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ORIGINAL ARTICLE

The Politics of Libel: Thomas Erskine, Freedom of the Press, and Transatlantic Legal Culture, c. 1780–1830

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Abstract

This article analyzes how the multidirectional movement of legal and popular printed texts, newspapers, letters, and citizens contributed to the political and legal influence of individual lawyers across the Atlantic. It is based on a case study of leading common law barrister and Whig MP Thomas Erskine (1750–1823). It examines the dissemination of Erskine's legal and political arguments, and other publications in support of freedom of the press and the constitutional importance of trial by jury in libel trials. Erskine's Country Whig politics, key role in the passage of the 1792 Libel Act, and support for American independence were admired by American lawyers, diplomats, and politicians. His disinterested public service as an advocate meant he personified the ideal of a patriot lawyer that underpinned the classical republican model of law, citizenship, and politics on both sides of the Atlantic. Erskine's powerful, often emotive forensic rhetoric was equally admired as part of a shared transatlantic legal culture, linking law, politics and literature. The speeches were reprinted and widely circulated in edited collections, texts on oratory, trial reports, newspapers, and periodicals; key arguments were also referenced in legal treatises on libel. Hence, parts of his most significant speeches in English libel trials came to be regarded as "usable" legal texts studied by students and re-cited by American defense lawyers in court.

> "The eloquence of the English Bar, the monuments of which, more especially in cases connected with the constitution of the government and with public liberty, ought to be carefully preserved."
>
> James Ridgway, ed., *The Speeches of the Hon. Thomas Erskine When at the Bar, on Subjects Connected with the Liberty of the Press and Against Constructive Treasons* (London, 2nd ed., 1813), viii.

Thomas Erskine (1750–1823) was the leading common law barrister in Britain and a Whig MP committed to defending freedom of the press. Famed for his powerful, classical rhetoric he was described as an "invincible orator" with "the tongue of Cicero and the soul of Hampden."[1] In 1813 a collection of his speeches was published by radical Whig bookseller James Ridgway, who believed forensic eloquence played an important role in political trials. In the preface to his edition, Ridgway highlighted the significance of bar advocacy in seditious libel cases that impacted constitutional issues and individual rights. His stated aim was to enable the wider public, as potential jurors, to read Erskine's speeches so they could understand the principles upon which the liberties of subjects and stability of the government depended.[2] Ridgway's collection of Erskine's speeches sold widely in Britain and America where it was read by lawyers, authors of legal treatises, and acquired by university law libraries. References to Ridgway's edition can also be found in libel treatises and collections of state trials, demonstrating the interrelationships between "popular," "political," and "legal" texts in Britain and Early Republic America.

Ridgway's collection is, therefore, a prime example of how and why Erskine's published arguments supporting freedom of the press were disseminated across the Atlantic and came to be regarded as "usable" texts by American lawyers. This article will examine the political, legal, and commercial factors that frequently shaped legal texts and bookseller-publishers' practices. It will also consider the broader transatlantic legal culture; one that embraced an ideal of the patriot lawyer and classical oratory, coupled with the constitutional importance of trial by jury. It will argue that Erskine's Whig politics and support for American independence, alongside his performances as an independent patriot lawyer committed to disinterested public service, resonated with American lawyers, diplomats, and politicians. Since eloquent advocacy was viewed as a powerful legal and political instrument in both countries, Erskine's court performances were also admired as models of forensic argument and oratory that could be deployed in American trials. Equally, Erskine was viewed as a "good man," the classical model of a civic orator whose moral character and sensibility underpinned the persuasive force of his arguments. While the French Revolution and fears of radicalism contributed to increasingly critical reactions to "theatrical" emotional displays in English courts, emotive performances remained central to American legal and political culture well into the nineteenth century, a factor that helped prolong the popularity of his legal arguments after his death in 1823.

The focus on transatlantic legal culture means this analysis is based upon a range of legal literature including lawyers' speeches, but particularly treatises, pamphlet trial reports, and other tracts on libel and liberty of the press (many

[1] Lord John Russell, *An Essay on the History of the English Government and Constitution, from the Reign of Henry VII to the Present Time* (London: Longman, Hurst, Rees, Orme and Brown, 1823), 168; A leading Puritan MP, John Hampden, opposed Charles I's illegal ship tax, was "martyred" in the English Civil War, and became a political icon for Whigs and American patriots. Maija Jansson, "Shared Memory: John Hampden, New World and Old," *Journal for Eighteenth-Century Studies* 32 (2009): 167–68.

[2] James Ridgway, ed., *Speeches of the Hon. Thomas Erskine* (London: James Ridgway, 1813) viii–ix.

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of which were written by lawyers) plus commentaries and compendiums of State Trials. While legal treatises have been viewed as problematic, static compendiums of law at a specific time and place, Fernandez and Dubber have argued they were produced by writers equally concerned with advocating what the law should be.[3] It follows therefore, that authors' political beliefs could also shape their interpretations of libel law. Moreover, as Billings and Tartar have argued, law books and the legal profession were "virtually inseparable and ... both were equally inseparable from statecraft" in America.[4] To a lesser extent, this discussion also draws on newspapers and periodicals which have played an important role in narratives of political change and the development of public opinion or politics "out of doors." As Lemmings has argued, widespread press coverage and publication of trials and lawyers' speeches enabled even "relatively ordinary people" to engage critically with issues of justice and good governance.[5] The public has also been specifically acknowledged as an important factor for influencing changes to libel law as readers and jury members.[6] Recent work has further challenged the notion of restricting the role of the press in rational public debate to imagined "national communities," since its influence clearly transcended national boundaries.[7] Press coverage of Erskine's court cases and parliamentary contributions extended beyond England to Scotland, Ireland, France, India, and Jamaica as well as to America.[8]

Advocates' rhetoric and their assertions of individual rights in court were widely reported, and they could provide a platform for political office.[9] Erskine frequently sent his speeches to newspapers, often having edited them for better effect. His early legal successes attracted approval from the parliamentary opposition Whig party, as well as friendship with its leader, Charles James Fox, and entry to the Prince of Wales' social circle.[10] Yet, one

[3] Angela Fernandez and Markus D. Dubber, "Putting the Legal Treatise in its Place," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, eds. Fernandez and Dubber (Oxford & Portland, Oregon: Hart Publishing, 2012), 1, 3–4.

[4] Warren M. Billings and Brent Tarter, "Introduction," in *"Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia*, eds. Warren M. Billings and Brent Tarter (Charlottesville: University of Virginia Press, 2017), 3.

[5] David Lemmings, "Criminal Courts, Lawyers and the Public Sphere," in *Crime, Courtrooms and the Public Sphere in Britain, 1700–1850*, ed. Lemmings (London: Routledge, 2016), 3–8.

[6] Eckhart Hellmuth, "After Fox's Libel Act: Or, How to Talk about the Liberty of the Press in the 1790s," in *Reactions to Revolutions; The 1790s and their Aftermath*, eds. Ulrich Broich et al. (London: Global Book Marketing, 2007), 137; H. M. Lubasz, "Public Opinion Comes of Age: Reform of the Libel Law in the Eighteenth Century," *History Today* 8, no. 7 (1958): 453–61.

[7] Hannah Barker and Simon Burrows, eds., *Press, Politics and the Public Sphere in Europe and North America, 1760–1820* (Cambridge: Cambridge University Press, 2007), 11.

[8] See e.g., *Royal Gazette*, vol. 15 (Kingston, Jamaica, 1793); *Kentish Chronicle The Spirit of the Public Journals* (Canterbury, France, Ireland, 1797); *Bombay Courier*, vol. 4 (Bombay, India, 1795, 1810); *Bell's Weekly Messenger*, vol. 2 (London, Ireland, France, America, 1803) in *Eighteenth-Century Journals*, accessed January 8, 2019, www.18thjournals.amdigitital.co.uk.

[9] Wesley W. Pue, *Lawyers' Empire: Legal Professions and Cultural Authority, 1780–1950* (Vancouver: University of British Columbia Press, 2016), 42–44.

[10] David Lemmings, "Erskine, Thomas, first Baron Erskine (1750–1823)," *Oxford Dictionary of National Biography*, http://www.oxforddnb.com/vie/article/8873.

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of the questions this case study seeks to answer is how a lawyer, as opposed to a superior court judge such as Lord Chief Justice Mansfield, or famous jurist and author William Blackstone, could influence legal and public opinion about freedom of the press across the Atlantic. As Halperin has argued, while legal historians have tended to focus on "great works" written by famous judges and jurists, when writing a history of lawyers, it is equally important to assess the impact of legal literature more broadly and in different countries.[11]

Thomas Erskine was the impoverished youngest son of the Scottish Whig and Presbyterian 10th Earl of Buchan. Erskine and his elder brother David (later 11th Earl) were vociferous supporters of American independence and George Washington, with whom both corresponded.[12] Nevertheless, they also maintained friendships and corresponded with George III's family.[13] Erskine enrolled at Lincoln's Inn in 1775 and was called to the bar in 1778, 2 years before fellow student and future Prime Minister William Pitt, who became a personal and political adversary. Erskine progressed from Whig MP for Portsmouth (1783–84, 1790–1806), to Attorney General to the Prince of Wales (1783–92) then to Lord Chancellor to George III (1806–7) adopting "Trial by Jury" as his Baronial Motto. Erskine upheld his family's Whig principles by supporting first the Marquess of Rockingham, then joining Charles James Fox's party in opposition to Pitt's Ministry. Initially he was a friend of Edmund Burke as a fellow supporter of American Independence, but Burke's *Reflections on the Revolution in France* (1790) forced them apart and in libel trials Erskine repeatedly criticized him and Pitt for their change of attitude. Although he was an early supporter of the French Revolution, Erskine was an elite reforming Whig who sought to increase the franchise by supporting parliamentary motions for reform in 1792, 1793, and 1797. He campaigned through societies such as Friends of the People, which espoused a form of civic humanism related to classical Roman republicanism. Founded in 1792 to support more equal representation of the people while tempering the views of more radical reform societies, its members shared the Rockingham Whigs' Country party view of citizenship as restricted to virtuous, independent landed gentlemen; a position which underpinned their admiration for the classical model of Republican government in America.[14]

Erskine's performances in libel and other trials brought him to political and public notice in the 1780s, but his fame peaked with his successful defense of

[11] Jean-Louis Halpérin, "For a Renewed History of Lawyers," *American Journal of Legal History* 56, no. 1 (2016): 53–59.

[12] Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II Until the War with the Thirteen Colonies* (New York: Atheneum, 1968), 219, https://hdl-handle-net.ezproxy01.rhul.ac.uk/2027/heb00188.0001.001, views Buchan as a "Real Whig" within a more radical Scottish tradition. He and Washington exchanged eighteen letters in 1790–98, https://founders.archives.gov/documents/Washington/05-05-02-0181.

[13] See e.g., Letter from Duke of Kent to Buchan, September 6, 1809, RA GEO/MAIN 453, Royal Archives, Windsor.

[14] Iain Hampshire-Monk, "Civic Humanism and Parliamentary Reform: The Case of the Society of the Friends of the People," *Journal of British Studies* 18, no. 2 (1979): 71, 74.

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radicals against charges of constructive treason in 1794. His public reputation in America, however, had risen in early 1793 when newspapers published reports of his defense of Thomas Paine's *Rights of Man* in December 1792.[15] In placing professional principles above political advancement, Erskine's defense of Paine cost him his post as Attorney General to the Prince of Wales. Nevertheless, admiration of America's Republican government led him to invest considerable sums of money in U.S. stocks. In 1798 he sent his eldest son David Montague to oversee his investments there and, as Lord Chancellor, supported his appointment as Minister to the United States in 1806. Although Erskine's legal practice ceased in that year, he continued to condemn coercive legislation from the House of Lords, such as the suspension of Habeas Corpus and the "Six Acts," to prevent seditious meetings.[16]

Identified by legal historians as a rare "libertarian" lawyer and an important figure in the development of links between lawyers, "political liberalism" and forms of adversarial trial in different countries, Thomas Erskine was not a typical member of the predominantly conservative English bar.[17] Erskine's liberalism was shaped by the political thought of Locke, Milton, and Algernon Sidney, a Whig patriot whose *Discourses on Government* (1698) was central to American revolutionary thought.[18] There is no academic account of Erskine's life, and while his biographers have addressed the issue of his legal influence in lauding his impact on Anglo-American law in general, none discuss how this was achieved.[19] Legal historians Wesley Pue and Leonard Levy, by contrast, have identified Erskine's contribution to libel law and debated his political agency. Locating a liberal definition of a free press in England, Levy views the trial of William Shipley, Dean of St Asaph in 1784 as pivotal in the evolution of Anglo-American libel law, public opinion, and the passage of Fox and Erskine's Libel Act in 1792 that clarified the role of juries. Levy also praised Erskine's "exhilarating forensics" in Shipley's defense, which inspired pamphlet authors who opposed limiting juries' rights in libel trials.[20]

[15] See e.g., *The Columbian Centinel* (Boston), February 16, 1793: 2; *The Mirrour* (Concord, New Hampshire), February 16, 1793: 2; the *New Jersey State Gazette* (Trenton), March 6, 1793: 1–2, March 20: 1, 4; *The Argus* (Boston), April 16, 1793: 1–2; *The Trial of Thomas Paine, for a Libel, Contained in the Second Part of Rights of Man .... with the Speeches of the Attorney General and Mr. Erskine at Large* (Boston, 1793).

[16] 41, Parl. Deb., H. L. (1st Ser.) (1819) 441–48, accessed September 6, 2022, https://hansard.parliament.uk/lords/1819-11-30/debates/bfa49c6b-b611-4091-bd7e-c9ad5bc8b108/StateOfTheCountry#441.

[17] Pue, *Lawyers' Empire*, 33–73; and "Lawyers and Political Liberalism, in Eighteenth- and Nineteenth-Century England," in *Lawyers and the Rise of Western Political Liberalism: Europe and America from the Eighteenth to the Twentieth Centuries*, eds. T. C. Halliday and L. Karpik (Oxford: Clarendon Press, 1997), 174–78.

[18] Annabel Patterson, *Nobody's Perfect: A New Whig Interpretation of History* (New Haven: Yale University Press), 1; Caroline Robbins, "Algernon Sidney's *Discourses Concerning Government*: Textbook of Revolution," *William and Mary Quarterly* 3, no. 4 (1947): 266–96.

[19] J. A. Lovat-Fraser, *Erskine* (Cambridge: Cambridge University Press, 1932); Lloyd Paul Stryker, *For the Defence: Thomas Erskine, One of the Most Enlightened Men of his Times, 1750–1823* (New York: Staples Press, 1947); John Hostettler, *Thomas Erskine and Trial by Jury* (Hook: Waterside Press, 2010).

[20] Leonard Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985), 282–85.

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Erskine's contributions to libel law are important because of his role in the passage of the Libel Act and, the political, ideological and legal significance of the principle of freedom of the press as a bulwark against tyranny in eighteenth-century Britain and America. Historians have debated the origins and causes of an increasingly restrictive implementation of libel law in English courts and whether this was primarily due to changing public opinion, the role of judges in developing new doctrine, or judicial disagreements over legal procedure and the role of juries.[21] Most, however, note the impact of a restricted notion of "no prior restraint," articulated by William Blackstone in his seminal *Commentaries on the Laws of England* (1765–70). For Blackstone, liberty of the press was "essential to the nature of a free state" but that did not extend to "freedom from censure for criminal matter when published."[22] Since the danger of libels was their tendency to provoke public disorder and undermine good government when published, it was immaterial whether the text was true or false, because "the provocation, not the falsity" must be punished.[23] Yet this meant that authors, publishers, and booksellers were all at risk of prosecution, particularly if their texts were deemed politically seditious.

Blackstone's definition of libel was upheld by Lord Chief Justice Mansfield (1756–88) in King's Bench at Westminster and what Bird has termed the "Blackstone–Mansfield doctrine" became dominant in England and America.[24] Equally importantly, judges in King's Bench libel trials increasingly restricted the role of juries. Mansfield insisted that judges must decide matters of law relating to the malicious and seditious nature of the text placed on record and thus determine criminal intent, which they inferred merely from publication of the writing itself. Juries could only consider the fact of whether the defendant had written or published the text and if its meaning was that stated in the indictment.[25] As Mansfield explained, in libel trials the jury's verdict was therefore "equivalent to a special verdict in other cases."[26] Erskine vehemently opposed this limitation because it effectively deprived juries of their constitutional right to decide the whole issue as they did in other criminal trials. Yet Mansfield accepted that if the meaning of a text was not clear or expressed through "innuendoes," judges need not divulge their own view to the jury.[27] Since a jury's interpretation of the meaning of words depended on the social,

[21] Ibid.; Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime, c. 1770–1820," *Oxford Journal of Legal Studies* 10, no. 3 (1990): 307–52; Phillip I. Blumberg, *Repressive Jurisprudence in the Early American Republic* (Cambridge: Cambridge University Press, 2010), 52–66; Wendell Bird, *Press and Speech Under Assault: The Early Supreme Court Justices and the Campaign Against Dissent* (Oxford: Oxford University Press, 2016), 31–70.

[22] William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–70), Book 4, 152.

[23] Ibid., 150–51.

[24] Bird, *Press and Speech Under Assault*, xxi–xxii, 31; see e.g., R v Shipley (1784) 4 Douglas, 73, *English Reports*, Vol. 99, King's Bench.

[25] Ibid., 55–58; Lobban, "From Seditious Libel": 312–20.

[26] "Judgement of the Court in the Case of the Dean of St. Asaph," Lord Mansfield, November 16, 1784, in *Speeches*, ed. Ridgway, 370.

[27] Ibid.

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but particularly the political context at the time of publication, Erskine could successfully challenge the prosecution's case which was based only on selected passages.[28] As a result of Erskine and Fox's efforts, the Libel Act (1792) gave juries the right to deliver a general verdict on issues of fact and law (whether separate or blended); but it also enabled judges to give their opinion and directions to the jury.[29]

To assess Erskine's impact on American lawyers and politicians, a brief comparison of English with American libel law provides useful context. After the Declaration of Independence, nearly all new states initially accepted English common law in their reception statutes and English-trained American lawyers, and judges, while English legal texts remained important throughout the eighteenth century.[30] Nevertheless, Americans increasingly made their own decisions about which English or European legal texts would best serve their purposes in particular cases and which should be viewed as more authoritative.[31] In criminal libel cases, Blackstone's definition and his restriction on jury findings, supported by Lord Mansfield, remained dominant for American judges and prosecution lawyers, even after the passage of the 1792 Libel Act, although more frequently contested.[32] The most politically important difference for American seditious libel law was the passage of the First Amendment prohibiting Congress from abridging any right to freedom of the press or speech in 1791—a measure also adopted in many state constitutions. Neither piece of legislation made a major impact on reducing or changing the outcomes of seditious libel trials.[33] Nevertheless, suppressive legislation could also result in more liberal outcomes. The Federalist 1798 Sedition Act increased prosecutions of Democratic Republican newspaper editors, but it also gave juries the right to decide law and fact, and established truth as a valid defense to libel charges. The Act expired in 1800, and while some U.S. courts continued to consider truth, it was not accepted in English courts until 1843. Libel battles continued in courtrooms on both sides of the Atlantic into the nineteenth century, so texts recording Erskine's arguments remained usable in American courts long after his death in 1823, as did admiration for his "invincible oratory" and Whig political principles.

Politics, the Press, and Trial by Jury

Links between histories of law and politics often run on parallel, but rarely intersecting, lines that obscure the dual activities of lawyers who practiced

[28] Lobban, "From Seditious Libel": 310–21; and see R v Shipley (1783–4) and R v Stockdale (1789) discussed later.

[29] 32 Geo. III. c. 60 (1792); full text in *Speeches*, ed. Ridgway, 383.

[30] Blumberg, *Repressive Jurisprudence*, 52, 57–58. Lawrence Friedman, *A History of American Law* (New York: Touchstone, 2005), 95.

[31] Angela Fernandez, *Pierson v Post, The Hunt for the Fox: Law and Professionalization in American Legal Culture* (Cambridge: Cambridge University Press, 2018), 12–13; Bird, *Press and Speech*, 31 nt. 1, views Blackstone as "influential," not "authoritative."

[32] Blumberg, *Repressive Jurisprudence*, 60–65.

[33] Lobban, "From Seditious Libel": 309; F. K. Prochaska, "English State Trials in the 1790s: A Case Study," *Journal of British Studies* 13, no. 1 (1973): 63–82; Levy, *Emergence of a Free Press*, 285.

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both. Erskine's political contributions in Parliament for example, have either been dismissed as relatively ineffective or largely ignored; Alexander Hamilton's legal career has, until recently, been overshadowed by his political office.[34] Yet freedom of the press and the rights of juries were constitutional and party-political issues in both countries. Since, as James Vernon argues, the meanings of both written and unwritten constitutions are not fixed but remain fluid, so constitutional rhetoric could also be "used strategically as a language of legitimation" in different ways.[35] During the late eighteenth and early nineteenth centuries highly politicized libel battles took place between government and opposition Whigs, or Loyalists and Radicals in England; and between Federalists and Republicans in America. Politics also shaped American attitudes to rulings by English common law judges after 1783. Lord Mansfield's decisions and earlier conservative opposition to American colonists for example, provoked Jefferson to call for Mansfield's judgments after 1760 to be excluded from U.S. courts, while Federalists such as Adams and Hamilton broadly supported his rulings.[36]

The use of broad conceptual terms such as "liberal" or "patriot" to describe individual lawyers can obscure the "Country" Whig political beliefs that informed Erskine's parliamentary and legal performances. Reflecting on his long career in 1819, Erskine claimed that he had preserved his principles by "constantly maintaining, both at the Bar and in Parliament, all the doctrines ... which .... characterised and ought perpetually to distinguish the representatives of the Whigs who had effected the Revolution."[37] Newspaper coverage of parliamentary proceedings and publication of his speeches, delivered while a member of extra-parliamentary reform associations such as "The Friends of the People," but also the "Friends to the Liberty of the Press" which opposed Loyalist attempts to restrict political debate in the press, were admired by British and American Whigs. At the latter's second meeting in December 1793, Erskine presented a powerful speech on constitutional, political, and legal issues which the society printed and then distributed 10,000 copies.[38] In 1796 Elias Boudinot, a New Jersey Whig lawyer, judge, and director of the U.S. Mint, read one of Erskine's speeches to a "Society in London." Impressed by Erskine's admiration of Washington and his deep interest in Americans' "welfare," Boudinot sent a pencil portrait of Washington to Erskine as, "a testimony of Respect from an American, who esteems the

[34] Kate Elizabeth Brown's *Alexander Hamilton and the Development of American Law* (Lawrence: University Press of Kansas, 2017) demonstrates how Hamilton's use of English common law principles in court shaped his political policies.

[35] James Vernon, "Notes Towards an Introduction," in *Re-reading the Constitution: New Narratives in the Political History of England's Long Nineteenth Century*, ed. James Vernon (Cambridge: Cambridge University Press), 2, 9.

[36] Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason* (Montreal: McGill-Queen's University Press, 2013), 396–97.

[37] Erskine, *A Short Defence of the Whigs against the Imputations Attempted to be Cast Upon Them During the Late Election for Westminster* (London: Ridgway, 1819), 6–7, Hathi Trust, accessed April 7, 2021, https://babel.hathitrust.org/cgi/pt?id=umn.31951002039079v&view=1up&seq=3, vii.

[38] See *Proceedings of the Friends to the Liberty of the Press* (London, 1793). Members included Foxite Whig MPs, Charles Gray, R. B. Sheridan, and Arthur Piggott (Attorney General, 1806–7).

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rational supporters of Liberty & good Government, to whatever Nation or Country they may belong."[39] Boudinot's comments reflected more radical Whig beliefs in a form of patriotism that included virtuous citizens who supported reason and liberty in any country.[40]

Erskine's most successful political publication, *The Causes and Consequences of the Present War with France* (1797), a text which heavily criticized the British government, could be found in the libraries of Washington, Jefferson, Adams, and St George Tucker.[41] Former Continental Army General Horatio Gates mailed Jefferson a copy claiming that: "Every True Whigg [sic] upon this Continent must adore the Man for the Wisdom of his Head, the uncorruptness of his Heart, and the Firmness with which he has delivered his Sentiments."[42] Historians have also portrayed Erskine as a principled, "patriot" lawyer. Lemmings has identified a shared ideal of the "classical good lawyer" who sought public justice rather than financial reward, but demonstrated it was a model more strongly adhered to in America.[43] As McCormack has shown, manly independence and classical "virtu" were highly praised ideals for politicians who were demonstrably disinterested, incorruptible models of patriotic, classical republicanism. In 1788 a New York journal published an ode to Erskine, a "Persuasive Advocate!" whose willingness to aid the "indigent" in court, moral "character," and "honest heart" demonstrably fulfilled Tully and Cicero's requirements for a "good orator."[44] It was the Country Whig "classical-patriot" understanding of liberty and the right to resist tyranny and corruption that was adopted in America.[45] This was a model of which Erskine proved to be an uncommon example in England but the ideal, linked to his Whig politics and legal arguments, was much admired by lawyers in America. For John Adams, knowledge of the "Powers of Eloquence" was equally essential to the classical patriot ideal. There was, he wrote, no higher object for "any mortal to aspire than to ... assist the feeble and friendless, ... to procure

[39] Elias Boudinot to Samuel Bayard, April 6 (1796) Coll. Ref. GLC03627, accessed March 14, 2021, http://www.americanhistory.amdigital.co.uk/.

[40] James Epstein, "Our Real Constitution: Trial Defence and Radical Memory in the Age of Revolution," *Re-reading the Constitution*: 26.

[41] Results of search for "Erskine" in "Legacy Libraries," accessed July 2019 in catalogues for Washington, Jefferson, and Adams on https://www.librarything.com/legacylibraries/; Tucker's edition in William and Mary College, Tucker-Coleman collection.

[42] Horatio Gates to Thomas Jefferson, May 9, 1797, *The Papers of Thomas Jefferson Digital Edition*, eds. James P. McClure and J. Jefferson Looney (Charlottesville: University of Virginia Press, Rotunda, 2008–17), accessed June 22, 2017, http://rotunda.upress.virginia.edu/founders/TSJN-01-29-02-0287.

[43] David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2003), 236–37, 244–47, 306–7.

[44] *Independent Journal*, 188 471 New York, June 4, 1788. On the origins and use of the classical model of an orator see Kenneth Cmiel, *Democratic Eloquence: The Fight over Popular Speech in Nineteenth-Century America* (New York: Morrow, 1990), 23–31.

[45] Matthew McCormack, *The Independent Man: Citizenship and Gender Politics in Georgian England* (Manchester: Manchester University Press, 2005), 2; Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1992), 33–36.

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redress to wrongs" and "to assert and maintain liberty and virtue, to discourage and abolish tyranny and vice."[46]

The cornerstone of Erskine's legal and political argument was the constitutional basis of trial by jury and its right to decide both fact and law in criminal libel trials. The issue of jury rights in seditious libel trials had been heatedly debated in eighteenth-century British and American pamphlets since the 1730s.[47] Yet it was this essentially Whig "political" interpretation, based upon their historic view of constitutional rights that Americans admired. As Fox argued, when introducing Erskine's case for a declaratory act to clarify the role of juries to the House of Commons, the English constitution rested on two main springs: "the representation of the people through the medium of that House, and the juridical power of the people through the medium of juries."[48] Fox cited Erskine's defense in the Dean of St Asaph case (1784) as the basis for the motion which resulted in The Libel Act (1792) that "restored" the power of juries. He told the Commons that he wanted Erskine to make the main argument to: "crown the work he had so nobly begun and give his sanction to an act of parliament to insure to his country and to posterity, the real existence of those rights and privileges the theory of which he had formerly defended so eloquently."[49] Erskine considered this legislative victory to have been won by a "band of patriots" defending "the principles of that modern Magna Charta, of 1688" against a doctrine that was "utterly subversive of the Liberty of the Press, and through that liberty of all the rights and privileges of mankind."[50] It was a view shared by Americans who had enshrined trial by a jury of local peers in the Constitution and the Bill of Rights. Nevertheless, as John Quincy Adams explained in 1810, "there have been very sharp disputes how far the authority of the court and jury respectively extend, and where is the line of separation between them," which shaped the role and oratory of advocates in both countries.[51]

Trial by jury was, therefore, a powerful constitutional ideal that required lawyers to exercise persuasive rhetoric for legal and political ends. It was also considered a means of ensuring judges' independence from the crown and government in both countries. The need for both royal and parliamentary agreement to remove a judge meant American lawyers, like Alexander Hamilton, viewed the English system as more independent than their own.

[46] "Extract of a Letter to Jona. Sewall, Octr. 1759" from the Diary of John Adams, Founders Online, accessed August 19, 2022, https://founders.archives.gov/?q=Page-Ref%3AADMS-01-01-02-pb-0123&s=1511311112&r=3.

[47] Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press, 1985), 318–55.

[48] Parliamentary House of Commons Debates, May 20, 1791, *Parliamentary Register*, 29 (1780–93), 466 Proquest Parliamentary Papers, accessed December 12, 2018, https://parlipapers.proquest.com/parlipapers/docview/t70.d75.pr_1780_1796-001968?accountid=11455.

[49] Ibid.

[50] Erskine, *A Short Defence of the Whigs*, 6–7.

[51] John Quincy Adams, *Lectures on Rhetoric and Oratory: Delivered to the Classes of Senior and Junior Sophisters in Harvard University* (Cambridge: Hilliard & Metcalf, 1810), 281, Internet Archive, accessed April 19, 2021, https://archive.org/details/lecturesonrheto02adamgoog/page/n6/mode/2up.

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Yet many judges benefitted from Crown patronage and ministerial power, just as Lord Mansfield did as a member of the cabinet between 1757 and 1765.[52] Lawyers were equally criticized as financially and professionally motivated. In 1811 radical author and Sheriff of London, Sir Richard Phillips, published detailed legal advice to potential jurymen. He cited Erskine's name among the very few "truly illustrious" lawyers, including Camden and Romilly, who remained "effective friend[s] to public liberty" rather than seeking professional preferment in court. A friend of Whig MP Richard Brinsley Sheridan, Phillips' political position was clear from the summary of his conclusions. Juries, he explained, are "ancient constitutional bulwarks of liberty." Writing after the Libel Act, Phillips emphasized that the law constituted them "the sole independent judges of the intention of the parties; ... it lies entirely in their own judgment and discretion to declare on the innocency or criminality of any alleged libel."[53] His appendix included a verbatim extract of Erskine's argument with Judge Buller in the St Asaph case over the jury's refusal to bring in a recognized verdict.

The seditious libel trial of William Shipley Dean of St Asaph in 1784, for republishing *The Principles of Government, in a Dialogue between a Scholar and a Peasant*, focused on whether the dialogue included seditious innuendoes that could disturb the peace and the Dean's plan to circulate copies among the lower orders of Welsh people. Hence, publication, political context, and ascertaining the meaning of phrases were major issues. The trial has been widely discussed and viewed as one of the most significant legal and political cases in histories of libel and a free press.[54] The pamphlet's author, William Jones, was a lawyer, jurist, and Whig critic of English policy in America during the revolution. He was admired by American lawyers for his *Essay on the Law of Bailments* (1781).[55] His advocacy of neo-classical oratory modeled on Cicero proved very influential to eighteenth- and early nineteenth-century lawyers and politicians.[56] Erskine's defense of Shipley became one of his most famous performances during which he established his credentials as a civic orator and Whig patriot lawyer, declaring that where: "the conviction of the private individual is the subversion or surrender of public privileges, the advocate has a more extensive charge. The duty of the patriot citizen then mixes itself with his obligation to his client, and he disgraces himself, dishonours his profession

[52] Lemmings, *Professors of the Law*, 285–92.

[53] Sir Richard Phillips, *On the Powers and Duties of Juries, and on the Criminal Laws of England* (London: Sherwood, Neeley and Jones, 1811), 18, 305, 384, 388, 337–44.

[54] Green, *Verdict According to Conscience*, 328–31; Lobban; "From Seditious Libel to Unlawful Assembly": 315–18; Anthony Page, "The Dean of St Asaph's Trial: Libel and Politics in the 1780s," *Journal for Eighteenth-Century Studies*, 32, no. 1 (2009): 21–36; Kevin Crosby, "R v. Shipley (1784): The Dean of St Asaph's Case," in *Landmark Criminal Cases*, eds. H. Mares, I. Williams and P. Handler (Oxford: Hart Publishing, 2017), 103–24.

[55] AWB Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review*, 48, no. 3 (1981): 659–60.

[56] Robert A. Ferguson, "The Emulation of Sir William Jones in the Early Republic," *The New England Quarterly*, 52, no. 1 (1979): 3–26, https://www.jstor.org/stable/364352.

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and betrays his country if he does not step forth in his genuine character and vindicate the rights of all his fellow-citizens."[57]

That Erskine's patriotism was founded on his Country Whig beliefs becomes clear in his statements about the history of political rights since the Revolution of 1688. Describing John Locke as, "the greatest Whig that ever lived in this country," Erskine cited his argument against "tyranny" as the prevention of any magistrate to exceed the "power given him by the law" to act against and invade the rights of another.[58] Yet Erskine's reasoned legal arguments focused on the rights of juries to deliver a full verdict and the need to consider both the context of publication and criminal intent of author or publisher—points that would be reproduced in American law books.[59] The jury gave a verdict of "Guilty of Publishing only," and refused to find the Dean guilty of sedition or libel.[60] Defense counsel at the Pennsylvania trial of Edward Shippen (1805), praised Erskine as "a good man, a patriot and a great lawyer" for defending juries' rights in libel cases and declared that his reasoned argument in the Asaph case would "eternize" [sic], thus asserting its lasting significance.[61]

Arguably, the the Dean of St Asaph's trial possessed the same political, constitutional, and symbolic significance in England as the earlier Zenger trial did in America; it also demonstrates how American legal arguments for freedom of the press influenced English lawyers. Described as "the morning star of that liberty which subsequently revolutionized America" by statesman Gouverneur Morris, Zenger was tried for printing critical newspaper articles concerning the governor of New York in 1733.[62] The key issues turned on the truth of these criticisms and the restricted role of the jury in libel trials. Zenger's counsel, Andrew Hamilton, contested the standard charge of publishing a "false, malicious, seditious ... libel" by arguing that the criticisms were truthful. He persuaded the jury to acquit against the Court's assertion that truth was inadmissible, because as local men they were acting as "witnesses to the truth of the facts" published. If they believed the criticism was true, Hamilton argued, the jury must exercise its "integrity" and "right" to decide the issue regardless of the Court's opinion.[63]

Newspapers and publishers were quick to capitalize commercially and politically on the links between Zenger's trial and the Dean of St Asaph's case.

[57] *The Whole of the Proceedings at the Assizes at Shrewsbury on Friday August 6, 1784 in the Cause of The King on the Prosecution of William Jones Attorney at Law Against The Rev. William Davies Shipley, Dean of St Asaph* (London: The Society for Constitutional Information, 1784), 43.

[58] Ibid., 62.

[59] Ibid., 52–53, 56–65, 66, 71–72, 74.

[60] Ibid., 107–11.

[61] William Hamilton, *Report of the Trial and Acquittal of Edward Shippen, Esquire, Chief Justice, and Jasper Yeates and Thomas Smith, Assistant Justices, of the Supreme Court of Pennsylvania, on an Impeachment, before the Senate of the Commonwealth, January, 1805* (Lancaster, Pennsylvania: 1805), 445, the library of John Adams, accessed March 25, 2020, https://archive.org/details/reportoftrialacq00ship/page/446.

[62] Morris, cited in *Edinburgh Encyclopaedia*, ed. David Brewster, 18 vols (William Blackwood, 1808–30, US edition), 400.

[63] *The Tryal of John Peter Zenger of New York, Printer* (London: J. Wilford, 1738), 15, 28.

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Publication of the former almost certainly influenced Erskine's strategy but was dedicated to the jury, who reached the same decision in the Asaph trial. American and English accounts of Zenger's trial were "reprinted for the special gentlemen [jury] of Shrewsbury," one of which was dedicated to Erskine for "asserting the Liberty of the Press and ... the unalienable rights of jurors."[64] Hamilton's points about the danger of viewing innuendo as libel in every text were also highlighted in a letter to the editor of the London *Gazeteer and New Daily Advertiser*, published a month after Mansfield had dismissed Erskine's appeal in the Dean of St Asaph's case.[65] Joseph Towers' *Observations on the Rights and Duty of Juries* (1784) stressed the need for the public to understand the constitutional importance of Erskine's arguments but also referenced the Zenger trial in the hope that America would not adopt English libel law and so preserve the rights of its own juries.[66] Towers claimed he was writing for the public and potential jurors, his tract was later published in Philadelphia where the *Independent Gazetteer* printed excerpts for its own readers in 1789, keeping Erskine's arguments before the American public for several years.[67] As the *Charleston Courier* waspishly noted in 1807: from the moment Erskine "lost" the Asaph case, "he gained friends and admirers, because it was dangerous to offend him; from that moment the public journals could ring with his panegyrics, because it increased ten-fold the number of their patrons."[68]

Transatlantic Legal Print Networks

Historians have studied transatlantic political connections, but analysis of the multidirectional movement of people and texts reveals both legal connections and evidence of how Erskine's speeches, trial reports, and political publications were sold or read in America. American lawyers and diplomats who traveled to London observed, conversed, or dined with Erskine and read his work. William Austin, a young American training at Lincoln's Inn 1802–3, observed Erskine's honorable, non-partisan character as an advocate in a series of letters published as a collection in Boston and serialized in American periodicals. Describing Erskine's gestures, expressions, and voice as "a torrent of eloquence," Austin emphasized that "in the moment of passion, when self-convinced, he is pure intelligence," leaving the judge and jury "prostrate in chains."[69] William Pinkney, an experienced lawyer and admired orator, was appointed to negotiate the Jay treaty in 1796. Pinkney attended debates in

[64] Ibid. (Boston, MA, 1738; rep. editions London & Shrewsbury, 1784) inscribed to the Hon. T. Erskine.

[65] *Gazetteer and New Daily Advertiser*, 17487, December 28, 1784, 4.

[66] Towers, *Observations*: vii, 111–14, 13; Wendell Bird, "Liberties of Press and Speech: 'Evidence Does Not Exist To Contradict the ... Blackstonian Sense' in Late 18th Century England?," *Oxford Journal of Legal Studies* 36 (2016): 1–25.

[67] *Philadelphia Independent Gazetteer*, November 13, 1789, 2.

[68] *Charleston Courier*, July 2, 1807, 2.

[69] "Letter XXXVII," August 2, 1802, in William Austin, *Letters from London in the Years 1802 & 1803* (Boston, 1804), 283–88; republished as "Character of the Hon. Thomas Erskine," in *Weekly Visitor, or Ladies Miscellany*, November 24, 1804, 3, 8.

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Parliament and the Courts, where he watched "Mr. Erskine, who was then in the meridian of his fame" and witnessed "a higher standard of literary attainments than had been thought necessary to embellish and adorn the eloquence of the bar in his own country."[70] Pinkney returned to London with James Monroe from 1806 to 1808, during most of which Erskine was Lord Chancellor. At a political function in August 1806 newspapers reported that Pinkney raised the toast "may the name of Erskine and trial by jury ever be united."[71] Monroe developed an "affectionate" friendship with Erskine while in England and on leaving in November 1807 he promised that "you are one of those in whose fame and wisdom I take the greatest interest. Be assured that I shall be attentive to whatever is connected to you in either respect."[72]

Radical Whig London booksellers were embedded in transatlantic intellectual, political, commercial, and news networks, as were a number of American and British lawyers.[73] Whig lawyer MPs such as Erskine and Arthur Pigott, who was also a member of the "Friends of the Liberty of the Press," acted as defense counsel for publishers accused of seditious libel.[74] James Ridgway was one of a group of booksellers who published tracts for the "Friends of the People," as well as reports of Erskine's speeches at meetings of "Friends of the Liberty of the Press," during which he discussed the St Asaph case and Thomas Paine's libel trial (1792). Erskine and Pigott also defended Ridgway against libel charges in 1793, but without success. Ridgway had begun his publishing career working for John Almon as did John Stockdale, both of whom Erskine also defended. Thomas Jefferson, John Adams, John Quincy Adams, and Henry Laurens developed personal relationships with Stockdale while in London, and all except Jefferson took lodgings with him above his shop.[75]

Stockdale, like Ridgway, published American texts, including Jefferson's *Notes on the State of Virginia* (1787) and sent English books and pamphlets to him in the United States. Erskine successfully defended him against a charge of libel against the House of Commons brought by Fox in Parliament and managed by Edmund Burke. Stockdale had published John Logan's *Review of the Charges against Warren Hastings* in 1788, defending him against published allegations and personal insults made by Burke before the trial began. Erskine argued

[70] Henry Wheaton, *Some Account of the Life, Writings, and Speeches of William Pinkney* (New York: J. W. Palmer & Co., 1826), 45.

[71] *Evening Post*, New York, October 3, 1806, 3.

[72] James Monroe to Thomas Erskine, November 1, 1807, mss33217, Series 4, Addenda, 1778–1831, James Monroe Papers, Library of Congress Digital Collection, accessed December 19, 2020, http://hdl.loc.gov/loc.mss/ms009142.mss33217.017.

[73] Michael Guenther, "Ideology "out-of-Doors": Networks of Print & Politics in Revolutionary London, 1760–1780" (Conference Paper, Northwestern University, 2012), https://www.academia.edu/28159694/Ideology_Out_of_Doors_Networks_of_Print_and_Politics_in_Revolutionary_London_1760_1780; Ralph A. Manogue, "James Ridgway and America," *Early American Literature* 31, no. 3 (1996): 264–74.

[74] Ralph A. Manogue, "The Plight of James Ridgway, London Bookseller and Publisher, and the Newgate Radicals, 1792–1797," *The Wordsworth Circle* 27, no. 3 (1996): 158–66.

[75] Eric Stockdale, *Tis Treason My Good Man: Four Revolutionary Presidents and a Piccadilly Bookshop* (Delaware: Oak Knoll Press, 2005), passim, 121, 131, 162–68, 221–38.

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that the jury must consider the whole text, not just the lines "artfully" set out by the prosecution plus the context of its publication. Erskine reasoned that, minds "subdued by the terrors of punishment" could not create great works or critical contributions from which "our own constitution, by the exertion of patriot citizens, has been brought back to its standard."[76] If the jury found Logan's intention to be a justified, even if intemperate defense of Hastings, they should acquit Stockdale. For "Liberty" was not unalloyed, but she "must be taken just as she is; you may shape her into a perfect model of severe scrupulous Law, but she will be liberty no longer and you must be prepared to die under the lash of this inexorable justice which you have exchanged for the banner of freedom."[77]

In its assessment of Ridgway's collection of Erskine's speeches *The Edinburgh Review* (1810) claimed this speech was "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."[78] The *Review*, and later Lord John Campbell, agreed that it combined skilled argument, the application and "exquisite" illustration of sound principles, with "powerful and touching language in which they are conveyed." Nevertheless, "the fire of that .... *rhetoric* (for it was quite under discipline) which was melting the hearts and dazzling the understanding of his hearers" never fell into the fanciful eloquence of a popular preacher or actor, it was rationally deployed by a consummate advocate in defense of his client and the liberties of his country.[79] Stockdale published *The Whole Proceedings* of his own trial in 1790, adding an account of the Dean of St Asaph's trial and four letters to the *Public Advertiser*, which brought together both of Erskine's most highly regarded arguments in libel cases and boosted sales across the Atlantic.

Printed editions of Erskine's libel trials were read and discussed in Britain and America, particularly if they had some political resonance, but also as models of effective oratory. Some lawyers, including Erskine, deliberately edited or "improved" their speeches prior to publication.[80] Erskine's fees for the Dean of St Asaph's trial were paid by the Society for Constitutional Information (henceforth SCI) which was founded to promote political reform. It also published free political pamphlets to educate citizens, and distributed 1,500 copies of a shorthand version of Erskine's appeal before Lord

[76] *The Whole Proceedings on the Trial of an Information Exhibited Ex Officio by King's Attorney General against John Stockdale for a Libel on the House of Commons Tried in the Court of Westminster on Wednesday the Ninth of December 1789 the Right Hon. Lloyd Lord Kenyon Chief Justice of England Taken in Shorthand by Joseph Gurney, To Which Is Subjoined an Argument in Support of Juries* (London: John Stockdale, 1790), 91.

[77] Ibid., 92, 90–93.

[78] *The Edinburgh Review* 16, 31 (April, 1810): 108–16; and Lord John Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England, from the Earliest Times Till the Reign of King George IV* (London: John Murray, 1847), 443–50 included extensive extracts of the speech.

[79] *Edinburgh Review*, 117.

[80] David Lemmings, "Criminal Courts, Lawyers and the Public Sphere," 1–21.

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Mansfield, titled *The Rights of Juries Vindicated*, in 1784.[81] Thomas Jefferson acquired an SCI copy which he had bound for his personal library and, while Mansfield had rejected Erskine's argument about juries, he did succeed in getting the trial arrested.[82] Erskine's speech in the trial of Thomas Paine's second part of the *Rights of Man* (1792) was sold in pamphlet form and widely reported in newspapers for public discussion.[83]

In Paine's trial, shortly after the passage of the Libel Act, Erskine re-asserted his personal, professional, and political principles. As in Stockdale's trial, he stated his character and independence, famously arguing that he would "for ever, at all hazards, assert the dignity, independence and integrity of the English bar, without which, impartial justice … can have no existence" because the moment a lawyer could choose to refuse to "stand between the Crown and the subject arraigned in the court" liberty was at an end.[84] Yet the issue at stake in this case was "the nature and extent" of a free press, which meant that "every man *not intending* to mislead, but seeking to enlighten others with what his own reason and conscience, however erroneously, have dictated to him as truth, may address himself to the universal reason of a whole nation … upon the subject of governments."[85] To support this claim of the legal right to "praise or censure" governments, he cited Lord Stanhope's and Lord Loughborough's parliamentary support of the Libel Bill as "authorities" to claim it was a right now enshrined in English Law under the Libel Act. To persuade the jury that public debate was the best means to ascertain "what is truest," he drew primarily on Milton's *Areopagitica* (1644). This was a foundational liberal text for freedom of expression in Britain and America, but his use of it reflected an understanding of how truth could be reached through debate that was common among reformers and radicals at the time.[86] His most partisan political points, however, were aimed at Edmund Burke, whose rejection of Whig values once shared with American revolutionaries and publication of *Reflections on the Revolution in France* (1790) had, Erskine argued, provoked Paine into producing *Rights of Man* in response. Earlier, Erskine had praised the American constitution and independence, the results of which he compared favorably to current "abuses" in the English constitution.[87]

The combination of eloquence with legal and political argument appealed to lawyers, statesmen, and booksellers. Erskine's speeches in Paine's trial joined those from the trials of the Dean of St Asaph and Stockdale as standard examples of excellent forensic eloquence in American texts like *The British Cicero*

[81] *The Rights of Juries Vindicated* (Society for Constitutional Information, 1785). The print run and free distribution were agreed at a meeting of the Society, October 29, 1784.

[82] E. M. Sowerby, *Catalogue of the Library of Thomas Jefferson*, 2785; Lobban, "From Seditious Libel": 318, argues Erskine's argument succeeded.

[83] See e.g., *The Genuine Trial of Thomas Paine for a Libel Contained in the Second Part of The Rights of Man at Guildhall London before Lord Kenyon and a Special Jury … in shorthand by E. Hodgson* (London: J.S. Jordan, 1792).

[84] *Speeches*, ed. Ridgway, v. 2, 90–91, a principle now known as the "cab rank" rule.

[85] Ibid., 95–96, on truth see Hellmuth, "After Fox's Libel Act," 156.

[86] *Speeches*, ed. Ridgway, v. 2, 151–53, 144–47.

[87] Ibid., 123–24; 119–20.

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(1810), and *The Virginian Orator* (1808) copies of which were owned by Jefferson and St George Tucker, Professor of Law at William & Mary.[88] Copies of Erskine's speech in Paine's trial can also be found in the libraries of George Washington, Alexander Hamilton, and Daniel Webster (a leading lawyer under John Marshall).[89] John Adams' family discussed Erskine's role in Paine's trial in their correspondence and exchanged a copy of the shorthand report. Adams urged his son Charles to read as many British trial reports as possible, because the speeches of Erskine and Edward Law were "Models of Eloquence for the Bar."[90] In England, Erskine's emotive performances, particularly in the 1790s treason trials, were criticized by the Loyalist press and satirists as histrionic and overly theatrical.[91] Nevertheless, as a 1797 manual aimed at young barristers and dedicated to Erskine explained, if expressing sentiments in public in ways admired by classical orators was difficult for gentlemen in the current age, the "eloquence of the body" still remained remarkably effective. Illustrative examples were drawn *inter alia* from classical texts, Shakespeare's plays, and Erskine's own performances.[92] By contrast, American courts and press continued to admire lawyers' emotive rhetoric, "passionate logic," and theatrical performances in jury trials until the 1870s. Sentiment and sympathy remained equally important American moral and political virtues within a broader culture of sensibility that grew after the 1780s.[93]

Political, legal, and commercial imperatives were often combined in texts that served to educate both the public and the legal profession in libel law and forensic oratory. Professional stenographer William Blanchard provided the text for the SCI's version of the *Rights of Juries Vindicated*, but he also

[88] Thomas Browne, *The British Cicero; or, A Selection of the Most Admired Speeches in the English Language,* Vol. 3 (Philadelphia: Birch & Small, 1810); Thomas Erskine Birch, *The Virginian Orator: Being a Variety of Original and Selected Poems, Orations & Dramatic Scenes; to Improve the American Youth in the Ornamental and Useful Art of Eloquence & Gesture* (Richmond, VA: 1808) linked Erskine, Fox, and Burke with classical orators.

[89] Searches in Legacy Libraries, Library Thing returned: Hamilton, *The Celebrated Speech of the Hon. T. Erskine* (Edinburgh: A. Scott, 1793); Washington, *The Whole Proceedings on the Trial ... against Thomas Paine* (London: Martha Gurney, 1793); Webster, *Speeches*, ed. Ridgway (New York: Eastburn, Kirk & Co., 1813), Paine trial, vol. 2.

[90] John Adams to Charles Adams, December 16, 1794, *The Adams Papers Digital Edition*, ed. Sara Martin (Charlottesville: University of Virginia Press, Rotunda, 2008–18), accessed November 8, 2018, http://rotunda.upress.virginia.edu/founders/ADMS-04-10-02-0199.

[91] David Lemmings, "Thomas Erskine and the Performance of Moral Sentiments: The Emotion Reportage of Trials for 'Criminal Conversation' and Treason in the 1790s," in *Criminal Justice During the Long Eighteenth Century: Theatre, Representation and Emotion*, eds. David Lemmings and Allyson N. May (Abingdon: Routledge, 2020), 199–217; Judith Pascoe, "The Courtroom Theatre of the 1794 Treason Trials," in *Romantic Theatricality: Gender Poetry and Spectatorship*, eds. idem (Ithaca: Cornell University Press, 1997), 33–67.

[92] T. Knox, *Hints to Public Speakers, Intended for Young Barristers, Students at Law, And All Others Who May Wish to Improve their Delivery and Attain a Just and Graceful Elocution* (London: J. Murray and S. Highly, 1797), 57–58, 75–77, 21–23, 35–36, 40–41, 43–44.

[93] Simon Stern, "Forensic Oratory and the Jury Trial in Nineteenth-Century America," *Comparative Legal History* 3, no. 2 (2015): 293–306; Andrew Burstein, "The Political Character of Sympathy," *Journal of the Early Republic* 21 (2001): 601–32; Sarah Knott, "Sensibility and the American War for Independence," *American Historical Review* 109, no. 1 (2004): 34–35.

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sold the tract from his own premises, as did four others including the radical bookseller Joseph Johnson in St Paul's Churchyard. Blanchard claimed that he published only Erskine's arguments "in favour of juries" but not Mansfield's ruling in King's Bench to speed up publication because the public had "been attracted in an extraordinary degree to the question which this cause has brought forward."[94] Quick publication was also politically necessary to support the SCI's and Erskine's efforts to endorse the first Libel Bill Fox was preparing in 1784.

Copies of Erskine's speeches were also used to educate future American lawyers. Jefferson added Blanchard's tract to the catalogue of books to be ordered for the new University of Virginia law library in 1828. He also acquired the first two volumes of James Ridgway's edited collection of Erskine's *Speeches* on liberty of the press and against constructive treason that were reprinted in New York in 1813.[95] The *Speeches* can be included within a genre of "law books" for two reasons. First, as the *Edinburgh Review* stated, its pages contained "a complete body of the law of libel and a most perfect history of its progress" from the prosecution of the Dean of St Asaph in 1784 to Fox's libel bill in 1792.[96] The periodical claimed that the collection's initial publication was an event of "great importance, both in a literary and political view."[97] Secondly, as John Quincy Adams argued, the art of rhetoric was not separate from "the art of reason, without which [it] would be destitute to all solid foundation."[98] For early UVA law students, this edition of Erskine's speeches combined a history of libel law with a practical guide to the best legal arguments and rhetoric to deploy in court. Over time, Ridgway's popular edition of Erskine's speeches effectively became an established law book referenced in legal treatises on libel and editions of English state trials.

Literary Culture and Politics in Law Books

American lawyers both needed and desired substantial professional libraries that contained a wide range of literature, history, science, philosophy, and classic Greek and Roman texts, as well as law books. Lawyers and judges such as Adams, Hamilton, Jefferson, James Kent, and Joseph Story engaged with transatlantic literary culture in the belief that knowledge was as essential for their learned profession as it was for liberty.[99] As Ferguson argues, from 1765 to 1830

[94] *The Rights of Juries Vindicated: The Speeches of the Dean of St Asaph's Counsel in the Court of King's Bench, Westminster On the 15th of November, 1784 ...Taken in Short hand by William Blanchard* (London, 1785).

[95] *Rights of Juries* (London, 1785); *Speeches*, ed. Ridgway, Vols 1 and 2 (New York, 1813), in the *1828 Catalogue*, accessed March 15, 2019, http://archives.law.virginia.edu/catalogue/browse?op=setSearchTerm&value=Erskine&submit.x=30&submit.y=11.

[96] *Edinburgh Review*, 16, 31 (April, 1810): 104.

[97] Ibid., 102.

[98] John Quincy Adams, *Lectures on Rhetoric and Oratory*, 34.

[99] Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984), 5–6, 27, 66–67; Fernandez, *Pierson v Post*, 111–13, Kent's Library 254–55.

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patriot lawyers eloquently wielded their literary and classical knowledge as effectively as their legal expertise.[100] Erskine's court speeches were similarly peppered with literary and political allusions to liberal authors including Milton, Locke, Sydney, Hampden, and Hume, as well as references to Cicero's cases.[101] Erskine frequently wrote poetry, but in 1817 he published *Armata*, a utopian novel in two parts in London and New York; it was also a thinly veiled critique of English politics and law. In part II the narrator criticized Armata's legal system, its harsh Libel Law, and discussed the roles of judges and juries, to prove how valuable England's Libel Act had been.[102] Hence Erskine formed part of what La Croix has described as a transatlantic "conversation" linking law, politics, literary culture, and moral sentiment.[103] The existence of a shared literary legal culture enabled American lawyers in the Early Republic to identify with the literary as well as political basis of many of Erskine's legal arguments, just as Pinkney had done in London.

The publication, distribution, and sale of law books evolved as "one of the principal ancillary support and communication networks" which, as Hoeflich demonstrates, "combined to make the development of American law and the American legal profession possible."[104] The relative speed of uptake and dissemination of Erskine's legal work, alongside that of other English lawyers and legal scholars, was therefore shaped by the conditions of the book trade as well as changes in American legal practice and demand from lawyers. Impressive sales of Blackstone's *Commentaries* in the 1770s encouraged the importation of more legal texts and the trade in law books grew steadily, until by 1800 three-quarters of all law booksellers' stock was imported from London or Dublin. The latter acted as a copyright-free conduit created by entrepreneurial arbitrageurs to supply cheaper editions to lawyers thereby creating a boom in English law books until the British Act of Union in 1798 closed the loophole. Hulsebosch's study of Chancellor James Kent's library 1785–1823 demonstrates the "enduring influence" of British "lawyers, judges, books and booksellers" on early U.S. legal culture well into the nineteenth century.[105] By the 1820s the number of American imprints of English law books had grown substantially, but many of these, including legal treatises on libel, had additional notes of American cases which increased their utility to lawyers

[100] Ferguson, *Law and Letters*, 64–72.

[101] Annabel Patterson, *Nobody's Perfect*, 201–37; see also, "Law Report," *The Times*, December 19, 1792, 2–3, of Paine's libel trial, *The Times Digital Archive*, https://link.gale.com/apps/doc/CS34738067/GDCS?u=rho_ttda&sid=bookmark-GDCS&xid=b6828de5, accessed September 5, 2022; in R v Stockdale (1789), Erskine cites Cicero's impeachment of Verres, *Proceedings*, 63–64.

[102] Thomas Erskine, *Armata: A Fragment* (London, John Murray, 1817), 125–28, accessed April 19, 2021, https://play.google.com/books/reader?id=bFgqAAAAMAAJ&hl=en&pg=GBS.RA1-PA125.

[103] Alison LaCroix, "The Lawyer's Library in the Early American Republic," in *Subversion and Sympathy: Gender, Law and the British Novel*, eds. Alison LaCroix and Martha Nussbaum (New York: Oxford Academic, 2013), 250–73, https://doi.org/10.1093/acprof:oso/9780199812042.003.0013.

[104] Michael H. Hoeflich, *Legal Publishing in Antebellum America* (Cambridge: Cambridge University Press, 2010), 3.

[105] Daniel J. Hulsebosch, "Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic," *Alabama Law Review* 60, no. 2 (2009): 377–424, at 381.

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needing to adapt the application of common law in different states.[106] Lawyers' libraries contained copies of Erskine's more famous speeches in pamphlet form soon after they were delivered in the 1780s and 1790s and many lesser known cases in the form of Law Reports covering the court of King's Bench where he was the leading practitioner.[107] It was not until the early nineteenth century that his defenses of key libel cases appeared in libel treatises in America.

Analysis of treatises on libel law authored by lawyers with diverse political affiliations offers reasons why their interpretations differ and whether they cited Erskine's legal arguments. Moreover, as Hartog has argued, while authors of legal treatises believed they had provided objective legal principles for which precedents were cited as supporting evidence, lawyers did not use their texts as "repositories of legal truth." They bought books as "repositories of all the possible positions that could be raised with regard to a particular legal problem" and used the footnotes and indexes to find arguments and precedents to cite, or counter argue against.[108] Nevertheless, as Campbell has demonstrated, the effectiveness of deploying libel treatises in different states largely depended on existing local legal traditions and the political situation within which the text was interpreted, but it could result in legal change.[109] In the treatises discussed here, Erskine's forensic oratory, patriot Whig ideals and defense of citizens' rights were equally important, as was the constitutional role of trial by jury and the relative significance of the 1792 Libel Act that he had instigated. In effect, therefore, Anglo-American libel treatises and trial reports presented, frequently politically informed, "usable" legal arguments, which American lawyers could effectively employ in court.

The political nature of trial reports and libel treatises can be illustrated not only by the interpretation of case law, but by analyzing prefatory remarks, and by arguments made within the footnotes, or in appendices. St George Tucker's annotated 1803 edition of Blackstone's *Commentaries* contained copious notes on differences between English and American (federal and state) attitudes to a free press, in which he argued America did not allow governments to encroach on citizens' "absolute" rights to a free press and disputed Blackstone's interpretation.[110] Joseph Story later took issue with Tucker's views in his *Commentaries on the Constitution* (1833) by supporting the English common law view of no prior restraint. Story argued that "the noblest patriots of England, and the most distinguished friends of liberty, both in parliament, and at the bar, have never contended for a total exemption from responsibility, but have asked only that the guilt or

[106] Hoeflich, *Legal Publishing*, 34, 43–44, 50–51, 54–55.

[107] Lemmings, *Professors*, Appendix C, 347; Thomas Peake, *Cases determined at nisi prius, in the Court of King's Bench* (1795) includes fifteen of Erskine's cases from Easter term 1790 to after Michaelmas term, 1794.

[108] Hendrick Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2002), 16.

[109] Lyndsay Campbell, "Truth and Privilege: Libel Treatises and the Transmission of Legal Norms in the Early Nineteenth-Century Anglo-American World," *Law Books in Action*, 165–80.

[110] St George Tucker, *Blackstone's Commentaries: with notes of reference to the constitution and laws, of the federal government of the United States, and of the Commonwealth of Virginia*, 5 vols (Philadelphia: 1803), Appendix Vol. 1, Part 2, Note G, 3–30, 18.

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innocence of the publication should be ascertained by a trial by jury." In a footnote, Story referenced the Libel Act 1792 and the "celebrated defence of Mr Erskine, on the trial of the Dean of St. Asaph" as supporting evidence.[111]

Collections of State Trials are, by their nature, a largely political record of a state's prime concerns about threats to its stability, but can also shed important light on constitutional, legal, and political history.[112] John Adams owned Sollom Emlyn's *State Trials* (1730), and in the preface to the second edition the author claimed his collection taught the law concerning the "life and liberty of the subject," and offered readers "eloquent speeches and learned arguments," which could form the basis of practice for future lawyers.[113] In demonstrating the power of legal argument and forensic eloquence, and in counteracting concerns about the influence of executive power on judicial independence and protecting the liberties of subjects, editions of State Trials shared the values of other genres of legal literature including libel pamphlets and collected speeches.

From 1808 to 1826 William Cobbett's *State Trials*, which included reports of Erskine's major libel cases, were edited by father and son Thomas Bayley and Thomas Jones Howell, both of whom were Whigs. The Howells' Whig beliefs were reflected in footnotes that contained opinions by Fox, Godwin, Horne Tooke, Irish lawyer John Philpott Curran, and Erskine—collectively termed "foot-of-the-page heroes" by contemporary legal writer Alexander Luders—which effectively provided a liberal, reform-orientated perspective to the collection.[114] Erskine's name appears in multiple footnotes, some of which suggest he provided the information on his own work and the political battle to pass the Libel Act. The 1814 edition complimented Erskine's published speeches for the Dean of St Asaph, cited *The Edinburgh Review*'s praise of Ridgway's edited collection, and included information about speeches Erskine made prior to the Libel Act. The 1817 edition reported Stockdale's trial with a note directing readers to see the defendant's own publication of the trial which included "Lord Erskine's excellent Argument in Support of the Rights of Juries."[115]

Lawyers wanting to adopt arguments in support of jury rights were therefore effectively "directed" to consider the defense speeches in the Asaph case. In 1825 Thomas Jefferson ordered his agents to buy all 32 volumes of *Cobbett's Complete Collection of State Trials* from London when drawing up his catalogue of law books for the University of Virginia.[116] The purchase was clearly aimed at

[111] Joseph Story, *Commentaries on the Constitution of the United States*, Vol. III (Boston: Hilliard, Gray, and Company,1833), 738, 737, and nt. 3.

[112] F. Murray Greenwood and Barry Wright, "Frontispiece," in *Canadian State Trials: Law, Politics and Security Measures, 1608–1837*, Vol. 1, eds. idem (Toronto: University of Toronto Press, 1996).

[113] Sollom Emlyn, ed., *A Complete Collection of State-Trials and Proceedings for High-Treason: and Other Crimes and Misdemeanors* (London: 1742), Vol. 1, i–ii.

[114] Greenwood and Wright, "Introduction," in *Canadian State Trials*: 1, 5–6.

[115] *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors*, Vol. XXI (London, 1814), 847–1046, notes to Erskine's published speeches 970–71, 1035, 1038, 1045; ibid., Vol. XXII (London, 1817), 29.

[116] *Cobbett's Complete Collection of State Trials*, Vols 1–32 (London, 1817), *The 1828 Catalogue Project*, accessed May 3, 2019, http://archives.law.virginia.edu/catalogue/publication/state-trials-cobbett-1163-1817-london-20.

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acquiring an up-to-date edition, but its political and practical worth also lay in the Whig reforming principles espoused in footnotes that reflected American republican values. For lawyers contesting libel trials it effectively linked the arguments in the Asaph case with the subsequent legislation on the Libel Act that would be raised in future U.S. court cases.

Legal treatises that focused on libel law could be equally divided along political lines. Francis Ludlow Holt expressed pleasure at the reception of his 1812 treatise on *The Law of Libel* (reprinted with notes by American counselor Bleeker, in New York in 1818) by both "the public and the profession." Nevertheless, he defended his systematic distillation of libel law from accusations that it represented his own views because of the difficulty in disentangling questions of law from the "question of frequent political discussion" that had "strayed into pamphlets and popular harangues." He explained that the subject lay "so near the confines where politics encroach upon the science of law, that it is difficult to avoid stepping from one to the other."[117] Holt's interpretation of the law of libel was conservative and later critics considered his treatise a "superficial" summary and the work of a "tory" lawyer.[118] He therefore supported Mansfield's rulings, particularly that in the Dean of St Asaph's case and noted that when questioned by the House of Lords regarding the Libel Bill, the judges unanimously agreed with Mansfield and the court of King's Bench. Holt played down the passage of the Libel Act as merely enabling jurors to deliver a general verdict on a plea of not guilty.[119] Hence he did not discuss points made by Erskine against the conduct of criminal libel trials.

By contrast, in 1813 Thomas Starkie published a treatise on libel that represented an arguably more "Whig," interpretation of libel law. He devoted ten pages to discussing the Dean of St Asaph's case, with references to Ridgway's publication of Erskine's speeches. He names Erskine as defense counsel and quotes from the dispute over the incomplete jury verdict with Judge Buller.[120] Eight pages discuss five points that Erskine made on appeal before King's Bench: the right of juries to return a general verdict; the need to prove malicious intention; the need to read the whole publication for context, not just passages in the indictment; that libel cases were not solely an issue of law; and the question of whether mere publication could be construed as criminal intent. Starkie records Mansfield's ruling in rejecting the appeal, but notes Erskine's successful move for an arrest of judgment. Yet, in referencing these points directly from Ridgway's edited collection of his *Speeches*, he effectively provided lawyers with the necessary information to find relevant passages to use or cite in libel cases. Moreover, Starkie followed Mansfield's ruling by pointing out that "Parliament deemed it proper to interfere and remove all doubt from this important subject" by passing the Libel Act and detailing its

[117] Francis Holt, *The Law of Libel: First American, from the Second London Edition* (New York: J. T. Murden, 1818), vi–vii.

[118] Michael Lobban, "Holt, Francis Ludlow (1779–1844)," *Oxford Dictionary of National Biography*, accessed November 17, 2018, https://doi.org/10.1093/ref:odnb/13609.

[119] Holt, *The Law of Libel* (London: 1816), 296–97.

[120] Thomas Starkie, *A Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours* (New York: Collins and Hannay,1832), 561–72; ref Ridgway, *Speeches* v. 1, at 561; Erskine 562, 568.

provisions, thus giving the Act more persuasive legal weight than Holt had done.[121] The early American editions (1826 and 1832) with additional notes, included discussion of the first Amendment and state constitutions that also granted the right for juries to decide fact and law. Initially less popular in the United States, it eventually sold more editions than Holt's, continued well into the twentieth century and has been recognized as the origin of modern libel law.[122]

Usable Texts in American Practice

To describe Erskine's texts as "usable" indicates that his published arguments and/or speeches could be adapted and deployed by a variety of lawyers or citizens in libel and other criminal trials in early nineteenth-century America, as the following examples demonstrate. Nevertheless, their use frequently depended on the relative authority with which the Libel Act was viewed and to what extent Erskine's role in its passage was acknowledged.

In New York the significance of the Libel Act was an issue in the *People v Croswell* (1804) concerning a libel on President Jefferson, which raised matters relating to the Dean of St Asaph's case. The prosecution supported Mansfield's doctrine restricting the role of the jury and not admitting truth as evidence. The defense was led by Alexander Hamilton, who had long advocated a Whig view of the need to protect legal liberties, individual rights, and those of the jury and a free press. The case was cited in libel treatises because shortly afterward New York changed its constitution to recognize Hamilton's argument that the jury had the right to decide both fact and law to protect the safety of the citizen as in other criminal cases; but he also insisted that the truth of a published statement should be allowed as evidence for the defense.[123]

Hamilton, like Erskine, was praised as a superb forensic and frequently emotive orator. James Kent described his oratory in Croswell as both very earnest, but "at times highly impassioned and pathetic"; although Hamilton's reasoned arguments were equally informed by his admiration for the English constitution and his political beliefs.[124] He claimed that, on this occasion, Mansfield had been in error when ruling on the Asaph case. Legal historians have identified links to the Asaph case and echoes of Erskine's arguments, which strongly suggest Hamilton knew them.[125] Moreover, as Brown has indicated, the case should be read as a constitutional question that also settled a more extensive scope of common law in New York, because Hamilton took

[121] Ibid., 570–72.

[122] Campbell, "Truth and Privilege," 168–69.

[123] Counsellor Bleeker, note in Holt, *Law of Libel*, 47–48; *The Speeches of Mr Van Ness, Mr Caines, the Attorney General, Mr Harrison and General Hamilton in the Great Cause of the People v Harry Croswell* (New York: G. & R. Waite, 1804).

[124] William Kent, *Memoirs of Chancellor Kent* (Boston: Little, Brown and Company, 1898) 323, 325–26, accessed July 29, 2021. https://archive.org/details/cu31924018816979/page/n343/mode/2up; Brown, *Alexander Hamilton*, passim and at 189, 191–203,

[125] Ibid., 261 nt. 89; Morris D. Forkosch, "Freedom of the Press: Croswell's Case," *Fordham Law Review* 33, no. 415 (1965): 424–27.

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Parliament, as the Highest Court in England, as a higher authority than Mansfield sitting in the Superior Courts of Westminster. Hamilton argued that since the executive appointed judges, their independence was not "so well secured" as in England, and it was essential to "uphold the power of the jury" to maintain liberty.[126] Kent, a Federalist like Hamilton, broadly accepted defense arguments in the Asaph trial without mentioning Erskine. However, he declared the passage of the Libel Act in Parliament was discussed by "an assemblage of talents, of constitutional knowledge, of practical wisdom, and of professional erudition, rarely if ever before surpassed" and therefore constituted a "very respectable authority."[127] For both men, the 1792 Libel Act clarified the issue of jury rights. By 1832 Benjamin Oliver emphasized this point in *The Rights of an American Citizen* which commented on both states' rights and the U.S. Constitution.[128] Oliver traced the rights of juries back to the Zenger trial, which he believed Erskine had adopted in the Dean of St Asaph's trial, and eventually became "settled law in England and in this country."[129]

In British North America the status of the Libel Act remained contested, yet a private citizen recited Erskine's arguments from treatises, including Starkie, in his own defense. In *Rex v Howe* (1835), the reformist editor and proprietor of the *The Nova Scotian* newspaper was prosecuted by the Crown Attorney General and tried before a special jury for publishing a letter that accused Halifax magistrates of mishandling public money. Declaring himself and his fellow Nova Scotians to be true British patriots, Howe asked the jury to heed "Erskine, through whose exertions the declaratory [Libel] act was passed, confirming the rights of juries to decide on the law and the facts, and whose views of the true bearing of the law of libel are now generally recognized." He also quoted from Erskine's defense of the Dean of St Asaph that "the publication would not be criminal" if the jury did not believe that it had been published "with a criminal intention."[130] Referring to Stockdale's trial, Howe claimed that the doctrine of intent was supported by both judge and jury and demonstrated that "an innocent man was protected by the law against the whole power of the House of Commons," as he hoped the jury would protect him from "persecution" here. On his acquittal, Nova Scotians resident in New York sent him a silver pitcher praising "his eloquent and triumphant

[126] *Speeches of Mr Van Ness*, 64.

[127] *People v. Croswell*, 3 Johns. Cas. 337 N.Y. (1804).

[128] Kate Elizabeth Brown, "Rethinking People v Croswell: Alexander Hamilton and the Nature and Scope of Common Law in the Early Republic," *Law and History Review* 32, no. 3 (2014): 611–45.

[129] Benjamin Oliver, *The Rights of an American Citizen, with a Commentary on State Rights and on the Constitution and Policy of the United States* (Boston: Marsh, Capen & Lyon; Philadelphia: P.H. Nicklin & T. Johnson, 1832), 325.

[130] "Trial for Libel on the Magistrates of Halifax, The King vs. Joseph Howe before the Chief Justice and a Special Jury; Supreme Court—Hilary Term, Halifax, N.S." (1835), in *The Speeches and Public Letters of The Hon. Joseph Howe*, ed. William Annand (Boston; Halifax; Montreal, and London, 1858), 44–80, at 62, accessed November 4, 2018, https://babel.hathitrust.org/cgi/pt?id=yale.39002068152090;view=1up;seq=28.

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defence in support of the Freedom of the Press."[131] In 1835 Howe produced his own report of the trial, which was reprinted in an edited book of his letters and speeches published in Boston, Montreal, Halifax, and London in 1858, extending Erskine's posthumous reputation.[132]

American lawyers also used Erskine's arguments for trial by jury as a constitutional and legal right in cases other than libel. During the 1805 impeachment of Edward Shippen discussed earlier, defense counsel also had to cite examples from British common law to argue that Shippen should not be tried before the House of Representatives of Pennsylvania. Hence, they compared Shippen's trial to that of John Stockdale by jury in a Court of Law (rather than the House of Commons) which acquitted him. They cited Erskine's arguments from Stockdale's and Paine's trials, and a list of Whig patriots including Sidney, Russell, and Hampden. Furthermore, they argued that Erskine had not sought to impeach judges but took proper action by working with Fox to enact the Libel Bill in Parliament, which declared juries had the right to decide "whether the publication was a libel and the defendant guilty."[133] In 1808, Colonel William S. Smith was accused of violating the Neutrality Act of 1794. The case was tried in New York where Smith's counsel quoted Erskine's arguments about the constitutional rights of juries to decide fact and law at length from the trials of the Dean of St Asaph and John Stockdale. He told the court that he had found the former "in the report of Stockdale's trial, page 124," which suggests he was reading Stockdale's English publication of both his own and the Dean of St Asaph's trial.[134]

Conclusion

Thomas Erskine's Country Whig principles, patriot advocacy, and brilliant forensic oratory meant that his speeches were widely admired and re-cited in America, regardless of whether he had won or lost a trial. His arguments in criminal libel cases functioned as "usable texts" for American defense lawyers who cited or quoted them from English trial reports or American editions of libel treatises. In many of these, lawyers could follow references to Ridgway's edited collection of Erskine's speeches, four volumes that were initially aimed at the public; but they could also read about his performances in newspapers, journals, and texts on oratory. The growth of transatlantic print networks and the trade in law books, significantly supported transmission of his work in America. As a lawyer, rather than a judge or jurist, however, it was his arguments in the Dean of St Asaph's case and his prominent role in the passage

[131] Ibid., 66, 80. See Barry Cahill, "R. v. Howe (1835) for Seditious Libel: A Tale of Twelve Magistrates," in *Canadian State Trials*, eds. Greenwood & White, 547–75 on the significance of the case as a precedent compared to Zenger.

[132] See note 130.

[133] *Trial and Acquittal of Edward Shippen*, 351–54, 446–47.

[134] *The Trials of William S. Smith, and Samuel G. Ogden for Misdemeanors, had in the Circuit Court of the United States for the New-York District* (New York: I. Riley, 1807), 177–78. Smith (married to John Adams' daughter) undertook a private mission to liberate Venezuela from Spanish rule, which he claimed was sanctioned by Jefferson and Madison.

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of the Libel Act in Parliament that proved particularly useful in American trials.

A shared transatlantic legal culture linking law, politics, and literature enabled American lawyers and politicians to appreciate both Erskine's literary citations and his oratory. His rhetoric effectively combined reason and emotion, attributes that underpinned the classical republican model of citizenship and politics. His professional independence and character, particularly in the political trials of Stockdale and Paine, was highly respected, although it also functioned as an effective rhetorical strategy. The endurance of a culture of sensibility and an American politics of sympathy also ensured that the passionate logic of Erskine's speeches in swaying juries continued to be admired into the late nineteenth century.

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