



**SECURITY, FREEDOM OF SPEECH AND CRIMINAL JUSTICE IN THE AGE OF PITT,  
BURKE AND FOX**

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My subject this evening is the series of criminal trials for treason, seditious libel and other offences against the state held in Britain during the last decade of the 18<sup>th</sup> century. It is a subject which has been covered quite fully both by legal historians and by general historians and biographers.<sup>1</sup> But it is a subject of perennial interest, not least because of its relevance to contemporary debates about security, policing and freedom of speech. On the whole I shall leave you to draw your own conclusions about that.

Quite apart from the present-day relevance of the trials for treason and sedition, they occurred during an exceptionally interesting period of European (and indeed world) history. May I remind you very briefly of the historical context? In 1776 (as convenient a starting point as any) the American Declaration of Independence marked the beginning of the war which led, over the next seven years, to Britain's loss of its American colonies. In 1780 London was gripped by the Gordon Riots, the worst civil disturbance that the capital has ever experienced. The mob, spurred on by the slogan of "No popery," ravaged through London, pillaging and burning, for seven days in June. Newgate Prison was attacked and set on fire and about 300 prisoners were released (some of them narrowly escaped being burnt to death before they got out). Then the mob set fire to the house of the Lord Chief Justice, Lord Mansfield, in Bloomsbury Square, destroying his priceless law library and collection of manuscripts. Other public buildings (including the Bank of England, the Royal Mint and the Royal Arsenal, and three other prisons) were threatened. It was a week before the army restored order. Hundred of rioters were arrested and in due course 25 were hanged.

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<sup>1</sup> The series of State Trials (especially Vols. 21-24) are an important primary source; my secondary sources include Holdsworth, *History of English Law*, Vols. 10-13; Carless Davis, *The Age of Grey and Peel*; and for the wider background, Norman Davies, *Europe: A History*, Chapter 9. I am particularly indebted to John Barrell, *Imagining the King's Death* (OUP 2000), to which further reference is made below.

It is a matter of speculation whether a rather different turn of events in London in June 1780 might have led to the fall of Newgate being as momentous an event as the fall of the Bastille nine years later. But there can be no doubt that when the French Revolution did arrive, its impact on Britain was enormous. France had in 1782 entered the war in America in support of the colonists, and by 1789 the declarations of liberty and the rights of man resonating on both sides of the Atlantic were seen by many in Britain as an axis of violent revolution which threatened the British constitution. The disturbed mental state of King George III, and the regency crisis of 1788, increased political volatility. In retrospect, the main demands of the radical societies which sprang up in England and Scotland – widening of the parliamentary suffrage and the reform of the rotten boroughs – seem modest enough. But in the lurid light of the Terror which raged in Paris from 1793, followed by the emergence of the military genius of Napoleon Bonaparte, Britain had very real grounds for apprehension.<sup>2</sup>

William Pitt (who became Prime Minister in 1784) hoped to keep out of war with revolutionary France, but Britain was drawn into war in 1792. This war, waged by a series of fragile coalitions, went on more or less continuously until Waterloo. The theatre of war reached from Moscow to the West Indies and upper Canada. Most of the criminal trials that I am going to focus on took place in 1794. Britain was then in a state of war and (for some of the population) near-famine, and worse was yet to come: mutinies in the Royal Navy at the Nore and at Portsmouth in 1797 and armed rebellion in Ireland in 1798. Nelson's great victories at sea were not matched by successes on land. Trafalgar was followed within months by Napoleon's great victory at Austerlitz, which broke Pitt's heart. He died in 1806 at the age of 46.

In short, it was a period of high drama, enacted by some remarkable individuals. Our nation's affairs were being debated in the House of Commons – despite the obvious democratic deficit in the electorate – by some of the greatest parliamentarians in our history, including William Pitt, Edmund Burke and Charles James Fox. Relations between Burke and Fox, old friends and political allies, were irretrievably damaged by their differences over the French Revolution, and Burke was driven to make common cause with Pitt, despite their being politically and temperamentally incompatible.

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<sup>2</sup> Conor Cruise O'Brien has drawn attention to Burke's foresight in predicting, at a very early stage in the French Revolution, both its increasingly savage violence and the likelihood of its leading to military dictatorship: Edmund Burke (abbreviated edition, 1997) pp215-6.

Two others who in different ways played leading parts in the trials were Thomas Paine and Thomas Erskine. Tom Paine, a Quaker from Thetford in Norfolk, went to America in 1774 and became a leading figure there. In 1781, as Clerk to the Assembly of Pennsylvania, he went to Paris and successfully negotiated for assistance for the American insurgents. He became well known in France also; in 1790 Lafayette entrusted him with the key of the Bastille for carriage to America. In 1791 and 1792 he published his *Rights of Man*, partly in reply to Burke's *Reflections on the Revolution in France*. For this publication he was tried for treason and convicted in his absence, having fled to France. He spent the rest of his life in France or America. Despite his very strong radical views he argued, when in Paris, against the execution of King Louis XVI. The result was that Paine only just escaped the guillotine himself. His published works, though banned, were hugely influential among those who joined radical societies in England and Scotland.

Thomas Erskine is generally regarded as one of the greatest, and perhaps the very greatest advocate who ever practised at the English Bar. He defended Lord George Gordon, Tom Paine and others whom we shall come to. Erskine's sensational rise to fame, and his courageous and indefatigable eloquence, have been described so often that I shall not attempt to do so again. But on this annual celebration of the great man from whom this club takes its name, I may perhaps be permitted to recall that the paths of Thomas Erskine and Jeremy Bentham are known to have crossed at least once. It was at a period of their lives when Erskine was about to rocket to fame and fortune as an advocate, and Bentham was turning his genius to being a philosopher rather than a practitioner of the law.

Erskine was the son of a Scottish peer, but he was the younger son of an impoverished peer, and he had been sent to sea as a midshipman at the age of 14. At 18 he joined the army and educated himself while on garrison duty on Menorca. Bentham, by contrast, came from a prosperous background and was an infant prodigy. He went to Westminster School at the age of 7 and to Queen's College Oxford at 12. He was called to the bar by Lincoln's Inn in 1769, but became increasingly disenchanted with practice as a barrister. Meanwhile Erskine, disenchanted with the army, was called to the bar (also by Lincoln's Inn) in 1775. During the next year they met in the Inn. Bentham wrote<sup>3</sup> that Erskine "was so shabbily dressed as to be quite remarkable." This was of a man who was to take silk within five years of being called, and who in 1791 became the first counsel ever to have

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<sup>3</sup> Bentham, Works x 564-5

earned £10,000 in a single year. This was less than fifteen years after his very first case<sup>4</sup> in which he boldly stood up to Lord Mansfield, explaining afterwards

“. . .that he thought that his children were plucking at his robe saying ‘Now, father, is the time to get us bread.’”

The hackneyed phrase “from rags to riches” really does apply to Erskine.

Having mentioned the genius of this place I should perhaps add that Bentham, although thoroughly radical in his outlook, had no truck with notions of the rights of man. He called the American Declaration of Independence a “hodge-podge of confusion and absurdity in which the thing to be proved is all along taken for granted” and was even more scathing about its French counterpart. It was of Paine’s Rights of Man that he pronounced one of his most famous put-downs:<sup>5</sup>

“Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.”

Bentham also seems to have been sceptical about women’s rights and in particular female suffrage, a topic on which both radicals in Britain and revolutionaries in France showed some ambivalence.<sup>6</sup>

So much for the general background. I apologise if I seem to have gone into it at length – actually I have only scratched the surface – but I will now come closer to matters of legal history. At this period the two principal offences against the state were treason and the variety of criminal libel termed seditious libel. Treason was a statutory offence under one of the oldest criminal statutes still in force today: the Treason Act 1351. It was a capital offence triable before a judge and jury. Seditious libel, by contrast, was a non-statutory offence which had been greatly developed, in Stuart times, by the Court of Star Chamber. It heard cases summarily, without a jury. It could not impose the death penalty but could and did impose savage non-capital sentences: Sir John Baker<sup>7</sup> refers to “an imaginative range of punishments . . . including the slitting of noses and the severing of ears.” When the Star Chamber was abolished in 1641 seditious libel came within the jurisdiction of the ordinary

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<sup>4</sup> *R v Baillie* (1777) 21 ST1; Erskine was the most junior of five counsel briefed for Captain Baillie, who was accused of criminal libel for protesting about abuses at Greenwich Hospital.

<sup>5</sup> Works ii, 501

<sup>6</sup> Claire Tomalin, *Mary Wolstonecraft*: as to female suffrage see Appendix 1, and as to Olympe de Gouges (Mary Wolstonecraft’s French counterpart, guillotined in 1793) see chapter 13.

<sup>7</sup> *An Introduction to English Legal History*, 4<sup>th</sup> ed. P119.

criminal courts. But there was a long-running debate, which continued for much of the eighteenth century, as to the functions of judge and jury in a trial for criminal libel.

That was one of the legal issues, of central importance to freedom of speech, which was fiercely debated at this time. The other was the interpretation and scope of the language of the Treason Act, especially the judge-made concept of the constructive levying of war, and the archaic words “when a man doth compass or imagine the death of our Lord the King.” In 1794 Cullen, a Scottish advocate defending Downie on a charge of high treason, observed<sup>8</sup> that the enactment

“was written in the French language, and the words are ‘compaser ou imaginer la mort nostre seigneur le roy.’ It is perhaps singular . . . that the life of every British subject prosecuted by the Crown for high treason should continue to depend upon the critical construction of two obsolete French words.”

This topic has been closely examined in a remarkable work of scholarship by John Barrell, *Imagining the King’s Death*<sup>9</sup>. It explores the complex ambiguities of “imagining” with reference to literary and psychological as well as political sources. I gladly acknowledge my indebtedness to this work, and I recommend it to anyone who wants to go further into these topics.

May I now take you back to the first controversy, which was settled in the courts in 1784 and then reversed by legislation in 1792. In the middle of the eighteenth century that controversy became focused on two of the greatest lawyers of that time, William Murray (Lord Mansfield) and Charles Pratt (Lord Camden). Pratt became Attorney-General in 1757 in direct succession to Murray, who was ennobled as Lord Mansfield and embarked on his extraordinary term of office – lasting over 30 years – as Chief Justice of the King’s Bench. Pratt had in 1752 defended a bookseller, Owen, accused of seditious libel on the House of Commons.<sup>10</sup> He argued that the jury should be able to deliver a general verdict; the judge directed the jury that they had no such right; but the jury refused to convict the prisoner. As Attorney-General, Pratt stuck to his liberal principles. He was perhaps the first Attorney-General in the modern mould. He insisted on the need for the Law Officers to exercise independent judgment and to resist the pressure of political expediency. In 1761 he was appointed as Chief Justice of Common Pleas and ennobled as Lord Camden. In that

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<sup>8</sup> *R v Downie* (1794) 24 ST 1, 123

<sup>9</sup> (2000) OUP

<sup>10</sup> *R v Owen* (1752) 18 ST 1203.

capacity he presided over some very important cases concerned with powers of search and detention, the best known being *Entinck v Carrington*.<sup>11</sup> He was made Lord Chancellor in 1766 and thereafter, it must be said, showed himself rather less liberal in his views, especially as regards the American colonies. But in 1792, aged nearly 80, he spoke in the House of Lords in favour of Fox's Libel Bill, in a speech which was generous in praise of his old rival, Lord Mansfield.

Mansfield had taken a totally different view in the debate about the functions of judge and jury in a trial for criminal libel. His views were set out most clearly in his judgment (dismissing a motion for a new trial) in the great case of *R v Dean of St Asaph*<sup>12</sup> in 1783. The sole function of the jury, in his view, was to decide two factual issues: whether the defendant published the words complained of, and the meaning of the words. The issue of meaning was limited to whether the words referred to a particular person, place or thing. The issue of seditious intention was a question of law for the judge. The result was that the jury had no say on the crucial issue of *mens rea*.

The Dean of St Asaph, William Shipley, had published a short work entitled *A Dialogue Between a Gentleman and a Farmer*. As transcribed in the indictment (with every innuendo laboriously spelled out) it does not make light reading. It is like a hybrid between the more tedious of the Socratic dialogues and an early traveller's phrasebook: here is a brief extract (the farmer has been speaking of the working men's club in his village):

- "G. A word or two on another head. Some of you (meaning the said club), I presume, are no great accountants.
- F. Few of us (meaning the said club) understand accounts; but we (meaning the said club) trust old Lilly, the schoolmaster, whom we (meaning the said club) believe to be an honest man; and he keeps the key of our (meaning the said club's) box.
- G. If your (meaning the said club's) money should in time amount to a large sum, it might not perhaps be safe to keep it (meaning such large sum) at his (meaning Lilly's) house, or in any private house.
- F. Where else should we (meaning the said club) keep it (meaning such large sum)?

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<sup>11</sup> (1765) 19 ST 1030.

<sup>12</sup> Also reported as *R v Shipley* (1783) 21 ST 847; 4 Douglas 73

- G. You (meaning the said club) might choose to put it (meaning such money), into the funds, or to lend it to the squire, who has lost so much lately at Newmarket, taking his bond, or some of his fields, as your (meaning the said club's) security for payment, with interest.
- F. We (meaning the said club) must, in that case, confide in young Spellman, who will soon set up for himself, and, if a lawyer can be honest, will be an honest lawyer.

And so on, for many pages. This was the “false, wicked, malicious, seditious and scandalous libel, of and concerning our lord the King, and the Government of this realm” for which the Dean was prosecuted.

The eloquence of Mansfield's judgment dismissing the motion for a new trial matches that of Erskine who had moved it. Mansfield said,<sup>13</sup>

“Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now, in the present state of things, puerile rant and declamation. The Judges are totally independent of the Ministers, that may happen to be, and of the King himself. Their temptation is rather to the popularity of the day. But I agree with the observation cited by Mr Cowper from Mr Justice Forster, ‘that a popular Judge is an odious and a pernicious character.’

The judgment of the Court is not final; in the last resort it may be reviewed in the House of Lords, where the opinion of all the Judges is taken.

In opposition to this what is contended for? – that the law shall be, in every particular cause, what any twelve men, who shall happen to be the jury, shall be inclined to think; liable to no review, and subject to no control, under all the prejudices of the popular cry of the day, and under all the bias of interest in this town, where thousands, more or less, are concerned in the publication of newspapers, paragraphs, and pamphlets. Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.”

However Mansfield did accede to a motion in arrest of judgment, and the Dean was released without being sentenced. Whereas Camden became rather less liberal in his old age, Mansfield seems to have become rather more liberal. It was his support for measures relieving Roman Catholics that led to his house being singled out for attack and destruction

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<sup>13</sup> *R v Shipley* (1783) 21 ST 847, 1040; 4 Douglas 73, 170-1.

during the Gordon Riots. Indeed, we may wonder why Mansfield was not asked to recuse himself when Lord George Gordon was tried for treason.<sup>14</sup>

The Dean of St Asaph's case led to Fox's Libel Act of 1792.<sup>15</sup> Erskine, by then a Member of Parliament, took part in its passage through the Commons; Camden, as we have seen, supported it in the Lords. The Act made clear that the jury in a trial for criminal libel could return a general verdict. It is notable that Pitt, who could almost certainly have defeated the measure, did not oppose it. He thought that under the new Act it would be easier for the prosecution to obtain convictions for seditious libel. In many cases (such as *Owen*) juries had refused to convict for no obvious reason other than resentment at the restrictions placed on their powers.

The prosecution of the Dean of St Asaph was by no means the first time that George III's ministers had used the criminal law to suppress political discussion and dissent. In 1777 Horne Tooke was imprisoned for a year for acting as treasurer of a fund raised for the families of American soldiers "inhumanly butchered" in the Battle of Lexington. In 1779 two respectable Scotsmen, Thomas Muir and the Reverend Thomas Palmer, were sentenced to long terms of transportation<sup>16</sup> for sedition (fourteen years for Muir, seven for Palmer). Their education and social status were regarded as an aggravating factor by Scottish judges who (according to Carless Davis<sup>17</sup>) "made not the slightest affectation of impartiality." Palmer's crime was to have written in a pamphlet (otherwise expressed in moderate language),

"You are plunged into a war by a wicked ministry and a compliant Parliament."

Lord Abercromby told the jury that universal suffrage would be tantamount to total subversion of the constitution.

In the remaining part of this lecture I want to look at five trials which took place during 1794, two in Edinburgh, one at Lancaster Assizes, and two in London. Three ended with acquittals and two with convictions. It is clear that there was at this time strong cooperation between officials in London and Edinburgh: Henry Dundas, the Home Secretary, was the

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<sup>14</sup> *R v Gordon* (1781) 21 ST 485.

<sup>15</sup> 32 Geo III c 60.

<sup>16</sup> Transportation (to America) had been introduced by the Transportation Act 1718. The loss of America led to the introduction (by the Criminal Punishments Act 1779) of prison hulks. But in 1787 the settlement at Botany Bay provided a new destination. Transportation finally ended in 1868.

uncle of Robert Dundas, the Lord Advocate. Barrell suggests, on convincing grounds, that the Law Officers used some of the prosecutions in Edinburgh as a sort of testing-ground for some of their adventurous arguments for extending the scope of high treason. Lord Braxfield, a notoriously prosecution-minded Scottish judge, was only too ready to oblige. Entwined with these trials are the reports of parliamentary committees leading up to the Habeas Corpus Suspension Act, passed in May 1794.

But I must first say a little about the London Corresponding Society and other radical societies which were formed in many cities and towns in England and Scotland. Their general aim was constitutional reform, with universal male suffrage and parliamentary reform at the top of the agenda. As you would expect in a loose confederation of “grassroots” societies, there were many differences in the proposed ways and means of reform. There was much anti-monarchist talk, some of it violent, especially when members were meeting and imbibing, as they often did, in public houses. But it is questionable whether any significant number of the thousands of members wished to see King George III go to the guillotine. Most of their early Francophile enthusiasm wore off with the coming of the Terror and the executions of Louis XVI and Marie Antoinette. Samuel Coleridge Taylor (like Wordsworth, initially an enthusiast for the French Revolution) said of the Jacobins:

“England was saved from civil war by their enormous, their providential blundering.”

The societies were not closely-knit bodies with strong personal loyalties. On the contrary, their membership included many spies and agents provocateurs, and others who, when it came to a crisis, were constrained by threats or actual imprisonment to give evidence against their leaders. They were mostly respectable tradesmen with a few professional persons among their number: the thirty or so members of different radical societies arrested between May and July 1794 included an engraver, a silversmith, a wax-chandler, an inkstand-maker, a hairdresser, and a cutler: but there was also a special pleader, a unitarian minister and an attorney. These three were on the committee of the Society for Constitutional Information, which seems to have been rather more staid than the London Corresponding Society. In Edinburgh the leading society (with several branches) was called the Friends of the People.

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<sup>17</sup> op cit p81.

In January 1794 the trial took place in Edinburgh of William Skirving, the secretary of the Friends of the People, and Maurice Margarot, the Chairman of the London Corresponding Society.<sup>18</sup> They were the first to be tried of seven men who were charged with sedition following the British Convention, a gathering of Scottish delegates which met intermittently in Edinburgh between 29 October and 4 December 1793, being joined halfway through by delegates and observers from England and Ireland. The Convention adopted procedures and nomenclature similar to that of the French National Convention. It debated various motions and topics, some centring on petitions to the King and Parliament for reform, and some on the more dangerous topic of what action should be taken in the event of coercive action by government, such as a bill banning conventions, a bill for the suspension of habeas corpus, or the bringing into the country of foreign troops.

The thrust of the charges against Skirving and Margarot was that they had, under the pretence of reform, conspired to subvert the constitution. The prosecutions were conducted by the Lord Advocate (Robert Dundas) and the Solicitor General for Scotland (Robert Blair) and the bench was presided over by the Lord Justice Clerk, Lord Braxfield. Both accused defended themselves in a forthright and uncompromising manner. Braxfield's conduct of these and other trials led Dundas himself to refer to him as "that violent and intemperate gentleman who sits in the judiciary." It is said that when one defendant protested to him that Jesus was a reformer, Braxfield replied,

"Muckle he made o'that. He waur hangit tae."

He summed up in *Margarot's* case in terms which suggested that a mere tendency to create disaffection was enough for strict liability for seditious words.<sup>19</sup>

"In some sense, the crime of sedition consists in poisoning the minds of the lieges, which may naturally in the end have the tendency to promote violence against the state; and endeavouring to create a dissatisfaction in the country, which nobody can tell where it will end, it 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."

Both defendants were convicted and sentenced to fourteen years' transportation.

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<sup>18</sup> *R v Skirving* (1794) 23 ST 391; *R v Margarot* (1794) 23 ST 603.

<sup>19</sup> 23 ST 603, 766

The prosecution and trial of Thomas Walker shows English justice at as low an ebb as Scottish justice was in Edinburgh. Walker was a prosperous and respected cotton-merchant and one of the founders of the Manchester Constitutional Society. He was a friend of Josiah Wedgwood and others of that circle. In May 1793 a warrant was issued for his arrest on a charge of compassing and imagining the King's death. It was issued on the information of a drunken labourer, Thomas Dunn, who had been arrested with Benjamin Booth for distributing an anti-war pamphlet. Dunn was suborned into alleging that the works of Tom Paine had been read at meetings at Walker's house; that there had been drilling with arms at a warehouse next to his house; and that he had spoken seditious words including, "Damn the King . . . if I had him in my power I would as soon take his head off as I would tear this paper!"

The warrant was not executed in Manchester because Walker was in London, where he wrote to the Home Secretary, Henry Dundas, informing him of his whereabouts. Still he was not arrested. This was probably because though an arrest warrant for high treason could be issued on the evidence of a single witness, two were needed for a prosecution<sup>20</sup>. Booth, Dunn's companion, was pressured into giving evidence against Walker, but then withdrew it. The Clerk of Arraignment wrote a report expressing doubts about the prosecution. The seriousness with which the matter was treated is reflected in the fact that the report was seen by Pitt, Dundas, The Lord Chancellor (Lord Loughborough), the Attorney General (Sir John Scott, later Lord Eldon) and the Solicitor General (Sir John Mitford). It was decided not to proceed with a charge of treason, but with charges of conspiracy to overthrow the constitution, and seditious libel. In March 1794 Dunn turned up at a meeting between Walker and three solicitors acting in his defence. He said that he had been bribed to make false accusations against Walker, from whom he asked forgiveness. The Attorney General for Lancaster, Edward Law (later Lord Ellenborough) was informed of this, but nevertheless continued with the prosecution.

The trial began in April 1794.<sup>21</sup> Erskine appeared for the defence. Law's opening speech shows that he expected Dunn to be attacked and discredited as a witness, and he told the jury that an attempt had been made to tamper with Dunn's evidence. Dunn gave evidence and denied that he had asked Walker's forgiveness for his false testimony.

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<sup>20</sup> under the statute 7 & 8 Will III c.3

Erskine was on the point of calling two of the solicitors who had been present at the meeting at which Dunn admitted his false testimony. At that point, probably to the great relief of Law, the judge interrupted to ask why Walker was not charged with treason. Law made submissions to the effect that facts amounting to high treason could be charged as a misdemeanour, citing the case of John Hampden; the question should be reviewed, he said, by taking a special verdict and referring the matter to the judges of the King's Bench. Erskine protested vigorously at a course which might lead to a technical but ignominious acquittal without crucial evidence having been heard. The prosecution was then abandoned, without the solicitors having been called, and Dunn was later tried and imprisoned for perjury. But after his acquittal Walker's business collapsed.

In November 1793 Daniel Eaton published the eighth number of a periodical called *Politics for the People, or Hogg's Wash*, which led to his being prosecuted for seditious libel.<sup>22</sup> The main complaint was a report of a fable entitled 'King Chaunticlere; or The Fate of Tyranny.' It had been told at a meeting in the City of London by John Thelwall (who was himself later tried for treason). It was the story of a gamecock, 'a very fine majestic kind of animal,' who bullied and starved all the other birds in the farmyard, and eventually had his head cut off, though he continued to run about. The cock was frequently described in the fable as a 'tyrant' and a 'despot.'

In the indictment for seditious libel every innuendo had to be spelled out, as we have seen in the Dean of St Asaph's case. So in the indictment of Eaton each reference to 'tyrant' or 'despot' was followed by '(meaning our said Lord the King)'. Prosecuting counsel, Fielding, foresaw that this point would be taken by the defence counsel, Gurney:

"Good God! The advocate may say (because an advocate can always affect astonishment) why should you suppose the King is meant by this cock . . . and though he may please to say, by your legal operation of an innuendo, you may charge that the cock means the King, why you are the libeller yourself, by putting it on the record."

And so it was; Gurney told the jury:

"He must have given unbridled and unbounded licence to an imagination the most wanton and the most heated, before he could have sat down to ascribe meanings to this paper, so foreign and indeed so ridiculous."

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<sup>21</sup> *R v Walker* (1794) 23 ST1055.

<sup>22</sup> *R v Eaton* (1794) 23 ST 1013

And a little later:

“The art of drawing indictments, and contriving innuendoes, and so manufacturing libels is indeed a curious art... The drawer of this indictment might just as well have employed himself, like Dean Swift’s projector, in attempting to extract sunbeams from cucumbers, as in attempting to extract sedition from this story of the game cock.”

Eaton was acquitted. The line of argument which Gurney deployed so successfully in his defence became known as the Gurney defence and it was used in many later cases. It suggested, in effect, that only the deranged imaginations of the prosecuting authorities could have supposed that loyal British subjects meant to harm their king, as opposed to tyrants and despots elsewhere in the world. There was a good deal of truth in this, since (as I have suggested) few English Republicans wished to see King George III beheaded, whatever they said or sang when in their cups. One of the astonishing (and edifying) things about this period is how far British citizens were prepared to go in defence of their right to free, unrestrained and even violent debate, when the consequence might be prosecution on a capital charge.

Eaton’s trial has a feeling of almost light-hearted comedy about it, but at the trials of Watt and Downie in Edinburgh, a few months later, the comedy was very much darker. The comedy came from the absurdity of the conspiracy with which they were charged, an almost insane plan to seize Edinburgh Castle with a handful of men armed only with pikes, and then to carry the uprising to the rest of Scotland, England and Ireland. There was evidence of pike-heads being ordered and manufactured in Sheffield, and 16 pike-heads were found at Watt’s house. But it was black comedy because both men, having been tried separately during September 1794, were convicted of treason<sup>23</sup> and sentenced to the revolting torture and death that was still, in the age of Wordsworth and Coleridge, the mandatory punishment for high treason committed by a male.<sup>24</sup> In the event Downie was reprieved and Watt was hanged until he was dead, and the mutilation of his body was confined to decapitation of his corpse. There are many disturbing aspects of the case. There is documentary evidence that Watt was in touch with Dundas during the alleged conspiracy; there may have been something of the agent provocateur about him. The pressure put on him, after his conviction, to make a full confession implicating other conspirators raises the deeply unpleasant

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<sup>23</sup> *R v Watt* (1794) 23 ST 1167; *R v Downie* (1794) 24 ST 1.

<sup>24</sup> The normal death penalty by hanging was substituted by statute in 1815.

question whether there was some sort of bargain about the mode of execution of the death penalty.

Finally I come to the trial in London, on a charge of high treason, of Thomas Hardy, a leading member of the London Corresponding Society. This was not the last of the treason trials but it was the crucial one. Hardy's acquittal, despite a campaign of official disinformation out of court, and a strenuously conducted prosecution in court, seems to have made the prosecuting authorities lose heart: during the subsequent trials of Horne, Tooke and Thelwall, Sir John Scott, the Attorney-General, is said to have been in tears of mortification.

The government's decision to move against the reform societies may have been triggered by a meeting at Chalk Farm held by the London Corresponding Society on 14 April 1794. It was attended by 2,000 people who heard speeches condemning the stationing of Hessian troops on the south coast, and proposals for the arming of French émigrés. The government was, it was said, "arming one part of the people against another." Hardy and Adams, the secretaries of the London Corresponding Society and the Society for Constitutional Information, were arrested on 12 May on warrants alleging treasonable practices. During the next three months another thirty members of the societies were arrested. Hardy's and Adams' papers were seized and placed, not before prosecuting authorities, but before a secret committee of the House of Commons, established on 13 May on Pitt's motion. This was after Dundas, on the very day of the first arrests, presented to the Commons a message from the King phrased in highly prejudicial terms. The House of Lords also established a secret committee. They acted with extraordinary speed; on 16 May the Commons' Committee's first report concluded that there was a "traitorous conspiracy." On the same day the Habeas Corpus Suspension Bill was introduced, and it was enacted on 23 May. In June both Houses agreed a reply to the King confirming the existence of "a seditious and traitorous conspiracy." It is no surprise that Erskine, in his defence of Horne Tooke, said of Hardy's trial:

"The protecting Commons was itself the accuser of my client, and acted as a solicitor to prepare the very briefs for the prosecution."

Soon after Hardy's arrest his wife Lydia, who was pregnant, had to climb out of a back window of her house to escape an angry mob. She became ill and died soon afterwards, while Hardy was in prison awaiting trial. The violence of the demonstrations may be a

reflection of the government's success in stirring up feeling against Hardy and the other accused persons. It is in striking contrast to the enthusiasm which greeted Hardy's eventual acquittal, and an extraordinary example of the volatility of public opinion.

The trial of Hardy began on 28 October 1794. The trial was presided over by Sir James Eyre, the Chief Justice of Common Pleas, who had also presided over the committal proceedings. The prosecution had a team of eight barristers, led by Scott and Mitford. Erskine led for the defence, with Gurney as part of his team. The trial lasted for eight days, then an unprecedented length, with a day's break on Sunday. On most days the court sat from eight in the morning until midnight or later. Hardy's trial caused a great stir in society. Charles Grey (who was then a rising Whig Member of Parliament, and later as Lord Grey was to see the Reform Bill enacted) attended the trial and wrote to his fiancée:

“Of this trial I will say nothing. I have no power to express my abhorrence of the whole proceeding. If this man is hanged there is no safety for any man. Innocence no longer affords protection to a person obnoxious to those in power, and I do not know how soon it may come to my turn.”

The indictment on which the Grand Jury committed Hardy (and 12 others who were not tried with him) alleged:

“That they contrived and intended an Insurrection to subvert the Constitution – depose the King, and put him to death; and for that purpose with Force and Arms, conspired, compassed, and imagined to excite Rebellion, etc.”

It then gave particulars of nine overt acts, four of which were concerned with the summoning of a convention in defiance of Parliament. The others covered the procuring of arms and conspiracy to subvert the Constitution and depose the King.

At the trial Scott's opening speech lasted nine hours (causing Lord Thurlow, it is said, to comment “Nine hours? Then there is no treason by God!”). Scott began dispassionately, telling the jurors that they should not be influenced by the recent reports of the secret committees or the suspension of habeas corpus. He then began to deploy two legal arguments which dominated the proceedings. One was that the King was bound by his Coronation oath to govern only according to laws enacted by Parliament, and not according to any other subverted form of constitution<sup>25</sup>:

“He *ought not* so to govern – I say he cannot so govern – he is bound to resist such a project at the hazard of all its consequences; he must resist the attempt; resistance necessarily produces deposition, it endangers his life.”

The other argument was that any plot against the King’s life was necessarily directed at the stability of government; therefore, it was said, any plot to subvert the constitution must amount to an attack on the King’s life and person. In support of this wholly illogical argument Scott quoted Erskine’s own words in the course of his defence of Lord George Gordon. The object of both limbs of the argument was to avoid the difficulty that though there was ample evidence that the London Corresponding Society wished for constitutional reform, if necessary by summoning a popular convention in defiance of Parliament, there was little if any evidence of a conspiracy to depose the King, and put him to death.

Scott insisted<sup>26</sup> that Hardy was accused of actual treason, not constructive treason, and he devoted much time to expounding the relationship between “compassing and imagining the King’s death” and the overt acts of treason specified in the indictment. His lengthy address on the law (followed by further lengthy submissions from Erskine and from the Solicitor General, Sir John Mitford, in reply, all in front of the jury) was in striking contrast to the brevity of the Chief Justice’s eventual summing up of the law. Then he moved on to the London Corresponding Society, describing it as a combination of the few to subdue the many, comparable to the mob at the Gordon riots and also comparable to the French revolutionaries. He attacked belief in “equal active citizenship”:<sup>27</sup>

“Now, it requires no reasoning to state, that a representation of the people founded upon the principle of equal active citizenship of all men, must form a parliament into which no King, nor Lords, could enter.”

Scott then embarked on a detailed survey of the oral and documentary evidence that he intended to call. He read in full many letters, minutes, resolutions and other documents. This part of his speech contains, in the State Trials report, almost one hundred columns of close-set print.

Late in the afternoon of the first day the Crown began to call its witnesses. The first group were King’s messengers who had executed search warrants at Hardy’s house and

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<sup>25</sup> 24 ST at 245.

<sup>26</sup> At 252.

<sup>27</sup> At 277.

seized his papers. All these were read at length. Eventually – it must have been nearly midnight – Erskine raised with the Chief Justice whether the prosecution would finish its evidence that night. Scott confirmed that it was quite impossible. Never before had a trial for high treason occupied more than a single day, and never before had the jury been allowed to separate during a trial for treason or felony. The Chief Justice directed that the jury must be given refreshment and housed overnight in the court premises. Erskine then complained – and it was to be a constant refrain throughout the trial – that he had not had copies of the documentary evidence against the accused, much of which was not printed, nor enough time to consider what he had been provided with. So the first day came to an end at a quarter past midnight, after a sitting of over sixteen hours, and the court adjourned until eight o'clock the next morning.

The Crown's evidence continued on the second day, with frequent clashes about the admission of documentary evidence, especially letters of which Hardy was neither the sender nor the recipient, and which he had never seen before. Much of the day was spent in reading, in full, the minutes of the weekly meetings of the London Corresponding Society, and in reading documents referred to in those minutes. Again the hearing ended after midnight, when the jury ventured to protest at the conditions in which they were being kept.<sup>28</sup>

“Nothing but mattresses to lie down upon and that they had not had their clothes off for more than forty hours.”

The Chief Justice directed that they should be lodged in Covent Garden at The Hummums (formerly a turkish bath, but then a hotel).

The Crown called several members of the two reform societies, most of whom seem to have been very reluctant witnesses, although a few were self-confessed spies. Erskine cross-examined them to good advantage. There was evidence that the societies had planned to arm themselves with pikes, but only for the purposes of self-defence. By the evening of the third day the Court had been sitting for forty-one out of the previous sixty hours. Unsurprisingly, tempers became frayed. The Attorney-General was prickly towards Erskine and obsequious towards the Chief Justice. Erskine was implacable towards everyone. The Chief Justice seems to have done his best to lower the temperature in the same way that the bar would expect of a judge today. At one point Erskine had interrupted

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<sup>28</sup> At 572.

the Crown's examination-in-chief, objecting to the line of questioning. The report in State Trials records how the dialogue developed:<sup>29</sup>

*Erskine:* The paper was fabricated by the spies who support the prosecution.  
*A-G:* You shall not say that, till you prove it.  
*Erskine:* I shall prove it.  
*A-G:* Till you prove that, you ought not to say it; it is a charge that ought not to be made.  
*LCJ:* If there is any point between you which should be heard, the appeal, to be sure, must be made to the Court.  
*Garrow:* I wish to God it was; we should save much time and trouble.  
*LCJ:* A little indulgence, on both sides, would save much time and trouble.  
*A-G:* When a paper is produced, which your Lordships hold not to be legal evidence to be read, it must not, and shall not be stated in this Court, unless it is proved, that the paper is fabricated by the spies who carry on the prosecution.  
*LCJ:* I hope nothing of that kind has been said, for it was an improper thing to be said; and, if it dropped from anybody, it was an inadvertent thing."

A few minutes later Scott and Erskine were at it again, and one riposte of Erskine<sup>30</sup>

"You will not repeat it anywhere else"

might be construed as an overture to a duel.<sup>31</sup> When the Chief Justice rebuked them both the Attorney-General apologised, but Erskine did not. The third day's proceedings ended at 1.30 am.

The fourth day followed the pattern of the third: more witnesses for the Crown, more complaints by Erskine about documentary evidence, and more angry clashes between counsel about the admission of evidence of conspiracy (including the matters for which Watt and Downie had been convicted in Edinburgh) to prove the case against Hardy. Again, the sitting ended at 1.30 am. I calculate that at that stage the Court had been in session for sixty-one out of the preceding eighty-eight hours. Erskine was granted the indulgence that on the next day (Saturday, 1 November) the Court would not sit until noon.

The Crown's case closed on the fifth day. Erskine then made his opening speech for the defence. It lasted for about six hours. Horne Tooke wrote in his copy of the report,

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<sup>29</sup> At 681-682.

<sup>30</sup> At 688.

<sup>31</sup> Especially since (almost incredibly) Erskine is said to have challenged the Chief Justice to a duel because of some remarks of his during Tooke's trial (Barrell p387).

“This speech will live forever.”

All contemporary sources agree that it was an extraordinary speech, and at the end of it there was an extraordinary public demonstration, both in the courtroom and in the street outside, which Erskine himself had to quell (though he was by then, it seems, so fatigued as barely to be capable of speech). But reading the speech in the cold print of State Trials we have to wonder just how much of it was understood by the jury, or would be understood by an Old Bailey jury today. The eloquence of the opening was lucid enough, as Erskine turned round the suggested parallel with what was happening in France:<sup>32</sup>

“To the Attorney-General’s second preliminary observation, I equally agree. I anxiously wish with him that you should bear in memory the anarchy which is desolating France . . .”

He reflected on the collapse of the rule of law in France and continued:

“If this prosecution has been commenced (as is asserted) to avert from Great Britain the calamities incident to civil confusion, leading in its issues to the desperate condition in France; I call upon you, gentlemen, to avert such calamity from falling upon my client, and through his side upon yourselves and upon our country. Let not him suffer under vague expositions of tyrannical laws, more tyrannically executed. Let not him be hurried away to pre-doomed execution, from an honest enthusiasm for the public safety. I ask for him a trial by this applauded constitution of our country . . . I protest, in his name, against all appeals to speculations concerning *consequences* when the law commands us to look only to *intentions*. If the state be threatened with evils, let Parliament administer a *prospective* remedy, but let the prisoner hold his life *under the law*.”

But Erskine went on, as Scott had, to deep questions of law concerning high treason which would today be made the subject of submissions heard in the absence of the jury. He cited Foster, Coke, Hale and Holt. After what must have been nearly two hours of recondite legal argument Erskine brought it down to a more homely level.<sup>33</sup>

“... if I only conspired and meditated this rising to repeal laws by rebellion, I could be convicted of nothing but a high misdemeanour. I would give my friends the case upon a special verdict, and let them hang me if they could. How much more might I give it them if the conspiracy imputed was not to effect a reform by violence, but, as in the case before us, by pamphlets and speeches, which might produce universal

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<sup>32</sup> At 878.

<sup>33</sup> At 906.

suffrage, which universal suffrage might eat out and destroy aristocracy, which destruction might lead to the fall of the monarchy, and, in the end, to the death of the King. Gentlemen, if the cause were not too serious, I would liken it to the play with which I amuse our children. 'This is the cow with the crumpled horn, which gored the dog, that worried the cat, that ate the rat' etc ending in 'the house which Jack built'.

I do therefore maintain, upon the express authority of Lord Holt, that, to convict a prisoner, charged with this treason, it is absolutely necessary that you should be satisfied of his intention against the King's life, as charged in the indictment, and that no design against the King's government will even be a legal overt act to be left to the jury as the evidence of such an intention (much less the substantive and consummate treason) unless the conspiracy be directly pointed against *the person of the King*."

Then Erskine embarked on the history of the reform movement. He spoke at length about the efforts which had been made since about 1780, by the Duke of Richmond and others, to achieve reform through normal parliamentary means. He dwelt particularly on the part played on these debates by Edmund Burke, who had since become a supporter (but a reluctant supporter) of Pitt. In one passage he quoted from Burke's *Thoughts on the Causes of the Present Discontents*<sup>34</sup>:

"But this is nothing. Mr Burke goes on afterwards to give a more full description of Parliament, and in stronger language (let the Solicitor General take it down for his reply), than any that has been employed by those who are to be tried at present as conspirators against its existence."

Erskine read the passage<sup>35</sup> and asked rhetorically,

"What is this but saying that the House of Commons is a settled and scandalous abuse fastened *upon* the people, instead of being an antagonist power *for* their protection; an odious instrument of power in the hands of the Crown, instead of a popular balance against *it*? Did Mr Burke mean that the prerogative of the Crown, properly understood and exercised, was an antiquated prejudice?"

Finally Erskine attacked the evidence called by the Crown, and was particularly scathing about the admission of evidence about Watt and Downie, on the strength of a single circular in the possession of Watt, of whom he said<sup>36</sup>:

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<sup>34</sup> At 919.

<sup>35</sup> Burke's Works (1808) Vol. 2 p229.

<sup>36</sup> At 964.

“Government hanged its own spy in Scotland upon that evidence, and it may be sufficient evidence for that purpose.

A little later Erskine said:<sup>37</sup>

“Gentlemen, I desire to be making no attacks upon Government; I have wished, throughout the whole cause, that good intentions may be imputed to it, but I really confess, that it requires some ingenuity for Government to account for the original existence of all this history, and its subsequent application to the present trial. They went down to Scotland, after the arrest of the prisoners, in order, I suppose, that we might be taught the law of treason by the Lord Justice Clerk of Edinburgh, and that there should be a sort of rehearsal to teach the people of England to administer English laws . . .”

The last half-hour or so of Erskine’s speech shone with eloquence, but I must resist the temptation to quote any more.

So the evidence for the defence began on the evening of Saturday, 1 November, the fifth day of the trial. It lasted little more than a day (but a very full day from eight in the morning until midnight or thereabouts.) A large number of witnesses were called and cross-examined. Many were members of the London Corresponding Society, some of whom were warned against self-incrimination. Other witnesses were prominent persons in public life: the Duke of Richmond, Richard Sheridan MP, Philip Francis MP (generally supposed to have been the anonymous author of *The Letters of Junius*) and the Earl of Lauderdale. Hardy himself could not of course give evidence, but Erskine tried to elicit from one of his witnesses<sup>38</sup> whether Hardy ever stated what his plan of reform was. This led to very lengthy argument as to whether that question was proper, and to further angry exchanges between Erskine and the Solicitor General.<sup>39</sup> Eventually the Chief Justice ruled, with rather obscure reasoning, that the question should be allowed.

The closing speech for the defence was made by Gibbs, who apparently fainted<sup>40</sup> as soon as he got to his feet, but recovered in a few minutes. Then the Solicitor General made a long closing speech for the Crown, which occupied the best part of Monday, 3 November and about half the following day. The Chief Justice began summing up on the afternoon of Tuesday, 4 October. He summarised the evidence fully and fairly, adjourning at 11.35 pm.

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<sup>37</sup> At 964-965.

<sup>38</sup> At 1065.

<sup>39</sup> At 1089.

<sup>40</sup> At 1111.

He sat again at nine am and gave the jury a brief direction on the law, to the effect that a conspiracy to depose the King or subvert the monarchy amounted to compassing the King's death.<sup>41</sup> This direction was contrary to much of Erskine's argument, but it was accompanied by a reminder that the proof must be "clear and convincing."

He sent out the jury, with a copy of the indictment (which one jurymen asked for) at half past twelve. They returned at half past three and delivered a verdict of not guilty. There were huge popular celebrations outside the courtroom. Indeed, it seems that they may have begun even before the verdict.<sup>42</sup>

There was much more to come, including the trial of Tooke and Thelwall (who were also acquitted)<sup>43</sup>; repressive legislation aimed at extending the law of treason and suppressing the reform societies, which had recovered strength after the acquittals<sup>44</sup>; and an incident in October 1795 when the King's coach was stoned on the streets of London.<sup>45</sup> But let us leave it there: Erskine, after the horses had been unhitched from his carriage, being hauled back by the crowd to Serjeant's Inn, exhausted but elated, with the motto "trial by jury" shining on the buttons of his coat; and Hardy, free but sombre, going to pay his first visit to his wife's grave in St Martin's Churchyard. And I will leave it to my kind and distinguished audience to decide what messages this story holds for us today.

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<sup>41</sup> At 1361-1362.

<sup>42</sup> Barrell p364.

<sup>43</sup> (1794) 25 ST 1.

<sup>44</sup> Notably the Treasonable Practices Act 36 Geo III c7 and the Seditious Meetings Act 36 Geo III c8

<sup>45</sup> Barrell, pp555-9.