, the trials of the progressive publishers George Westley, William Holland, and Thomas Spence. *See* Manogue, *supra* note 90.

94. 9 THE LAW MAGAZINE: OR, QUARTERLY REVIEW OF JURISPRUDENCE 366 (1833).

95. The procedure was authorized by a 1692 statute. For more, *see* Emsley, *supra* note 76, at 168; TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xliv.

96. The observer was Constantine Phipps, a peer in Ireland; Emsley, *supra* note 18, at 819. On the effectiveness of the approach overall, *see* Philip Harling, *The Law and the Limits of Repression, 1790–1832*, 44 HIST. J. 107 (2001).

the government. In making his case against Briellat, the Attorney-General emphasized the dangerous circumstances of the times. In summing up, Mainwaring, the presiding judge, attempted to draw a line between expressions of opinion, which he asserted remained protected, and statements that negatively influenced a broader public, which he declared should be punished. In his words:

upon this occasion your duty and your province lie in a very narrow compass indeed, [and] you have no occasion to be perplexed or entangled with history or politics ... Certainly we cannot but admit that no man is punishable for the discontent and dissatisfaction of his own mind; men have a right to their own opinions, and I should be sorry to see a man stand at this or any other bar . . . because he had in an unguarded manner delivered sentiments not strictly legal, or which, if construed too strictly, might be considered as seditious; but, gentlemen, no man in a discontented state of mind is to infuse that discontent into the minds of others, by which he disturbs the public tranquility, and becomes a very capital offender against the laws of his country; because, whatever disturbs the tranquility of the kingdom is a general detriment to us all.<sup>97</sup>

While Mainwaring thereby purported to recognize a certain space for freedom of opinion and expression, the free space he recognized was limited to inside an individual's head. Once "discontented" words were voiced publicly, the speaker might be subjected to punishment. Briellat himself was sentenced to a year in prison and a fine.

Not every case in the period resulted in a victory for the authorities, however. In December 1773, Daniel Isaac Eaton, publisher of the radical periodical *Politics for the People*, was arrested for publishing a speech by Thelwall, which described a gamecock named King Chanticleer, which was beheaded due to its despotic actions. In February 1794, he was brought to trial, where he was defended by John Gurney. Gurney suggested—not unreasonably—that the reference was to Louis XVI, not to George III, and then went further, suggesting that insofar as the work had not in fact referred to George III at all, it was in fact the prosecution which had committed seditious libel. Doubtless to the chagrin and frustration of the prosecution the jury found Gurney's defense convincing and acquitted Eaton in what was seen as an important victory for progressives.<sup>98</sup>

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97. 22 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 24, at 951–52.

98. Membership in the corresponding societies increased in early 1794, in part because of the positive press generated by Gurney's successful defense. Eaton's case also inspired an 1812

While the authorities were successful in the vast majority of the sedition trials they conducted, they were not successful in every case, as Eaton's case demonstrates. Moreover, despite their efforts, dissent continued to grow. Dissent was driven by economic as well as political motivations. In late September 1793, citizens of Bristol protested the renewal of an act imposing tolls on the Bristol Bridge. Soldiers were called in and ended up firing on the assembled crowd. Somewhere in the range of eleven to seventeen persons were killed, and many more injured. Recognizing the potential for unrest around the country, and the unsuitability of the military to the task of maintaining order, the authorities began to search for other mechanisms through which to maintain control. In 1794, a new force known as the "yeomanry" was established as an alternative and a supplement to the army and local constables. The yeomanry was recruited from the lower ranks of respectable society, chiefly landholders and tenant farmers with some means. By the end of 1794, there were approximately 30 troops of yeomanry, with each troop including up to 60 men.<sup>99</sup>

### *B. The Treason Trials*

While the yeomanry may have helped enhance the authorities' ability to address unrest around the country as a whole, the problem of the radical societies remained. Dissatisfied with the results of their campaign of sedition prosecutions, the government took a new, more aggressive tack in mid-1794. In May, the government launched a series of raids, in which they arrested over thirty leaders of the progressive movement, including several of the leaders of the corresponding societies.<sup>100</sup> Along with the arrests, the government confiscated all the papers they could find and set up a secret committee within the House of Commons, charged with examining those papers, with the aim of developing charges against those detained.

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pamphlet by Percy Bysshe Shelley, arguing that wide latitude should be given to freedom of expression. Eaton's case was an exception to the norm, however—he was one of the few radical publishers of the period to escape prison. See TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xviii.

99. By the end of the eighteenth century, the yeomanry had increased to some 205 troops. See PATRICK MILEHAM, *THE YEOMANRY REGIMENTS: OVER 200 YEARS OF TRADITION*, 8–13 (2003); IAN F.W. BECKETT, *BRITAIN'S PART-TIME SOLDIERS: THE AMATEUR MILITARY TRADITION 1558-1945*, at 69–141 (Pen & Sword ed., 2nd ed. 2011).

100. The fact that the detained radicals were principally tradesmen of various sorts—including two silversmiths, two shoemakers, a wax-chandler, a gun-engraver's apprentice, a victualler, an inkstand-maker, two hairdressers, two tailors, a hatter, a joiner, and two cutlers—testifies to the social makeup of radical societies. See BARRELL, *supra* note 73.



On May 16<sup>th</sup>, the secret committee submitted its first report, asserting that those detained had been part of a conspiracy, and calling for the suspension of *habeas corpus*.<sup>101</sup> The government promptly complied with the secret committee's report, passing the Habeas Corpus Suspension Act in 1794.<sup>102</sup> By its own terms, the Act was implemented in response to "a traitorous and detestable conspiracy . . . formed for subverting the existing Laws and Constitution, and for introducing the system of Anarchy and Confusion which has so fatally prevailed in France."<sup>103</sup> Substantively, the Act allowed, in effect, for the indefinite detention of those arrested based on suspicion of "high treason, or treasonable practices," on the basis of a warrant signed by a secretary of state, or a member of the Privy Council.<sup>104</sup> The Act had an immediate effect in chilling freedom of expression; it prompted Richard Wordsworth, for instance, to write to his more famous brother William, urging him to "be cautious in writing or expressing your political opinions," since "[b]y the suspension of the Habeas Corpus Acts the Ministers have [acquired] great powers."<sup>105</sup>

In June, the secret committee released a second report in which it asserted that the radical societies had been planning high treason. The committee based this claim on the fact that the radical societies had, on their account, been attempting to "over-awe" parliament, including through the assembly of "a great Body of the People." Further, they claimed the societies were planning to install a new government similar

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101. The pre-existing common law right of *habeas corpus* was guaranteed in Britain by the Habeas Corpus Act, which was passed in 1679, and required that anyone arrested must be brought before a court of law, where the legality of the detention might be determined. While the term *habeas corpus* has a longer history, the modern understanding of *habeas corpus*, as a means of pushing back against executive power, in the context of detentions in particular, can be traced to the late sixteenth century. See ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 89 (1960); DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 3-13 (A.E. Dick Howard ed., University Press of Virginia 1966); Neil Douglas McFeeley, *The Historical Development of Habeas Corpus*, 30 SMU L. REV. 585 (1976); PAUL HALLIDAY, *HABEAS CORPUS, FROM ENGLAND TO EMPIRE* (2010).

102. In full, "An act to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government." Habeas Corpus Suspension Act 1794, 34 Geo. 3 c. 54. The Act was initially set to last for eight months, but was renewed in February 1795 by Habeas Corpus Suspension Act 1795, 35 Geo. 3 c. 3.

103. 34 Geo. 3 c. 54, § I. Prime Minister Pitt, in urging the adoption of the Act, railed against the recent French Declaration of the Rights of Man and of the Citizen, suggesting that the principles contained within the declaration were responsible for the evils that befell France.

104. *Id.*

105. ERNEST DE SELINCOURT ED., *THE LETTERS OF WILLIAM AND DOROTHY WORDSWORTH: THE EARLY YEARS, 1787-1805* (1967).

to the one in France, and that the societies had been collecting weapons.<sup>106</sup>

Following this report, three of the most prominent persons arrested—Thomas Hardy, John Horne Took and John Thelwall—were put on trial for treason. The law on treason in Britain was still based on a 1351 Act.<sup>107</sup> That Act laid out several different manners in which treason might occur. The principal manner of treason was found “when a man doth compass or imagine the death of our lord the king.” The antiquated nature of the language of “compassing” and “imagining” was of course something of a problem, particularly in the context of such serious charges.<sup>108</sup> Building on the work of the secret committee, the treason charges were formally based on the contention that the defendants had been attempting to establish “a pretended general convention of the people, in contempt and defiance of the authority of parliament, and on principles subversive of the existing laws and constitution, and directly tending to the introduction of that system of anarchy and confusion which has fatally prevailed in France.”<sup>109</sup>

The trial of Hardy commenced on October 28<sup>th</sup>. The Attorney General, Sir John Scott, gave an opening statement that lasted for nine hours. In accordance with the charges, he argued that the corresponding societies’ aim of calling a convention with the aim of producing pressure for parliamentary reform constituted an attempt to usurp sovereignty and therefore, in effect, treason. Moreover, he suggested that by invoking rights and calling for equal representation the societies were seeking full democracy, relative to which he concluded “I cannot conceive or imagine by what species of reasoning, or upon what principle, or upon what authority, it is to be contended, that this would not have been high treason.”<sup>110</sup> In making this argument, the Attorney-General was not claiming the conspirators had been attempting the traditional treasonous crime of attempting to murder the monarch. Rather, he was contending that the detainees had been attempting a new kind of treason, which he referred to as “modern French treason.” He suggested that such a crime was even worse than traditional treason, insofar as it aimed

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106. There was little evidential basis for the latter claim. On the work of the secret committee, see BARRELL, *supra* note 73, at 182–251; TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xxvii–xxviii.

107. Treason Act 1351, 25 Ed. 3, St. 5 c. 2.

108. For more, see John Barrell, *Imaginary Treason, Imaginary Law: The State Trials of 1794*, IN THE BIRTH OF PANDORA AND THE DIVISION OF KNOWLEDGE 122–23 (1992); BARRELL, *supra* note 73, at 144–45, 186.

109. See TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xxvii.

110. See BARRELL, *supra* note 108, at 322.

not merely at the replacement of the king, but at the overthrow of the monarchy altogether.<sup>111</sup> In line with the sedition charges of the previous years, moreover, the prosecution repeatedly emphasized Hardy's lowly social status, suggesting that the very idea of a shoemaker advocating major political reforms was both ludicrous and offensive.<sup>112</sup>

Once again, Erskine served as defense counsel. While he may have had some losses in the previous years and had offered some defenses that were considered questionable, Erskine's defense of Hardy was one of his most impressive performances. Erskine argued that despite their denials, the prosecution were basing their case on a constructive theory of treason. He invoked several prominent authorities who had contended that such fanciful interpretations were to be resisted at all costs in treason cases, which should instead be based upon clear and evident factual proof,<sup>113</sup> and passionately denounced the harms that might follow if the loose theories of the prosecution were accepted. Erskine also underlined that while all agreed the crime of treason required intention, numerous authorities had suggested that an overt act towards the end in question must be clearly shown—a showing which he contended the prosecution had entirely failed to make.<sup>114</sup> Erskine also reminded the court that numerous well-respected politicians, including Prime Minister Pitt, had previously called for the creation of conventions of delegates with the aim of reforming the House of Commons, calling into doubt the government's current contention that calling for such reforms constituted treasonous activity. In addition to these powerful arguments, Erskine was at his best in his cross-examinations of the prosecution's witnesses, using his exchanges with those witnesses to decisively un-

111. See TRIALS FOR TREASON AND SEDITION, *supra* note 21. The prosecution also attempted to argue the societies had been planning an armed rebellion, but, like the secret committee, were able to offer little evidence to support this claim.

112. As Barrell puts it,

There is a moment in [Hardy's trial] where some lines of verse [were] read out in court. They [were] lines from James Thompson's poem Liberty; they offer[ed] a miniature civic homily on the virtues of patriotism and the dangers of corrupt and venal government; and they had been quoted in a document published by the London Corresponding Society ... There was no suggestion that Thomson, the poet laureate of the civic republic, could have written anything treasonous; but there was a real question as to whether a shoemaker, the leader of a popular political reform movement, could have quoted the passage except with a treasonous intent.

BARRELL, *supra* note 73, at foreword.

113. Among others, Erskine cited Coke, who had observed that treason charges should be based "upon clear and manifest proof, not upon conjecturall presumptions, or inferences, or straines of wit." Edward Coke, THE THIRD PART OF THE LAWS OF ENGLAND 12 (1644).

114. On which point, see BARRELL, *supra* note 73, at 123.

dermine the prosecution's suggestions of a shadowy revolutionary conspiracy.

Lasting nine days, Hardy's trial was the longest and most expensive trial for treason that had ever taken place up to that point, at a time when the vast majority of trials lasted less than a day.<sup>115</sup> At the conclusion of the trial, Justice Eyre attempted to push the jury towards a conviction. In summing up, he suggested:

Associations and assemblies of men, for the purpose of obtaining a reform in the interior constitution of the British parliament, are [not] simply unlawful; but, on the other hand, I must state to you, that they may but too easily degenerate, and become unlawful, in the highest degree, even to the enormous extent of the crime of high treason.

The process is very simple: let us imagine to ourselves this case: a few well-meaning men conceive that they and their fellow subjects labour under some grievance; they assemble peacefully to deliberate on the means of obtaining redress; the numbers increase; the discussion grows animated, eager, and violent; a rash measure is proposed, adopted, and acted upon; who can say where this shall stop, and that these men, who originally assembled peaceably, shall not finally, and suddenly too, involve themselves in the crime of high treason.<sup>116</sup>

Despite Eyre's invocation of the specter of violent, treasonous unrest, the jury acquitted Hardy.<sup>117</sup> The trials of Tooke and Thelwall came shortly thereafter, and each followed a similar course. Erskine's arguments on behalf of Tooke were similar to those he advanced in defense of Hardy; this time, however, he linked his argument to the notion that statutory language should be favored over judicial constructions, thus echoing the arguments Bentham had been developing over the last few decades in favor of a law governed by clear statutes.<sup>118</sup> Tooke was, in

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115. See Barrell, *supra* note 108.

116. JOSEPH GURNEY, THE TRIAL OF THOMAS HARDY FOR HIGH TREASON AT THE SESSIONS HOUSE IN THE OLD BAILEY Vol 1., at 10 (1794).

117. See TRIALS FOR TREASON AND SEDITION, *supra* note 21. The foreman of the jury allegedly fainted after delivering the not guilty verdict. See THOMPSON, *supra* note 47, at 19. While Hardy had been acquitted, his detention and trial constituted a serious punishment of its own, including due to the fact that his wife died while he was detained.

118. In defense of a strict interpretation Erskine observed, *inter alia*,

Where a statute is expressed in such plain, unambiguous terms, that but one grammatical or rational construction can be put upon it; where the first departure from that only construction does not appear to have taken its rise from any supposed ambiguity of its expression in the minds of those who first departed from it . . . but comes down tainted with the most degraded profligacy of judges notoriously devoted to arbitrary

any case, the least likely defendant to be convicted, given that he came from a more upper-class background, and was not a member of the London Corresponding Society but rather of the more elite Society for Constitutional Information. This certainly made a difference to Eyre, who appeared much more sympathetic to Tooke than he had been to Hardy. In summing up, Eyre drew a sharp distinction between the London Corresponding Society, which he described as a “political monster, spreading itself every hour from division to division, and each division producing its sub-divisions, those sub-divisions becoming divisions, and so on *ad infinitum*,” and the Society for Constitutional Information, which he presented as a comparatively reasonable institution. On the basis of this differentiation, Eyre suggested different standards of responsibility relative to participants in each: since members of the London Corresponding Society constituted a threatening mass, a “political monster,” its officers should be held responsible for all acts the organization might take; in contrast, members of the Society for Constitutional Information, understood as an umbrella organization consisting of numerous distinct individuals each possessed of their own personhood, would only be held responsible for those acts they had individually approved.<sup>119</sup> Tooke was acquitted in short order. Although Thelwall was much more of a radical, by the time the government came to try him, their prosecutorial theories were already badly damaged, and Thelwall too was acquitted.

The importance of the acquittals can hardly be overstated. For the accused themselves, it represented the gift of life and an escape from a gruesome fate: had they been found guilty of treason, the punishment would have been hanging, drawing and quartering.<sup>120</sup> As a matter of law, the findings in the cases represented a powerful blow against the

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and corrupt governments; ... in such a case, I do maintain . . . that if the statute of Edward 3<sup>rd</sup> can be departed from by construction, or can be judged otherwise than if it had passed yesterday, there is, properly speaking, no such thing as written law in England.

25 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, 1794-1796, at 269 (Thomas Jones Howell ed., London, T.C. Hansard 1818) [hereinafter 25 A COMPLETE COLLECTION OF STATE TRIALS]. For more, see JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Wilfred Harrison ed., Basil Blackwell 1967) (1776); JEREMY BENTHAM, OF LAWS IN GENERAL (H. L. A. Hart ed., The Athlone Press 1970) (1782); JEREMY BENTHAM, TRUTH VERSUS ASHHURST (T. Moses 1823) (1792).

119. See 25 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 118, at 731.

120. The acquittals were followed by widespread praise and adulation of Erskine. Reportedly, the horses from his carriage were released and his carriage was drawn along by cheering crowds—or, as one conservative paper would put it, by “an immense crowd of the *Swinish Multitude*.” MORNING CHRONICLE (Dec. 27, 1794), *cited in* BARRELL, *supra* note 108, at 402.

notion of constructive or modern French treason, on which the government's case had effectively been based. Following the failed prosecutions, the government released the rest of those it had detained. On top of that, the government was reportedly sitting on hundreds of further warrants it intended to execute in the event of successful convictions; the results of the trials forced the government to relinquish those plans as well.<sup>121</sup>

The acquittals also infuriated members of the establishment, including Edmund Burke, who had served on the secret committee. Burke's position became even more extreme, developing into a sort of proto-fascism. In the wake of the acquittals, he wrote:

Public prosecutions are become little better than schools for treason; of no use but to improve the dexterity of criminals in the mystery of evasion; or to shew with what compleat impunity men may conspire against the Commonwealth; with what safety assassins may attempt it's awful head . . . Whilst the distempers of a relaxed fibre prognosticate and prepare all the morbid force of convulsion in the body of the State the steadiness of the physician is overpowered by the very aspect of the disease. The doctor of the Constitution, pretending to under-rate what he is not able to content with, shrinks from his own operation. He doubts and questions the salutary but critical terrors of the cautery and the knife. He takes a poor credit even from his defeat; and covers impotence under the mask of lenity . . . the law is clear, but it is a dead letter. Dead and putrid, it is insufficient to save the State, but potent to infect, and to kill. Living law, full of reason, and of equity and justice, (as it is, or it should not exist) ought to be severe and awful too . . . Our most salutary and most beautiful institutions yield nothing but dust and smut: the harvest of our law is no more than stubble.<sup>122</sup>

Clearly, the years since his *Reflections on the Revolution in France* had not mellowed Burke but had rather enhanced his belief in the necessity of draconian, legally-authorized brutality in defense of Britain's established power structure. Unfortunately for him, those "most salutary and most beautiful institutions" that he praised—public prosecutions for treason, backed up by the penalty of hanging, drawing, and quartering,

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121. See THOMPSON, *supra* note 47, at 137.

122. EDMUND BURKE, TWO LETTERS ADDRESSED TO A MEMBER OF THE PRESENT PARLIAMENT, ON THE PROPOSALS FOR PEACE WITH THE REGICIDE DIRECTORY OF FRANCE 19–21 (1796).

against those arguing for the creation of a more democratic system—were proven less effective than he had hoped they would be.

### C. *The Trial of Henry Redhead Yorke*

While the challenges faced in London proved the difficulty of obtaining treason convictions, the authorities continued to prosecute radicals under charges carrying less severe penalties. One trial from 1795 is worth exploring in some depth, as it demonstrates the forms of advocacy the government deemed particularly problematic, how it attempted to make its case, the contentious nature of the political trials of the times, and some of the challenges the government faced even when it was able to secure a conviction. On April 7<sup>th</sup>, 1794, Henry Redhead Yorke, Joseph Gales, and Richard Davison—“malicious, seditious, and ill-disposed persons . . . greatly disaffected to our said lord the king,” according to the indictment against them—spoke at a large meeting of 4,000 or more persons outside Sheffield.<sup>123</sup> Among other things,<sup>124</sup> the speakers asserted that universal representation was a right, and called for the emancipation of slaves. Following the assembly, Yorke was arrested (Gales and Davison, meanwhile, successfully avoided the authorities). Yorke was initially charged with treason but the charge was reduced, after the precedent set by Hardy’s trial. Yorke was subsequently put on trial on July 23<sup>rd</sup>, 1795, for conspiracy to “traduce, vilify, and defame, the Commons House of Parliament, and the government of this realm, and to excite a spirit of discontent, disaffection, and sedition.”<sup>125</sup> His was the first major case at which a conspiracy charge was leveled against an individual on the basis of the sentiments he expressed at a public meeting.<sup>126</sup>

The heart of the case against Yorke rested on the words he had allegedly spoken before the Sheffield assembly. According to the indictment, in the most troubling part of his speech Yorke had reportedly referred to a “grand political explosion” and called for an end to “fanaticism and superstition” and “corruption and abuses,” for the “restitution of the original rights of human nature,” and for the establishment of a government responsive to “the commanding voice of the whole people.”<sup>127</sup> In short, from a sympathetic perspective, aside from

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123. See *Trial of Henry Redhead, Otherwise Henry Yorke, Gentleman, for Conspiracy (1795)*, in 25 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 118, at 1005.

124. *Id.* at 1008.

125. *Id.* at 1150.

126. See Lobban, *supra* note 20, at 323.

127. In full, Yorke had reportedly said:

the suggestion of a “grand political explosion”—language which Yorke contested having used<sup>128</sup>—Yorke’s speech involved a defense of reason and enlightenment, a call for “the original rights of human nature,” an end to despotic, corrupt, and abusive governance, and the suggestion that Parliament should be made responsive to “the whole people,” rather than just a portion of them.

For the prosecuting authorities, these suggestions were deeply problematic. The aptly named Law, the prosecuting attorney, began his presentation with attempting to underscore the great danger in Yorke’s words. He emphasized the troubled nature of the times, arguing that they were characterized by

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Fellow-citizens, the day is at length arrived, when fanaticism and superstition, deprived of their tinsel trappings, and exposed, in their nature ugliness, to the view of mankind, slink scowling back to the case of obscurity; there, I hope, they will for ever remain. The energy of Englishmen will no longer endure this strange uproar of injustice . . . I trust my countrymen . . . are sick of religious and political imposture, and that their decisive and manly conduct will command, in an imperious tone, which will take no denial, not a melioration of these enormous abuses . . . which would be to compromise with injustice; but I trust they will demand the annihilation of corruptions and abuses . . . and a restitution of the original rights of human nature . . . the government of Europe . . . present no delectable symmetry to the contemplation of the philosopher—no enjoyment to the satisfaction of the citizen. A vast and deformed cheerless structure, the frightful abortion of haste and usurpation, presents to the eye of the beholder no systematic arrangement, no harmonious organization of society. Chance, haste, faction, tyranny, rebellion, massacre, and the hot inclement action of human passions, have begotten them. Utility never has been the end of their institution, but partial interest has been its fruit. Such abominable and absurd forms, such jarring and dissonant principles, which change has scattered over the earth, cry aloud for something more natural, more pure, and more calculated to promote the happiness of mankind . . . it must be granted that this experience is important, because it teaches the suffering nations . . . of the present day, in what manner to prepare their combustible ingredients, and humanists in what manner to enkindle them, so as to produce with effect that grand political explosion, which at the same time that it buries despotism, already convulsive and agonizing, in ruins, may raise up the people to the dignity and sublime grandeur of freedom . . . Citizens . . . Go on, as you hitherto have done, in the culture of reason. Disseminate throughout the whole of your country, that knowledge which is so necessary to man’s happiness, and which you have yourselves acquired. Teach your children, and your countrymen, the sacred lessons of virtue, which are the foundations of all human polity. Teach them to respect themselves, and to love their country. Teach them to do unto all men, as they would that they should do unto them, and their love shall not be confined to their country, but shall extend to the whole human race. When such a revolution of sentiment shall have dispersed the mists of prejudice; when by the incessant thunderings from the press, the meanest cottager of our country . . . shall be enlightened and the sun of reason shall shine in its fullest meridian over us . . . then the commanding voice of the whole people . . . shall recommend the five hundred and fifty-eight gentlemen in Saint Stephen’s chapel . . . to go about their business.

*Trial of Henry Redhead, supra* note 123, at 1006–07, 1017, 1030.

128. *Id.* at 1073.



dangerous attempts that have been made, both from within and without, to undermine the government of the country, to spread disaffection and discontent among the minds of his majesty's subject, and particularly to draw into the disrespect of his majesty's subjects . . . the Commons House of Parliament.<sup>129</sup>

Law then went on to characterize the challenge presented by Yorke, and others like him, in ominous terms, appealing to the jury:

Gentlemen, you are aware, no doubt, of the industrious and mischievous pains that have been taken to circulate discontent respecting that branch of the legislature; to poison the minds of his majesty's subjects respecting it; to induce them to believe that their representatives, instead of being induced by motives of duty, are instigated by the sordid motives of gain and advantage; and that every thing like an attention to public duty is wholly extinct in that body . . . much pains have been taken to make us hold in disrespect that wholesome system of laws, and that beneficial arrangement of political and civil government, under which this country has long existed in a greater degree of happiness, both civil and religious, than any other country upon the face of the globe.<sup>130</sup>

In other words, it was deemed seditious in and of itself to suggest that the current structure of governance was problematic—and especially to suggest that some in the government might be driven by “sordid” motives.

Echoing Mainwaring's suggestion in Briellat's case, itself part of a longer tradition of approaches to freedom of opinion in Britain,<sup>131</sup> the prosecution did not rest their case on the contention that it was a problem for Yorke to hold such views. Rather, the problem was that Yorke had deemed it appropriate to share his objectionable views with others. In the first place, it was already troubling, from the authorities' point of view, to summon an assembly for the purpose of discussing “a public object”—as Law put it,

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129. *Id.* at 1012–13.

130. *Id.* at 1013.

131. As Blackstone had put it,

The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

BLACKSTONE, *supra* note 20, at 151–52.

[The organizers] . . . called themselves A Meeting of the Friends of Justice, Liberty, and Humanity . . . [they] convened [their assembly] by an advertisement in the Sheffield Register . . . It beg[an] . . . ‘Public meeting in the open air;’ and the very manner of convening [the assembly], indicate[d] an intention of disturbance. The convening a multitude, which no private house could afford room for, shows that intention; and particularly when they were convened respecting a public object . . .<sup>132</sup>

What was equally troubling—echoing statements made in the trials of Muir and Palmer, as well as the reaction against the second part of Paine’s *The Rights of Man*—was the fact that Yorke and the others had not been speaking to educated elites, but rather to commoners. In order to emphasize how dangerous this was, Law suggested those who had assembled were of lesser intelligence and perceptivity in various ways, characterizing Yorke’s audience as “unwary” and “ignorant,” and going on to state:

There can be nothing more mischievous than calling persons together to hear inflammatory harangues; and when people have not leisure to consider the subject, [the speakers] may carry the unwary to measures very dangerous to the public quiet, which if they had not been so acted upon, they would certainly never have thought of.<sup>133</sup>

Yorke’s defense was a bold and risky one, from a personal perspective, insofar as it in effect was arguing for the substantive validity and merit of the claims that had gotten him in trouble in the first place. At times, this led the trial to resemble a debate on political theory. Among other things, Yorke used his defense to argue for his view of rights. Law had previously observed, relative to Yorke’s invocation of “the original rights of human nature”:

What that means I am at a loss to conceive; the right of human nature before man enters into political society, is the right of the savage to wander about in the woods; and when he enters into society, he surrenders up his rights, as the purchase he pays for that beneficial protection which he derives from the laws of society . . .<sup>134</sup>

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132. *Trial of Henry Redhead*, *supra* note 123, at 1015. In response, Yorke argued, “To arraign the legality of the meeting—to say that men may not meet together, to consider their rights, or discuss subjects tending to their future benefit, is, to deny the principles of the British constitution.” *Id.* at 1067.

133. *Id.* at 1016.

134. *Id.* at 1018.

Not only was Yorke's view wrong, it was also deeply dangerous from Law's point of view; he suggested it embodied "that kind of spirit which, if it was permitted to increase, no political government of any description could possibly subsist under . . ." <sup>135</sup> In response, Yorke argued,

I deny this position. The rights of man before he enters society, are not known; for I believe there never existed a being not an associated one. To deduce, therefore, any metaphysical reasoning from that point, would be a mere chimera, because every analogy from human nature must be founded upon man as he is . . . it is said that man surrenders his rights. Does he surrender the rights of liberty and property? He only delegates the use of his faculties to the government for the purpose of public convenience . . .

The theory broached, that men surrender their natural rights by their entrance into society, is both futile and false. The natural rights of men do not even suffer a diminution by their becoming social members . . . [arguments for the alternative position] tend to legitimize tyranny, to support usurpation by sophistry, and to varnish despotism by illusion. <sup>136</sup>

In other words, Yorke asserted a social, politically-sensitive, and activist view of rights, against Law's constrained and limited vision.

Yorke's use of his defense to advance his principles placed the presiding judge, Rooke, in a difficult position. At one point, Rooke intervened to cut Yorke off, declaring,

Mr. Yorke, I mean to direct the jury, that every man has a right to discuss political subjects; but as to discussion here, I shall not suffer it . . . It is every man's rights, but he must take care so to express himself as not to excite discontent and disaffection. If a man expresses his political sentiments, it is for the jury to say with what intention he does it; they are not to discuss the metaphysical sentiments, but the intention . . . There is no doubt as to the great question; very honest men entertain different opinions upon the subject; the only difficulty is for every man so to maintain his sentiments, so as not to violate the public peace, and the question is, not whether you have maintained a false proposition; the question is, whether, when you find fault with imperfections, your speech has been such as tends to

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135. *Id.*

136. *Id.* at 1071.

peace and order: that every man has a right to discuss political subjects, I certainly agree . . .

Parliamentary reform has called forth a great deal of discussion . . . honest men may employ means whereby th[e] constitution may be ameliorated: but the question is, whether they have kept within the line; if they have made use of improper occasions, or language that is intemperate, they are amenable to the laws of their country: on the contrary, if in moderate language, and on proper occasions, then what they say is perfectly innocent.<sup>137</sup>

While this intervention may have motivated the judge's concern to prevent the trial from becoming a political debate, it served to support both the broader stand Yorke was taking, and his position in the trial itself. Following it he was able to declare:

Gentlemen, I conceive as his lordship has just now laid it down, that provided a man confined himself to the strict rule of decency and public order, he has a right in this country to give his opinions upon any specific plan of government, I conceive also, that he has a right, provided his speeches have not a tendency to disturb the peace or tranquility of the country, to advance any principles that shall ameliorate the social order.<sup>138</sup>

In short, Yorke underlined the fact that his speech had not, in fact, led to any clear form of public disorder—the speech and the assembly passing without such incident. From there, Yorke went on to even greater rhetorical heights, emphasizing the importance of open debate to all those concerned with the truth, as well as to the well-being of society generally.<sup>139</sup> He also emphasized the importance of the “art of printing” in particular, observing:

when the art of printing was invented, the mind commenced a revolt against error, and the heart became a rebellion against oppression; men became gradually better informed, and science enlarged her circuit; the principles of government were investigated, and its legitimacy was ascribed, not to a commission from heaven, a *jure divino* right, but to its fitness to promote and ensure the peace and happiness of society.<sup>140</sup>

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137. *Id.* at 1078–79, 1083. As Yorke would observe, in other words, the difference drawn was that between being a “reformer”—which would be accepted—and a “revolutionist”—which would violate the law.

138. *Id.* at 1081.

139. *See id.* at 1084–91.

140. *Id.* at 1089.

However, the threat to “peace and order” the government was concerned with was not a concrete one but was rather the more intangible threat they felt whenever the current government was criticized publicly. The jury was sympathetic to the government: Yorke was ultimately declared guilty, sentenced to two years imprisonment, to pay a fine of £200, and to provide a security for his ongoing good behavior.<sup>141</sup> After his release in March 1798, Yorke sharply attenuated his political position, largely constraining his public involvement to writings in favor of the war policies of Pitt’s government.<sup>142</sup> While the outcome of the case was hence largely a success, from the government’s point of view, the contentious nature of the proceedings themselves provided one more illustration of the uncertainties, occasions for dissent, and opportunities for the promotion of progressive causes offered by attempts to advance political suppression through open trials.

## V. TURNING TO NEW LEGISLATION

### A. *The Gagging Acts*

While the treason trials may not have secured convictions, this by no means meant the defendants had not suffered any consequences. All the defendants had been detained, suffering significant financial, medical and psychological harm. Furthermore, just because they had escaped the worst on the occasion did not mean they would be so lucky in the future. The treason trials formed only a small part of the authorities’ broader efforts. In the years following the 1792 proclamation calling on

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141. *Id.* at 1003, 1154.

Gentlemen, in cases of conspiracy . . . you cannot expect to bring persons who were present at the immediate meeting where the parties immediately confer and communicate upon their designs, and where originates the purpose stated upon the record as the conspiracy . . . but you are obliged, as in all other cases, to infer the purpose from the act, and where you find a number of persons acting apparently in concert, whose acts tend to one common end and object, and that common end and object of their united actings is an unlawful and mischievous purpose, you infer from that community of action a unity of design, and if you find them acting jointly, or acting separately, with an intention of effecting an unlawful purpose, the law denominates that a conspiracy, which by their acting they are endeavouring to promote . . .

*Id.* at 1013–14 (later reception of the case was skeptical.); see e.g., JOHN SIMPSON ARMSTRONG & EDWARD SHIRLEY TREVOR, A REPORT OF THE PROCEEDINGS ON AN INDICTMENT FOR CONSPIRACY, IN THE CASE OF THE QUEEN V. DANIEL O’CONNELL AND OTHERS, IN MICHAELMAS TERM, 1843, AND HILARY TERM, 1844, at 411 (1844) (“That case of Yorke, so far as I can learn, never had been brought into precedent, and I do not think any lawyer reading the report can say it was a constitutional or proper conviction.”).

142. For more, see JOHN GOLDWORTH ALGER, *Henry Redhead Yorke*, in DICTIONARY OF NATIONAL BIOGRAPHY, 1885-1900, Vol. 63.

magistrates to more forcefully prosecute sedition, more than a hundred such prosecutions took place.<sup>143</sup> In addition, the corresponding societies were infiltrated by spies who would report to the government on the societies' activities,<sup>144</sup> as well as by *agents provocateurs* who attempted to push the societies towards more radical, and hence more readily prosecutable, actions. Besides these tactics, the government seized the mail of suspected dissidents, supported groups which disrupted radical events (such as Reeves' Association) and writers who would attack radicals in the press, and threatened to revoke the licenses of those who hosted political debates or printed or distributed reformist literature.<sup>145</sup> As one progressive publication put it, the government's approach involved "the institution of a system of terror, almost as hideous in its features, almost as gigantic in its statute, and infinitely more pernicious in its tendency, than France ever knew."<sup>146</sup>

Nonetheless, the result of the treason trials forced the authorities onto the back foot for a moment at least. Perhaps recognizing it was hard to justify in the circumstances, the Habeas Corpus Suspension Act was allowed to expire in June 1795. No sooner had the Act been allowed to expire than severe food shortages broke out, leading to widespread protests.<sup>147</sup> Later the same year, in October, King George III's carriage was stoned by angry protestors as he made his way to parliament.<sup>148</sup> Whatever the circumstances behind this attack, it provided the

143. See TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xiii, xiv.

144. See, e.g., UK NAT'L ARCHIVES, REPORT ON RADICAL AND REFORM SOCIETIES, HLRO MAIN PAPERS (May 19, 1794).

145. See PAUL KEEN, THE CRISIS OF LITERATURE IN THE 1790S: PRINT CULTURE AND THE PUBLIC SPHERE 54 (1999); see also Mary Thale, *London Debating Societies in the 1790s*, 32 HIST. J. 57, 63 (1989).

146. THE CABINET (The Journal of the Tusculan Debating Society in Norwich), *cited in* C.B. JEWSON, THE JACOBIAN CITY: A PORTRAIT OF NORWICH IN ITS REACTION TO THE FRENCH REVOLUTION, 1788-1802, at 58 (1975). Meanwhile, the prominent Whig politician Charles Fox similarly emphasized a parallel between "the Jacobins of France and the Crown Party here"; William Godwin described "terror" as "the order of the day"; and John Gale Jones referred to Pitt as "the English Robespierre." See MEMORIALS AND CORRESPONDENCE OF CHARLES JAMES FOX (Lord John Russell ed., 1854) *cited in* Emsley, *supra* note 76, at 155 (1981).

147. In addition to bad weather, food security was negatively affected by the recent Enclosure Acts, which deprived many of access to land they had previously relied upon. For more on the unrest of the period, see Derek Benson, *The Tewkesbury Bread Riot of 1795*, 22 TEWKESBURY HIST. SOC'Y BULL. 2 (2013). Burke's response to the famine was to blame the poor, urging that "Patience, labour, sobriety, frugality and religion, should be recommend to [the poor]; all the rest is downright fraud." *Quoted in* THOMPSON, *supra* note 47, at 56. The government deployed the newly formed yeomanry to suppress the protests, a task at which it proved fairly effective.

148. For a piece highlighting the contemporary resonances of that action, see David Francis Taylor, *An Attack on the Royal Carriage by Angry Protestors. Sound familiar?*, GUARDIAN (Dec.

government with a powerful pretext on the basis of which to launch a new repressive strategy. Shortly after the stone-throwing, the authorities went into action.<sup>149</sup> First, the King issued a decree, which called on “all justices of the peace, sheriffs, mayors, bailiffs, constables, and all other our loving subjects throughout the kingdom, to use the utmost diligence to discourage, prevent, and suppress all seditious and unlawful assemblies,” and further called on all subjects to inform magistrates whenever they suspected an assembly might be held.<sup>150</sup> Shortly thereafter, the government passed a pair of forceful new laws that would come to be known as the “Gagging Acts.”<sup>151</sup>

The first was the Treasonable and Seditious Practices Act.<sup>152</sup> The justification of this Act was not only based on the recent “daring Outrages offered to your Majesty’s most sacred Person,” but also on

continued attempts of wicked and evil disposed Persons to disturb the Tranquility of this your Majesty’s Kingdom, particularly by the Multitude of seditious Pamphlets and Speeches daily printed, published, and dispersed, with unremitting industry, and with a transcendent Boldness, in Contempt of your Majesty’s Royal Person and Dignity, and tending to the overthrow of the Laws, Government, and happy Constitution of these Realms . . . .<sup>153</sup>

While the government claimed it was simply a “declaratory act,” that is, one which restated and clarified existing law, the Act extended the scope of treason substantially, and was intended to ensure that prosecu-

14. 2010), <https://www.theguardian.com/commentisfree/2010/dec/14/attack-royal-carriage-protectors-1795>.

149. The more forceful steps the authorities took were preceded by calls in the popular press for them to pursue such measures; it, however, appears likely that those calls themselves were produced by the government as part of a broader campaign aimed at generating public support for the measures. See BARRELL, *supra* note 73, at 569–71.

150. KING GEORGE III, THE KING’S PROCLAMATIONS RESPECTING SEDITIOUS MEETINGS (Nov. 4, 1795), *reprinted in* 32 THE PARLIAMENTARY HISTORY OF ENGLAND 242 (William Cobbet & T.C. Hansard 1818) [hereinafter THE KING’S PROCLAMATIONS]. In response, one prominent parliamentarian observed, “Behold, then, the state of a free born Englishman! Before he can discuss any topic which involves his liberty, he must send to a magistrate who is to attend the discussion.” Parliamentary History xxxii, 281 (Nov. 10, 1795), *cited in* VOGLER, *supra* note 48, at 20.

151. Organized efforts were undertaken to prevent passage of the bills, including several forceful statements by Whig politicians and a mass demonstration at Copenhagen Fields, organized by the Whig Club and the London Corresponding Society. These oppositional efforts failed, however. See THOMIS & HOLT, *supra* note 37, at 15–16.

152. Treason Act 1795, 36 Geo. 3 c. 7 (In full, “An Act for the Safety and Preservation of His Majesty’s Person and Government against treasonable and seditious Practices and Attempts.”).

153. *Id.* § 1.

tions such as those of Hardy, Tooke and Thelwall would be successful in the future. Notably, it did this by converting acts that would previously only have classified as potential forms of evidence of intent of treason into acts of treason in their own right—a crucial distinction, insofar as it placed the relevant decisional authority in the hands of the judicial authorities, rather than the jury.<sup>154</sup> Specifically, the Act extended the law of treason to cover not only anyone who by speech or writing “compass[ed], imagine[d], invent[ed], devise[d], or intend[ed]” the death, bodily harm, deposition, or war against the king, but also anyone who sought to pressure him into changing his “Measures or Counsels,” or to “intimidate, or overawe” Parliament.<sup>155</sup> In the same fashion, the Act punished as a high misdemeanor “maliciously and advisedly . . . express[ing], publish[ing], utter[ing], or declar[ing], any Words or Sentences to excite or stir up the People to hatred or Contempt of the Person of his Majesty, his Heirs or Successors, or the Government and Constitution of this Realm.”<sup>156</sup>

The second Gagging Act was the Seditious Meetings Act,<sup>157</sup> which required that a notification be submitted to a magistrate well in advance for any public meetings of fifty persons or more, convened for the “considering of or preparing any Petition, Complaint, Remonstrance, or Declaration, or other Address to the King” or Parliament.<sup>158</sup> Should it be determined that the meeting was for the purpose of altering “any Matter or Thing by Law established . . . otherwise than by the Authority of the King, Lords, and Commons,” or that it might “tend to incite or stir up the People to Hatred or Contempt of the Person of His Majesty, his Heirs of Successors, or of the Government and Constitution of the Realm,” then the justices could order that the meeting be dispersed, with any who remained guilty of a capital offense.<sup>159</sup> The Act also included a preemptive indemnity for magistrates should anyone be hurt in the process of dispersing an assembly.<sup>160</sup>

Very few persons were tried directly under the Gagging Acts.<sup>161</sup> John Binns and John Gale Jones were arrested under the Seditious

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154. See BARRELL, *supra* note 73, at 576–77; TRIALS FOR THE TREASON AND SEDITION, *supra* note 21, at xxv.

155. 36 Geo. 3 c. 7, § 1.

156. *Id.* § 2.

157. Seditious Meetings Act 1795, 36 Geo. 3 c. 8.

158. *Id.* § 1.

159. *Id.* § 6.

160. *Id.* § 9.

161. See Emsley, *supra* note 76, at 156–57.



Meetings Act, on the basis of a meeting they organized in Birmingham in 1796, but the grand jury refused to indict them.<sup>162</sup> The Seditious Meetings Act did have a direct effect through its passage alone, however. Following its promulgation, the London Corresponding Society reorganized the way it conducted its gatherings, to ensure that no more than forty-nine persons would be at any regular meeting.<sup>163</sup>

While the new acts were little used, trials continued to be brought for the preexisting common law offences of treason and seditious libel. Six men were tried for treason in the late 1790s. While five were acquitted, the sixth, the Reverend James Coigley, was found guilty and executed.<sup>164</sup> Sedition trials also continued apace, with the majority of those brought to court convicted,<sup>165</sup> while many more were required to apologize and were bound over.<sup>166</sup> Above and beyond adverse judgments, the legal costs defendants accrued, the psychological burdens imposed on them, and the harm inflicted on their businesses by the process, all took a steep toll.<sup>167</sup> Beyond their immediate effects, the ongoing prosecutions, combined with the new legislation, cast a wide shadow. That shadow was further extended by the authorities' use of a variety of less legalized accompanying measures, such as threats to proprietors if they hosted meetings of the corresponding societies or other progressives, the breaking up of meetings,<sup>168</sup> the development of a network of spies and *agents provocateurs*, and more broadly "the unofficial terror of beatings, inquisitions, sackings and ostracism."<sup>169</sup>

One silver lining could be found in this dark picture. Perhaps ironically, but understandably given the stakes, treason trials proved to be a site in which the due process rights of defendants were given enhanced attention. By the 1790s, defendants in treason trials were likely to be de-

162. See Emsley, *supra* note 18, at 813. Jones was later found guilty of the preexisting crime of seditious libel, but not sentenced.

163. *Id.* at 812.

164. See GOODWIN, *supra* note 44 at 323–24, 448.

165. See Emsley, *supra* note 76, at 172.

166. See *id.* at 174. "Binding over" refers to a process by which a magistrate requires an individual to conduct themselves in a certain manner, typically on pain of a financial penalty.

167. After being convicted of seditious libel, George Harley Vaughan, for instance, lost his job at a grammar school, failed in his subsequent attempts to start his own business, and committed suicide. *Id.* at 173.

168. For example, on July 31, 1797, a London Corresponding Society meeting at St. Pancras was broken up by magistrates, who read the riot act and arrested the meeting's leaders but did not press charges. Those detained sued for wrongful arrest; their suit was dismissed on procedural grounds, however. *Id.* at 138.

169. Emsley, *supra* note 18, at 802.

fended by an advocate or a team of advocates, a privilege the vast majority of the criminally accused in England did not enjoy. Persons charged with treason and their legal teams had to be given a copy of their indictments and a list of the jurors and witnesses the prosecution intended to summon, ten days before the trial. The defense team could then challenge the selection of any member of the jury, should they be able to show cause, and could make thirty-five challenges without providing any explicit justification at all. While the defense was still sharply limited in numerous ways,<sup>170</sup> these represented significant steps in the context of the times.<sup>171</sup>

### B. A Burst of New Targeted Repressive Legislation

Thanks to the extensive pressure they were under and the Gagging Acts in particular, by 1797 the corresponding societies were on the decline. Despite this, the authorities did not diminish their efforts; if anything, they built on their successes, complementing the Gagging Acts with a variety of new repressive legislative measures.

The government's first step along these lines was inspired by a new sort of threat. In April and May 1797, mutinies, motivated by a desire for better working conditions, took place at Spithead, near Portsmouth, and Nore in the Thames Estuary. Both mutinies lasted approximately a month before being suppressed.<sup>172</sup> Following the mutinies, the government passed an act imposing the death penalty as a punishment for any act that might be construed as encouraging mutiny.<sup>173</sup>

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170. The defense was given no advance notice of prosecution arguments, and hence had little chance to challenge the admissibility of evidence. In addition, the defense could not subpoena witnesses, and thus had to rely heavily upon their own rhetorical abilities and legal argumentation, rather than on mounting factual defenses. In accordance with longstanding practice, moreover, defendants could not give evidence on their own behalf—a limitation that would last until 1898. On top of these formal limitations, the prosecution did its best to game the system, placing numerous additional names on the lists of witnesses they would turn over to defense counsel, for instance. See TRIALS FOR TREASON AND SEDITION, *supra* note 21, at xlv-xlvii.

171. *See id.*

172. On those mutinies and their broader context, *see* CONRAD GILL, THE NAVAL MUTINIES OF 1797 (Ann Veronica Coats & Phil MacDougall eds., Cambridge University Press 2013) (1913); THOMPSON, *supra* note 47, at 108; MARCUS REDIKER, BETWEEN THE DEVIL AND THE DEEP BLUE SEA (1987); Niklas Frykman, *Connections Between Mutinies in European Navies*, 58 INT'L REV. SOC. HIST. 87 (2013).

173. Incitement to Mutiny Act 1797, 37 Geo. 3 c. 70 (In full, “An Act for the better Prevention and Punishments of Attempts to seduce Persons serving in His Majesty’s Forces by Sea or Land from their Duty and Allegiance to His Majesty, or to incite them to Mutiny or Disobedience.”).

Later in 1797, the government passed the Unlawful Oaths Act.<sup>174</sup> The Act was motivated both by the mutinies and the extension of the United Irishmen into Britain and Scotland.<sup>175</sup> The Act penalized “the administering or taking of any Oath or Engagement, purporting or intending to bind the Person taking the same to engage in any mutinous or seditious Purpose; or to disturb the Public Peace.”<sup>176</sup> In the years after its passage, the Act was used to sentence approximately half a dozen men to transportation for administering oaths.<sup>177</sup> That same year, the government also attempted a more subtle repressive measure by increasing the taxes imposed on printed materials, with the aim of pricing cheap publications out of the market.<sup>178</sup>

The year of 1798 saw the institution of further repressive measures.<sup>179</sup> *Habeas corpus* was once again suspended,<sup>180</sup> a suspension that was to last until 1801.<sup>181</sup> Later in the year, the government attempted to further tighten its repression of the press through the Newspaper Publication Act.<sup>182</sup> The law stipulated that its aim was to prevent the circulation of “matters tending to excite hatred and contempt of the persons of His Majesty and of the Constitution,” which it found to be “frequently published in newspapers or other papers under colour of having been copied from foreign or other papers of a like nature.”<sup>183</sup> Anyone found publishing such material could be imprisoned for a year. In addition, the Act required that all papers be registered, and that the names and addresses of printers and publishers be placed on every paper.<sup>184</sup>

The Gagging Acts and associated measures were largely effective in suppressing the work of the corresponding societies. The final nail in

174. Unlawful Oaths Act 1797, 37 Geo. 3 c. 123.

175. Emsley, *supra* note 18, at 815–16.

176. 37 Geo 3 c. 70.

177. Emsley, *supra* note 18, at 816.

178. Stamp Duties on Customary Estates Act 1712, 10 Ann., c. 19.

179. In addition to the legislative developments discussed below, 1798 also saw the creation of a new police force in the capital; the Thames Police. The force was initially funded by a small investment from West Indian merchants, and supported by Patrick Colquhoun, a local magistrate, and Jeremy Bentham. The statute establishing the force officially was the Depredations on the Thames Act, 39 & 40 Geo. 3 c. 87. Dick Paterson, *Thames Police: History- Origins*, THAMES POLICE MUSEUM, [http://www.thamespolice museum.org.uk/h\\_police\\_1.html](http://www.thamespolice museum.org.uk/h_police_1.html) (last visited Oct. 9, 2019). In 1800, the Marine Police Bill converted the force from a private to public agency.

180. Habeas Corpus Suspension Act 1798, 38 Geo. 3 c. 36.

181. 39 Geo. 3 c. 15; 39 Geo. 3 c. 44; 39 & 40 Geo. 3 c. 20; 41 Geo. 3 c. 32.; 41 Geo. 3 c. 26.

182. Newspaper Publication Act 1798, 38 Geo. 3 c. 78.

183. *Id.*

184. See Emsley, *supra* note 18, at 821.

their coffin came with the 1799 Unlawful Societies Act.<sup>185</sup> The passage of the Act followed a report from another secret government committee on March 15<sup>th</sup>.<sup>186</sup> The secret committee reported that it had found “the clearest proofs of a systematic design, long since adopted and acted upon by France, in conjunction with domestic traitor . . . to overturn the laws, constitution and government,” and that this plan had been advanced by “the institution of political societies . . . inconsistent with public tranquility, and with the existence of regular government.”<sup>187</sup> George Tierney, the leader of the Foxite Whig opposition, criticized the report, suggesting that “a report less supported by evidence, I believe, was never made to this House,” and further criticized the measure in question, which he found completely unnecessary given the extent of the government’s already existing powers.<sup>188</sup> The opposition, however, was insufficient, and the measure passed. In addition to targeting the London Corresponding Society, the 1799 Act also outlawed by name the United Irishmen, the United Scotsmen, and the United Englishmen,<sup>189</sup> as well as all other corresponding societies, and any other societies utilizing unlawful oaths or secret membership. Moreover, the Act combined the language of public order with that of morality by requiring that those places “used for delivering Lectures or Discourses, and holding Debate . . . of a seditious and immoral Nature; and other Places [that] have of late been used for seditious and immoral Purposes, under the Pretence of being Places of Meeting for the Purpose of reading Books, Pamphlets, Newspapers, or other Publications,” as well as every “House, Room, Field, or other Place, at or in which any Lecture or Discourse shall be publicly delivered . . . for the Purpose of raising or collecting Money” should be “deemed a disorderly House or Place.”<sup>190</sup> Should persons desire to present lectures or readings lawfully, the Act

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185. Unlawful Societies Act 1799, 39 Geo. 3 c. 79 (In full, “An act for the more effectual suppression of societies established for seditious and treasonable purposes, and for better preventing treasonable and seditious practices.” Also known as the “Corresponding Societies Act” and the “Combination and Confederacy Act.”).

186. See 34 T. C. Hansard, *THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 579–656, 988–92 (1819).

187. *Id.* at 579–80.

188. *Id.* at 988–92.

189. 39 Geo. 3 c. 79. The United Scotsmen initially aimed to push for universal suffrage and annually elected parliaments, before it became radicalized and organized a rebellion in 1797, which was quickly suppressed. The United Englishmen, which never reached the size of the United Scotsmen, had similar aims. For more, see Michael Davis, *United Englishmen/United Britons*, in 7 *INTERNATIONAL ENCYCLOPEDIA OF REVOLUTION AND PROTEST: 1550 TO THE PRESENT* 3390 (2009).

190. 39 Geo. 3 c. 79, § 15.

required that they obtain a license in advance.<sup>191</sup> Finally, the law required printers—other than newspapers, already governed by the Newspaper Publication Act—to register with the authorities and to print their name and address on every publication.<sup>192</sup>

Royal assent for the Act banning the corresponding societies came at the same time as royal assent for the 1799 Combination Act,<sup>193</sup> which effectively made trade unions illegal.<sup>194</sup> The coterminous passage of the bills was a clear sign that the authorities saw political dissent and labor organization as two sides of the same coin.<sup>195</sup> The 1799 Act was complemented and reinforced by another Combination Act passed the following year.<sup>196</sup> That act declared that “all contracts, covenants and agreements” previously made, with the purpose of improving wages, reducing working hours, for reducing the quantity of work, or for restricting who employers might employ, would be “illegal, null and void”;<sup>197</sup> made entering into agreements for such purposes a crime;<sup>198</sup> made entering into “any combination” with the purpose of securing such ends or attempting to influence the actions of any other worker or employer a crime;<sup>199</sup> and made attending trade union meetings a

191. *Id.* at § 18.

192. *Id.*, §§ 23, 27. As said in the Act, these measures were justified because the various corresponding societies had

at various times caused to be published in great quantities divers Printed Papers of an irreligious, treasonable and seditious nature . . . and such Societies have dispersed such Printed Papers among the lower classes of the Community, either gratis or at very low prices, and with an activity and profusion beyond all former example.

193. Unlawful Combinations of Workmen Act 1799, 39 Geo. 3 c. 81.

194. *Id.* § 23, 27 As Thompson notes, this is not to say trade unions had previously been legal—there were a variety of existing laws under which unions might have been prosecuted, for instance as common law conspiracies, or breaches of contract. The 1799 and 1800 acts provided a simplified and more direct means of conducting such prosecutions, together with a faster and more secure procedural route by allowing two magistrates to decide on prosecutions under the acts through a summary judgment procedure. *See* THOMPSON, *supra* note 47, at 504.

195. *See* Thompson, *supra* note 47, at 504. Testifying to a similar point, in the course of an action against boot and shoe-makers in London in 1804, Spencer Perceval, the Attorney-General, observed:

The system seems to be established upon the plan acted upon by the Corresponding Society and other United Societies, which have been formed to act with such mischievous concert in England, Scotland and Ireland, upon political points which were the object of their union; and there appears to be no doubt that the plan of the present combination is capable of being applied in support of any object to which they may be disposed to direct it.

*Cited in* ASPINALL, *supra* note 39, at 90-92.

196. Unlawful Combinations of Workmen Act 1800, 39 & 40 Geo. 3 c. 106.

197. *Id.*, § 1.

198. *See id.*, § 2.

199. *See id.*, § 3.

crime.<sup>200</sup> The Act also gave the authorities the power to force the court attendance of witnesses and to compel testimony.<sup>201</sup>

In 1801, the authorities finally determined that the period of emergency had ended and allowed the suspension of *habeas corpus* to lapse.<sup>202</sup> At the same time, they passed the Indemnity Act to make sure those who had been involved in administering detentions would be protected.<sup>203</sup> The Indemnity Act was justified in part based on the need to prevent the disclosure of the secret means through which the authorities had fought the insurrection. At its heart, it stipulated that

all [past and future] personal actions, suits, indictments, informations, and prosecution . . . and all judgments thereupon obtained, if any such there be, and all proceedings whatsoever, against any person or persons, for or on account of any act, matter, or thing by him or them done for apprehending, imprisoning, or detaining in custody any person charged with or suspected of high treason or treasonable practices, shall be discharged and made void . . .<sup>204</sup>

The period of unrest was largely over; it was time to restore the “regular” order of things, including by releasing any authorities who might have acted with excessive firmness from liability for what, from the government’s point of view, were measures only called for by the exceptional nature of the times.

## VI. CONCLUSION

The 1790s were a tempestuous time in Britain. The decade saw extensive pressure towards the creation of a more democratic system, driven by a sizable collection of individuals committed to progressive political reform. Rather than adopting this position and attempting to create a more representative system, those in power chose the path of repression. Yet the strength of the opposition made the task of repression more challenging, and it was only thanks to persistent determina-

200. *See id.*, § 4.

201. *See id.*, §§ 9-10, 18. In addition, the Act provided for the appointment of arbitrators, relative to worker-master disputes.

202. While the government’s approach closed immediate avenues for reform, the force of their suppression helped to encourage new forms of resistance. For Thompson, the Combination Acts “jolted the Jacobins and trade unionists into a widespread secret combination, half political, half industrial.” THOMPSON, *supra* note 47, at 500; *see also* Iain McCalman, *Ultra-Radicalism and Convivial Debating-Clubs in London, 1795-1838*, 102 *ENG. HIST. REV.* 309 (1987).

203. Indemnity Act 1801, 41 *Geo.* 3 c. 66. For more, see HALLIDAY, *supra* note 101, at 254–55.

204. *Id.*

tion that the government was finally able to subdue resistance—at least for a time.

What broader lessons can we take away from the way repressive governance evolved in the period? First, it is worth observing how organic its evolution was. Instead of unfolding as part of some well-thought-out plan, the British government's approach was highly reactive and experimental, with the suppressive measures that were adopted largely determined by the sorts of oppositional activity they were targeting or the challenges the government faced in implementing a particular strategy. Far from a weakness, this approach appears to have been a strength of the regime, which proved able to adapt to its losses and to fashion more effective means of repression over time.

While the overall flexibility of the government's response may have been a strength, not all of its strategies were as effective as it might have hoped. In general, the government's strategy of pursuing an aggressive policy of prosecutions did more to suppress dissent than it did to empower the opposition. At the same time, pursuing repression through the courts carried several drawbacks. In the first place, the results of trials were not guaranteed, thanks to juries' ability to defy expectations. Furthermore, public trials offered a forum through which radicals might present their broader political arguments and draw attention to their cause—as amply demonstrated by the way several trial defenses were later published as popular pamphlets. Even when individual radicals were convicted, setting repressive precedents, the punishments inflicted on them helped play into dissidents' message, reminding the broader population of the repressive, unrepresentative nature of the government.

It is also helpful to contemplate what it was that made the government's repression so effective. Ultimately, the authorities' efforts relied upon developments in four different areas. First, as we have seen, a variety of new institutions were constructed in the 1780s and 1790s, including the Home Department, the new London magistrates' offices (established by the Middlesex Justices Act), and the yeomanry. These new institutions enhanced the authorities' ability to project their will and correspondingly, their ability to combat unrest. Second, while prosecutions may not have been the government's most ideal means of repression, the extensive campaign of prosecutions the authorities embarked upon still exerted significant pressure on radical activists and organizations. Third, more informal avenues of repression, including the development of a network of spies and *agents provocateurs*, the exertion of substantial pressure on the owners of premises where assemblies might

be held, and the creation of loyalist organizations such as Reeves' Association complemented repression through the courts. Fourth, the final pillar of the government's approach was provided by the development of a raft of new repressive legislative measures, which, even when little were used in practice, helped to dissuade progressive advocacy by threatening harsh penalties against dissenters, thereby making any form of oppositional organizing all the more dangerous.

All of this suppressive activity enabled the development of a more reactionary polity. Earlier in the eighteenth century many elites were open to political reforms, and broadly preferred a less militarized, securitized and controlled society, due to fears that developments in those areas might restrict their freedoms as well. By the end of the century those attitudes had changed, however: support for parliamentary reforms was seen as radical in itself; the police, military, and paramilitary forces had all expanded dramatically;<sup>205</sup> and the central state had expanded its powers.

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205. As Randall has observed, earlier in the eighteenth century, elites preferred "to tolerate some degree of popular disorder," rather than

a state that, through an augmented domestic army or police, might seek to interfere in matters best left to local discretion . . . the threat of invasion from 1797 onwards . . . finally shattered the old [elite] attitude towards a large army. Thereafter the state itself enlisted troops wholesale from across the country . . . alongside regular regiments and enlarged militia were to be found yeomanry . . . volunteer fencible cavalry, loyalist associations, volunteer corps, volunteer infantry, and many other descriptions of citizens' armies. Almost none of these volunteer regiments existed before 1795, few before 1797 . . . by 1800 the presence of the military, in numbers and across a geography that in an earlier period would have seemed extraordinary, had come to seem so commonplace that the soldiery regularly filled the assembly rooms, and the pages of novels, as if part of the furniture.

By 1803, Linda Colley estimates, some 500,000 civilians 'were drawn into civil defence and given arms by the state'. This was, as she notes, a calculated risk. As we have seen, there were still residual fears of arming the poor. Yet by the end of the 1790s, supported by the press, the ministry had transformed the way in which the respectable classes viewed the question of public order and served to ensure that society as a whole had come to see the army as a boon and not as a curse. Pitt himself noted in 1803 that 'There was a time . . . when it would have been dangerous to entrust arms with a great proportion of the people of this country . . . but that time is now past.' A shared vision of a 'protesting people' had been transformed into one of patriotic citizens. The old consensus on the rights of the free-born Englishman to protest had been seriously eroded. The mood had become more sober, severe, and intolerant. It is, for example, impossible to imagine Pitt, or any of his successors, declaring, as Newcastle had done, his previous enjoyment in leading a mob or reminding the political class that that the state owed its existence to a mob.

RANDALL, *supra* note 16, at 322. The increasing strength of the military as an institution was complimented by the development of a new, more formalized, statutory military law, the independent force of which was upheld in what would become the well-known case of *Grant v.*



In addition to these lessons pertaining to the way repression evolved, the period presents valuable lessons relative to our understanding of the relationship between radical politics and human rights advocacy. Contrary to the suggestions often put forward by critical scholars today, rights advocacy during the period was closely aligned with radical political activity. Progressive defense lawyers, of whom Erskine was the paramount example, played an important role in supporting the radical movement. In the 1790s, the impact of their work was often limited to preventing the application of more severe penalties and forms of repression. Nevertheless, the impact of Erskine and other prominent defense lawyers was not limited to the 1790s alone. In the decades to come, his defenses would not only serve as an example of eloquence and of the art of pleading before a jury,<sup>206</sup> but also as a powerful articulation of the rationales in favor of granting broad scope to freedom of expression.

What the government of the time found so objectionable is worth bringing to the fore as well. While the government worked hard to present its suppressive efforts as motivated by threats to national security, public safety, the king's life, or the like, from an impartial perspective it is plainly the creation of a more representative, inclusive and egalitarian polity they hoped to suppress. In doing so, time and again the authorities emphasized that it was not simply the expression of an oppositional viewpoint that they found offensive and threatening, but rather the dissemination of that viewpoint to a broader public. Implicit in the authorities' vigorous punishment of attempts to politicize a broader public was their recognition that once mass popular engagement

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*Gould. Grant v. Gould* (1792), 126 Eng. Rep. 434 (HL) (appeal taken from Eng.). For more, see E.E. Steiner, *Separating the Soldier from the Citizen: Ideology and Criticism of Corporal Punishment in the British Armies, 1790-1815*, 8 SOC. HIST. 19, 19-35 (1983).

206. Thus, for instance, the Edinburgh Review would observe in 1810, of Erskine's defense in the case of Stockdale:

Whether we regard the wonderful skill with which the argument is conducted,—the soundness of the principles laid down, and their happy application to the case,—or the exquisite fancy with which they are embellished and illustrated,—and the powerful and touching language in which they are conveyed [Erskine's oration] is justly regarded by all English lawyers, as a consummate specimen of the art of addressing a jury;—as a standard, a sort of precedent for treating cases of libel, by keeping which in his eye, a man may hope to succeed in special pleading his client's case within its principle . . . by those merits, it is recommended to lovers of pure diction,—of copious and animated description,—of lively, picturesque, and fanciful illustration,—of all that constitutes, if we may so speak, the poetry of eloquence,—all for which we admire it, when prevented from enjoying its music and its statuary.

16 EDINBURGH REV. 108, as cited in 22 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 24, at 252-53.

had been achieved, institutional change would be likely to follow. In this context, both the opposition and the government recognized the close interrelationship between freedom of expression, access to information, the ability to assemble, and the ability to associate. The radicals fought hard in support of all such rights, while the authorities worked to systematically suppress them. In doing so, both sides set precedents—for rights struggles, and for the repressive measures taken against them—that continue to echo around the world.