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# Introduction

In 1830, Thomas Cooper – a transplant from Britain, a survivor of a prosecution under the 1798 American Sedition Act, a scientist, economist, political radical, philosopher and professor in South Carolina, wrote of liberty of the press,

> It forms one of the common-place panegyrics of what are called free governments. It is one of the boasts of those who admire that nonentity the British constitution. It is supposed to flourish particularly in these United States, and to form a distinguishing feature of our American governments. I hardly know in which of them to look for it.[1]

The extent to which the press and individual expression were "free" in North America in 1830 was a matter of perspective. The much younger Nova Scotian editor Joseph Howe, writing after a jury acquitted him on charges of seditious libel in 1835, pronounced,

> I do not ask for the impunity which the American Press enjoys, though its greater latitude is defended by the opinions of Chancellor Kent; but give me what a British subject has a right to claim, impartial justice, administered by those principles of the English law that our forefathers fixed and have bequeathed. Let not the sons of the Rebels look across the border to the sons of the Loyalists, and reproach them that their Press is not free.[2]

[1] Cooper, *Treatise on the Law of Libel*, xxxiv.

[2] "Supreme Court. Hilary Term. The King vs. Joseph Howe. Trial before the Chief Justice and a Special Jury, for a Libel on the Magistrates of Halifax," *Novascotian* (Halifax), March 12, 1835.



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Freedom to speak and publish were vital in Massachusetts and Nova Scotia in the early nineteenth century, in the wake of the American and French Revolutions and the repressive period that followed in Britain. Labeled the "palladium" of liberty, freedom of expression was said to protect other rights, such as freedom of religion.[3] What these freedoms entailed and protected and how they could be institutionally guaranteed in these similar and closely linked places, however, was contested. Lawyers and judges did not always agree with journalists or others about what was legally or constitutionally protected, or what limits, if any, on expression or behavior were necessary. Apprehensions about abusing freedom were weighed against the risks of restricting it. In the 1820s and 1830s, the colonies of British North America were developing their own versions of democratic governance and saw themselves as holding fast against the republicanism whose implications were being worked out south of the border. In this dynamic environment, the political and legal institutions of the Anglo-Atlantic world were remodeled in ways that involved rethinking the rights of institutions and individuals. The legal and cultural meaning of the freedoms of press and expression evolved in this context.

Legal seeds grow different ways in different climates and soils. The developing constitutional frameworks of these two closely connected places, combined with social and political pressures, caused the law of libel and the institutions through which it was expressed to evolve differently, so as to reflect prevalent understandings of the meaning and purpose of freedom of expression and of the press and to protect the two societies from apprehended harms to their own forms of democracy. The law diverged both substantively and procedurally. In Massachusetts, the place of evidence of truth in libel and slander cases was the key sticking point in criminal and civil defamation law, because individuals claimed a right to reveal their truths in the face of power, secrecy and violence. Massachusetts republicanism had to work out the balance between majoritarianism and individual rights, even as religious and social reformers seemed to be threatening political and familial authority and the American union. The place of truth in defenses in Massachusetts defamation cases twisted and turned in response to these kinds of threats, and debates around blasphemy

[3] See e.g. Whitman, *Trial of the Commonwealth, versus Origen Bacheler*, 28.

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and obscenity were shaped by evolving views about the importance of freedom of conscience. The individual's right to express truth lay at the heart of the legal debates in this area, and courtrooms and newspapers were the fora for struggle. As the civil defamation cases I describe suggest, taking disputes to court was common for middling white people in Massachusetts. With a written constitution to be interpreted by judges, courts became a key site for determining the scope of individual rights, while the violence of the mid-1830s raised the stakes.

In colonial Nova Scotia, by contrast, libel and slander cases and debates over the role of truth were far rarer. Much more important was a commitment to designing institutions that would balance the individual's rights against the interests of society. The legal concept of privilege, of building jurisdictional immunities into the law, was essential. In Nova Scotia, individual rights were read against a strong preoccupation with altering the division of power in government to give the legislative assembly more say in political decision-making. Individual consciences and freedoms were at times infringed by the legislature, a phenomenon that was raising constitutional unease in Britain as well. British legal writers' comments on mobilizing privilege to protect expression resonated in Nova Scotia. The pressures created in Massachusetts by movements such as antislavery and Free Thought did not much ruffle religious or political life in Nova Scotia or generate legal commentary. Nova Scotians watched from a distance as Thomas Erskine and his successors made British courtrooms into the forum for defenses of individual rights. Nova Scotian courts did not attract claims over expression the way that Massachusetts courts did. Nova Scotia had only one case in the period – Joseph Howe's in 1835 – in which individual rights took center stage, and Howe framed his defense chiefly in terms of privilege. Legal doctrine, legal procedure and institutional design evolved differently in Massachusetts and Nova Scotia, two places connected by history and legal tradition but separated by a revolution and diverging in their cultural and constitutional paths.

Drawing from unpublished court records and newspaper and pamphlet accounts of legal and legislative proceedings, this study explores the adaptation of a certain body of English law in Nova

Scotia and Massachusetts in the 1820s and 1830s.[4] The most vociferous disputes over the meaning of freedom of the press and expression in both places occurred in the context of proceedings over objectionable texts labeled "libels." The early nineteenth century saw the organization of the wide variety of laws that could be used to gain redress for troublesome expression into what we have come to know as the "law of libel." This law was adapted to a legal and social world that bears more than a passing resemblance to our own but was also profoundly different. The apparatus of the state was thin, and polities were understood to be vulnerable to collapse if the norms that bound individual consciences were not generally shared, especially by the lower orders. As older, more hierarchical power arrangements were challenged by democratic impulses, the individual conscience came increasingly to matter. The rights of individuals to hold and express their views troubled constitutional theory and the operation of libel law in both Massachusetts and Nova Scotia in the 1820s and 1830s, with Nova Scotian constitutional theory being complicated, additionally, by another layer of conflict: the question of the jurisdiction of the legislature versus the executive, a struggle interlaced with constitutional struggles involving similar principles but different political tensions in Britain.

In the 1820s, Nova Scotians were feeling the distant ripples of the considerable changes that were taking place in the British and imperial constitutions. Cabinet government was emerging in Britain, and the wave of repression that followed the French Revolution had produced a strong response that was soon to bring Whig reformers to power and

[4] This study compares a sample of 141 cases brought in 1820 through 1840 in the Courts of Common Pleas and Supreme Judicial Court in Massachusetts to what is likely the entire population of slander and libel cases brought in the Supreme Court and the Inferior Courts of Common Pleas ("ICCPs") of Nova Scotia, although the ICCPs did not actually produce any of the cases in this study. The records of magistrates and the Suffolk Justices Court have not survived, but these bodies probably heard few such cases anyway because even when they had jurisdiction to hear defamation cases, the monetary caps on the claims that could be made in them probably made them unappealing – plaintiffs had to put a low value on their reputational harm. The majority of these court records, and almost all of the unreported ones, are from Suffolk and Worcester counties, in Massachusetts, and Halifax, Pictou and Yarmouth, Nova Scotia, a selection of places that allows for the consideration of issues of center and periphery. I draw as well on contemporary periodicals, church records, pamphlets, newspapers, and catalogs and advertising drawn up by printers and libraries that offer hints about how particular law books moved through this world. Appendix A contains more information about sources.

liberal reforms to the political system: civic rights for Roman Catholics, the end of the rotten boroughs, limits on certain legal powers recently exercised tyrannically by the Crown, and new approaches to governance. Other constitutional forces hit Massachusetts. The Hartford Convention and New England's resistance to the War of 1812 left deep strains. The close connection between congregational churches and town government that had characterized the colonial period had received a serious blow in 1811, when a short-lived Republican government managed to pass legislation that permitted people to direct their religious taxes to the denomination of their choice. Constitutional change along the same lines would come to pass in 1833. The press was increasingly aggressive and vehement. New pamphlets appeared daily, aimed at audiences of women and young people as well as mature white men. With Jacksonian democracy and the Second Great Awakening spreading in America, Boston's brahmins on Beacon Hill faced the specter of power emerging from less rarefied addresses.

Individuals offended by expression in the 1820s and 1830s in Nova Scotia and Massachusetts could seek damages if they were prepared to pay for it. An offended person could also go to the local prosecutor or grand jury to lodge a complaint, which might, if successful, result in a fine or a few months' imprisonment or both. If the expression pertained to the legislature or a member, the legislature might exercise its powers of contempt. While few objected to civil lawsuits for slander or libel, criminal and legislative processes at times provoked concern about governmental encroachment on rights to freedom of the press and freedom of expression or "discussion," as it was often called. The prospect of legislative contempt proceedings brought the powers of the legislature, as the people's bulwark against an overbearing executive, into the discussion in ways that historians have tended to overlook in their focus on individual rights. In Massachusetts the written constitution, initially adopted in 1780, was an important element of conversations about the legitimacy of the regulation of expression. No longer new by 1820, it announced the importance of a free press but guaranteed free expression explicitly only to the members of the legislature in debate.[5]

[5] Constitution of the Commonwealth of Massachusetts, part I, articles XVI and XXI, printed in *General Laws of Massachusetts*.

A more extensive framework was a work in progress, the product of judicial decision-making and local activism. In Nova Scotia the constitutional framework of the period evolved against the backdrop of understandings of British law, politics and constitutional thought. These various constitutional constraints shaped the law of libel as understood in Nova Scotia and Massachusetts. Constitutional principles, however, especially the meaning of individual rights, were in turn shaped by libel and slander cases.

A vast range of other strategies for addressing problematic expression existed in both places. Editors could refuse to publish letters they received. Abolitionists, temperance advocates, unpopular politicians and others could be refused access to public spaces and pulpits or beaten in the streets. Fathers could ban pamphlets and newspapers from their homes, or try to. The acceptability of these other strategies – especially violence – affected legal and constitutional approaches to objectionable expression.

Reformers in both Massachusetts and Nova Scotia increasingly argued and assumed that the people could and should govern themselves. In Massachusetts this conviction animated contention about the boundary that protected private lives from public scrutiny, partly because Massachusetts had far more newspapers – and these were far more partisan and likely to offend – than Nova Scotia's. The question of what kinds of truths about individuals' conduct could be placed before the public came up repeatedly in Massachusetts libel cases. As abolitionists increasingly hurled insults against slaveowners, apprehension grew about the union's future. Legislative halls and courtrooms reverberated with arguments about what kinds of truths about individuals could be placed before the public: many libel cases reflected this tension. As the 1830s passed, the ground shifted somewhat to individuals' rights to speak their truth on religion and politics, as against the majority's right to silence minority opinion, whether through law or violence. Nova Scotians, however, tended to reject the republican logic of majority rights that this question assumed.

Proceedings in courtrooms provided occasions for arguing about the appropriate limits on expression as well as for gaining redress and revenge for reputational harm. Lawyers acted as champions of individual rights and of the state's interests in security and order. Seldom in either place did commentators challenge the legitimacy of civil defamation suits. The question came up in one case in

Massachusetts, but the constitution explicitly protected character and guaranteed the right to defend it in court, so not much breath or ink was wasted on this argument. How readily courts could be used, though, is important: Massachusetts courts were more accessible and inviting to defamed would-be plaintiffs than Nova Scotia courts were. Women brought lots of civil cases in Massachusetts but not in Nova Scotia. In both places, however, it was criminal libel cases that provoked the most serious commentary on rights.

## Organizing the "Law of Libel"

In the early nineteenth century, jurists were reworking the law around expression. Between about 1790 and 1812, the multiplicity of legal forms pertaining to expression was organized into a body of law we have come to know as the law of libel. William Blackstone, in his *Commentaries on the Laws of England*, published in the later 1760s, reveals an enormous number of categories of objectionable expression that could attract legal attention, both civil and criminal, including oral slander; written or printed libels, pictures or signs; maliciously procuring indictments; reviling the ordinances of the church; blasphemy; profane swearing; some kinds of treason, sedition and contempt; common barratry; perjury; spreading false news; putting up an unlicensed stage-play; challenging someone to a fight; and being a common scold.[6] Few of these, however, left traces in the court records of Massachusetts or Nova Scotia in the 1820s and 1830s. A few people were charged with somehow disturbing religious services. A woman named Nancy Princess was brought more than once before the Boston municipal court on charges of being a common barrator, a scold and a disturber of the peace and for profane cursing. However, the vast majority of cases related to expression that appear in the surviving records of the courts of Halifax, Pictou, Yarmouth, Suffolk and Worcester are for spoken words (i.e. slander) or for written or printed libel. Legislative assemblies took actions in both places over "libels" that offended the dignity of the

[6] Civil defamation, a private wrong, is discussed at *Commentaries*, 3:123–27. These criminal offenses and others are scattered through the fourth volume, on public wrongs, organized according to who was wronged.

House or its members. These actions were more constitutionally problematic in Massachusetts.

In the late eighteenth and early nineteenth centuries, with presses multiplying and politically charged prosecutions in England and the United States drawing public attention, texts criticizing the law and procedure around it proliferated, and speeches made in controversial trials were published as pamphlets. In 1812 and 1813 three texts that we would now identify as – and which explicitly purported to be – treatises on this area of law were published: John George's *Treatise on the Offence of Libel*, Francis Ludlow Holt's *Law of Libel* and Thomas Starkie's *Treatise on the Law of Slander, Libel, Scandalum Magnatum and False Rumours*. George's was concerned mainly with defining the proper limits of political discussion and has left no trace in the law libraries or cases in Massachusetts or Nova Scotia. Holt's and Starkie's treatises rapidly became authoritative in constituting and organizing the field of libel law. Slander and libel had long been civil wrongs. Objectionable texts known as "libels" had likewise been prosecuted for centuries, but the grounds for prosecuting them, the available defenses, and the institutions that had heard these cases had shifted and changed in the turmoil of the early modern period. The law was sufficiently unclear and the oppressiveness of recent political uses of it so apparent that reformer Sir Francis Burdett in 1811 argued somewhat hyperbolically that the "supposed offence called Libel, and what is called the law upon the subject, and what I shall call the practice, is novel in its nature, is borrowed from the worst periods of our history, and hostile to every principle of the Constitution; in short, that the methods of procedure, adjudication, and punishments for Libel, are the growth of tyranny and usurpation."[7]

The task that Holt and Starkie set themselves was to draw the different threads together and rationalize a body of law and procedure that was under attack as a tool of repression wielded against those, such as Thomas Paine and William Cobbett, who criticized the government. Holt followed a Blackstonian organizational scheme, commencing with offenses against God and descending through the monarch and the branches of government down to offenses – including civil proceedings – against private individuals. Starkie's text, which superseded Holt's, began with

[7] Burdett, *Speech of Sir Francis Burdett*, 8.

civil defamation, setting out the case for the plaintiff, what had to be proven, what defenses could be raised, what punishments could be applied, and what rules for process and procedure operated. He then moved on to the criminal libel case. The purpose of these actions, he thought, was to address attempts to create disorder by weakening moral and religious constraints, undermining the people's confidence in the state or provoking individuals to violence.[8]

By 1820, the outline and most of the details of the law of libel and slander were clear. The civil case for the plaintiff was generally straightforward: it was necessary to prove publication of the troublesome matter by the defendant, reference to the plaintiff, that the matter actually was defamatory if there was any doubt, and sometimes damages. Certain kinds of oral utterances were actionable without proof of harm; otherwise some specific loss had to be proven, the assumption being that most spoken utterances were ephemeral and unlikely to cause any lasting harm.[9] Criminal prosecution was argued to reflect a somewhat different logic, as the essence of the offense, at common law, was an effort to instigate a disruption of the public peace. According to these treatises, criminal expression included the blasphemous, profane, immoral, obscene, impious, subversive, seditious, malicious or scandalous, as well as expression contemptuous of certain offices or likely to stir up strife between nations or violence within households or neighborhoods. Although criminal slander was prosecuted in Massachusetts in the eighteenth century, and although allusions to these kinds of actions left traces in confusing footnotes in early nineteenth-century law books, in neither place do criminal slander cases appear in the courts I studied.[10] In both

[8] Starkie, *Treatise on Slander* (1813), 485. [9] *Ibid.*, 19–20.

[10] In eighteenth-century Massachusetts, the lower orders were prosecuted for their oral expression, including slander, usually before justices of the peace, in or out of the Sessions: Olbertson, Criminally Impolite, 74, 214. In theory, by the nineteenth century, slander – "words" in the language of the period – could be indictable if it threatened the peace and was not actionable civilly (only certain kinds of expression were: usually only impugning the plaintiff in his or her occupation, imputing a crime to the plaintiff or alleging that the plaintiff had a contagious disease). Peace bonds may have been issued instead of indictments, as more immediate remedies. Unfortunately few records of justices of the peace survive. I found only one appeal on a speech-related charge from a decision of a Suffolk justice of the peace, and it was for profane cursing and swearing, which was statutory. A Pictou grand jury indicted someone for "insulting a public officer" and "being 'an habitually wicked and

civil and criminal actions, the defense had the complicated side of the case; it was in the defenses that evolving understandings of the needs of freedom of expression and of the press were expressed.

## Comparing Nova Scotia and Massachusetts

Massachusetts and Nova Scotia had similar but diverging legal orders. One was ostensibly republican, with written bills of rights (state and federal) pasted on top of older traditions. The other was a British colony with a substantial American population, working through its own legal and cultural imperatives within British constitutional traditions, which were themselves evolving. In the 1820s and 1830s, the Nova Scotian assembly was increasingly assertive in its contest with the lieutenant governor and his council, particularly over the public purse. Criticisms of legislators and councillors raised concerns about the proper shape of democratic institutions, concerns that differed from the political concerns prevalent in Massachusetts and affected the shape of arguments about expression.

Another important difference between the two places was in the commonness of using courts as fora for addressing disputes over expression. As I describe in this book, civil defamation cases were far more common in Massachusetts than in Nova Scotia, and Massachusetts offered would-be plaintiffs more tempting risk-to-reward calculations. The substantial presence of women in Massachusetts cases is an important indication of the larger place of courts there than in Nova Scotia, where women were almost completely absent. As well, Massachusetts had more lawyers, and people in some parts of Nova Scotia had very little access to either

malicious slanderer'" in 1835, but it seems doubtful the prosecution succeeded. Because mention of such actions was relegated to footnotes and oblique remarks by treatise writers (e.g. Holt, *Law of Libel* (1812), 190–94, notes f and g), it seems likely that these actions were forgotten and passed from use during this period. Only the offense of profane cursing and swearing was mentioned in Freeman's 1810 magistrates' manual for Massachusetts, *Massachusetts Justice*, at 65, 231–33. The rule that oral defamation could not sustain a criminal prosecution is consistent with Burn's *Justice of the Peace* (see e.g. Burn, *Justice of the Peace* (1810), 3:120–24). Sedition, however, could be uttered orally, as Henry Brougham noted in 1816, although there were no such prosecutions in Massachusetts or Nova Scotia in the 1820s or 1830s: see "Liberty of the Press," 107.

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courts or lawyers, and religious, linguistic and other cultural reasons to avoid both.

Despite the different sizes of the populations (Massachusetts had four to five times as many people as Nova Scotia in the 1820s and 1830s), they had much in common. Both places were economically, legally and politically dominated by a single port city. Many New Englanders had settled in Nova Scotia in the 1760s, shortly after Halifax was founded, and many others had followed in the wake of the American Revolution. Extended families were split across the border: the young Samuel E. Sewall, soon to become a prominent abolitionist lawyer in Boston, enjoyed his time in Halifax around 1820, where he stayed with his maternal uncle, solicitor general Simon Bradstreet Robie, a direct descendant of an early governor of Massachusetts.[11] People traveled between the two places for education, religious fellowship and business, and there was much trade between them. Massachusetts had been an important source of law and civil procedure for Nova Scotia. Nova Scotians read Boston periodicals, and Bostonians reported on events in Nova Scotia. Moreover, New England's neutrality during the War of 1812 had left Nova Scotians without the suspicion of Americans that Upper Canadians often felt. Massachusetts and Nova Scotia were similar places, and they were aware of each other's experiences, fertile ground for a comparative study.

It was undoubtedly the needs and actions of newspapers and pamphleteers, their critics, supporters and persecutors, that had, for the previous three decades, been driving a small group of British lawyers to clarify and restrain the common law of libel. The texts these lawyers produced traveled across the Atlantic, at different speeds to different places, to provide guidance and frameworks for lawyers and judges called upon to consider contentious writings in newspapers. The press in Massachusetts was well established by 1820, and as in England, it was deeply involved in public life and politics. Nova Scotia, on the other hand, had few newspapers, but they multiplied between 1825 and 1840 and became much more politically engaged. Until about 1835, they seem to have been hesitant to give voice to sentiments critical of the political establishment, but after a high-profile criminal libel case that year, criticism became noticeably more direct and frequent.

[11] Tiffany, *Samuel E. Sewall*, 15–16; Beck, "Robie, Simon Bradstreet."

Both Nova Scotia and Massachusetts had an established upper crust that considered itself most fit to govern and resisted ceding political power in the face of democratizing impulses. This period was one in which the implications of republicanism, with its emphasis on the capacity for critical, responsible reasoning on the part of the vast majority of the white, male public, were being worked out in the United States. Those who held power and influence in Massachusetts often viewed the political pretensions of the masses with concern and at times contempt. Individuals who were not part of the elite, however, increasingly insisted on their rightful place as political actors and the importance of majority rule. Comparable developments were afoot in Nova Scotia, where a politically engaged middle class increasingly demanded a government accountable to the people. Responsible government – in which the executive was accountable not to a governor appointed in London but to the elected legislative assembly in Halifax – would be established in 1848, around the same time as in the Province of Canada, just over a decade after the Rebellions of 1837–38 underlined the depth of discontent especially in French Canada. During the 1820s and 1830s in both places, therefore, older political models in which a small group of people held power and addressed society's needs were challenged with assertions that the people could and should govern themselves.

Reputation was equally important in both places. Both inherited a body of law that assumed that unruly tongues were a danger to their owners and to society: intemperate speech could constitute sin, and society could suffer through destabilizing ideas, either because God might withdraw his blessing on society as a whole (an idea commonly associated with the early Puritan vision) or, more prosaically and more in keeping with common law reasoning, because angry people might resort to violence against each other or public figures. Having and keeping a good name, or "character," was also highly desirable, although not particularly rooted in Christian thought. The various threads of libel and slander law assumed that improper behavior should be kept quiet.

In a self-governing polity, however, the bad deeds of those with power were matters of deep and widespread interest. The evolution of the law of libel in Massachusetts and Nova Scotia suggests that they differed in their understandings of how much of an individual's life could be a matter of general interest. These understandings hinged on

theories of governance and the nature of the prevalent disputes about public affairs. The conflicts over religion and disestablishment, abolition, freemasonry and other reform movements in Massachusetts rendered the personal far more political in Massachusetts than it was in Nova Scotia, and the Massachusetts press fanned the flames.

## The Framework: "Libels," Privilege and Truth

Anglo-American writers in the late eighteenth century spoke of "libels," which were legally offensive texts. The most normative definition of a libel was "*a malicious defamation, expressed either in printing or writing*, or by *signs*, *pictures*, *&c.* tending either to blacken the memory of one who is dead, with an intent to provoke the living, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule."[12] Libels were normally written or printed, but symbols and other forms could in theory be libels as well. In 1791, the attorney general of Massachusetts provided the Supreme Judicial Court with a definition he drew from Blackstone: "Of a nature very similar to challenges [i.e. duels] are libels, *libelli famosi*, which taken in their largest and most extensive sense, signify any writings[,] pictures, or the like, of an immoral [or] illegal tendency."[13] It was this broadest understanding of the word libel that allowed obscene publications (which generally targeted no one) to be characterized as libels in *R. v. Curll* in 1727.[14] The word libel was used colloquially as well, to label a text offensive or deserving of legal measures, even if none were taken.

A range of different actors could instigate proceedings over libels, depending on the target. Libels might attract civil suits, criminal prosecutions or contempt actions by legislatures or, theoretically, courts, although I have encountered no such cases in Massachusetts or Nova Scotia in the 1820s or 1830s. Holt's 1812 *Law of Libel* was organized into chapters on libels against Christianity, "Morality, and the Law of Nature," "the Law of Nations," "the State and Constitution," "the King and his Government," "the Two Houses of

[12] Holt, *Law of Libel* (1812), 50 (Holt's emphasis), cf. Bacon, *New Abridgement*, 3:490 (1740).

[13] "Supreme Judicial Court: Trial for a Libel," *Columbian Centinel* (Boston), Feb. 26, 1791.

[14] *R. v. Curll* (1727), 2 Str. 788, 93 E.R. 849.

Parliament," "the Courts of Justice," "Magistrates" and "Private Persons."[15] Within these chapters, more specific pleas of the Crown and of private parties in civil suits were described. Because the fulcrum for analysis was the object – the "libel" – legal concepts and rules were often shared across different types of proceedings: legislative contempt proceedings were among the precedents mustered in a Massachusetts criminal libel trial in 1836, both types of proceedings addressing "offences against the common law of the state."[16] Statutes could be mobilized to address particular offenses, such as blasphemy, profanity and spreading false reports of the luminaries of the realm, although Holt thought this last cause of action "almost obsolete," it being preferable to treat magnates in ways comparable to humbler citizens.[17] Treason, which also had a statutory component, could be committed in a variety of ways, some of them written and some not. The Houses of Parliament and courts could bring printers, editors and others before the bar and try and sentence them for contempt based on their expression. Although set out in law books, few of these various types of proceedings over expression were commonly brought in Nova Scotia or Massachusetts, or indeed even in Britain.

Because libels could be addressed through different types of proceedings in different fora, jurisdictional conflict and risks of double jeopardy arose. A defamatory writing could attract both a civil action for damages and a criminal prosecution, although in Nova Scotia and Massachusetts, defendants faced one or the other. Both an offended legislature and the attorney general could proceed against a person who criticized a legislature, although likewise in practice only one did.

Constitutional protections for speech in the legislature, however, gave rise to a fundamental jurisdictional conflict over the extent of parliamentary privilege, a conflict that has received almost no scholarly attention. In 1765, Blackstone explained that every court of justice had its own laws and customs, "some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also it's [*sic*] own peculiar law, called

[15] Holt, *Law of Libel* (1812).
[16] *Comm. v. Whitmarsh*, Thacher's Criminal Cases 441, 450–55 (1836) ["Thach. Crim. Cas."].
[17] *Law of Libel* (1812), 151.

the *lex et consuetudo parliamenti*." Blackstone expressed Sir Edward Coke's caution that matters arising in the Houses of Parliament ought to be discussed and judged there and nowhere else. Courts were not to comment on parliamentary jurisdiction either; each House determined the proper scope of its own actions. The indeterminacy of parliamentary privilege, Blackstone said, was necessary to protect members and the "dignity and independence" of the houses from the Crown; if privileges were delimited, the Crown would be able to come up with ways to evade them and oppress troublesome members.[18] Some privileges were widely known, such as the freedom from arrest enjoyed by members of the House of Commons while the term was in session and for a certain period of time around it.

Privilege, like libel itself, was key to the constitutional disputes of the seventeenth, eighteenth and nineteenth centuries over the jurisdictions of the legislative, executive and judicial branches of government. A privilege entitled the holder to enjoy a particular liberty or bundle of liberties. The privileges of an institution such as a court or a legislature could be the foundation of disciplinary measures for contempt against those who failed to respect it or its members. Privilege could also be a shield that protected a person from legal measures – such as defamation suits – on the basis of who the person was or, in a broad sense, the circumstances under which an act was taken or expression uttered. The privileges at issue in this book are chiefly a legislative body's privilege to arrest and imprison its critics, a member's privilege of being protected against civil and criminal libel proceedings in court, and conceptual descendants of the latter, which protected other speakers and writers in other circumstances.

As writers in Nova Scotia and Massachusetts knew well, the English, and then British, constitutional struggles of the seventeenth and eighteenth centuries pitted the Crown and the judiciary against Parliament, and especially the House of Commons, that protector of the rights of Englishmen. The English Bill of Rights of 1689 protected freedom of debate in Parliament, a key privilege. Each House could discipline its own members, but no action would lie in the courts for what was said in parliamentary debate – indeed, it was a breach of the

[18] Blackstone, *Commentaries*, 1:158–59.

privileges of each House to publish its doings. Following the British model, most American colonial legislatures exercised judicial powers, and in the seventeenth and eighteenth centuries they disciplined and punished both their own members and "outside libelers" – importantly printers – over their characterizations of legislative proceedings and legislators.[19] The actions of legislatures were a considerable threat to the press in the colonial period, possibly more than courts in seditious libel prosecutions.[20] This history left open questions about the proper scope of the privileges of republican assemblies and Congress. As well, Americans tended to recoil at the idea that their neighbors, just because they had been elected to the assembly, could call them to account or indeed throw them in jail for criticism without the protections of a criminal trial. Even less clear were the privileges of colonial legislative assemblies such as Nova Scotia's, as they followed parliamentary practices and precedents but tended to be viewed (especially by nonmembers) as markedly less august than the British House of Commons. The question of the extent to which constitutional liberty meant guaranteeing the privileges of the legislature or, instead, protecting the individual freedoms of printers and other critics is a key point of divergence in the constitutional thought of Massachusetts and Nova Scotia. At this distance, legislative contempt actions may look like politics, not law, but this distinction reflects a perception of lines that were dimmer in the early nineteenth century than they seem now. We live in the wake of the ascendancy of courts and common law.

In the later eighteenth century, the powers of the houses of Parliament – especially the Commons – were under pressure in Britain. Luke Hansard published the first official report of parliamentary proceedings in 1774 in London, finally signaling Parliament's recognition of the public's rightful interest in its proceedings. Earlier in the century, unauthorized reports of parliamentary doings had drawn parties before the houses of Parliament to be tried and punished.[21] By the 1810s, courts were recognizing unauthorized but accurate reports of the debates of a House as providing a privilege against libel claims. Claims were being made increasingly successfully that parliamentary

[19] See generally Clarke, *Parliamentary Privilege in the American Colonies*.
[20] See generally Levy, *Emergence*, 14, 16–61; Clarke, *Parliamentary Privilege in the American Colonies*; Eldridge, "Before Zenger."
[21] Thomas, *Long Time Burning*, 104.

privilege was not as broad as previously thought and that individuals needed to be able to find protection in court against oppressive legislative actions, which featured angry legislators acting as prosecutors, judges and jurors in their own causes. The rise of the political press and the procedural and evidentiary protections being insisted upon in early nineteenth-century courts rendered legislative punishment increasingly problematic. The individual (typically a white man, or at least understood as such) was claiming and often acquiring increasing civil and political rights, which were understood to entail a right to speak and publish freely about matters of public importance. Any limitations on content, style or access to fora for communication had to be understood as consistent with broad public values and prevalent constitutional understandings. English cases and texts show the very concept of privilege being quietly democratized in courtrooms in the early decades of the nineteenth century, as it was reshaped from a perquisite of high personal status into a legal defense available, at least in theory, to all defendants facing libel or slander cases, in appropriate circumstances and depending on the speaker's or writer's intentions.

Privilege was an essential concept in debates over freedom of expression and the press in Nova Scotia in the 1820s and 1830s. In these decades, Nova Scotia had only a handful of prosecutions over expression, but it also had proceedings taken by the legislative assembly against newspaper printers and a recalcitrant member. These actions arose out of conflicts between the assembly and the council, conflicts that would soon result in responsible government, in which the executive was drawn from and responsible to the assembly. At stake was power generally and control over the public purse and patronage specifically. The popularly elected, increasingly assertive legislature insisted on its privileges vis-à-vis the council, and liberally inclined commentators supported claims to these privileges against the critiques of the council's supporters. Reformers' criticism was therefore muted when the legislature called its members or others to account for breaching the privileges of the assembly; it was conservatives friendly to the council who decried intrusions on freedom of expression and the press, at times magnificently misrepresenting how much more oppressive the Nova Scotian assembly was than the British House of Commons. Consistent with English tradition, a free press was characterized as an institution balanced against the other institutions

of governance. In both substance and procedure, the common law needed to be shaped so as to recognize and uphold a free press. If properly established through law, it would guarantee appropriate parameters of liberty to individuals, who would, through the exercise of that liberty, keep the other institutions of governance honest and accountable. The *Novascotian* newspaper declared in 1832 that an "unshackled press" was "[a]mong the greatest privileges enjoyed under a free and enlightened government."[22]

The nature of liberty presupposed by the Nova Scotian debates was fundamentally similar to that presupposed in Massachusetts: what Michel Ducharme has called modern liberty, individuals' freedom to pursue their own ends, with the state providing legal protection for person and property.[23] It was largely in the theory of how institutional responsibilities could best be divided that the two places differed, with Nova Scotians wrestling with how to innovate while remaining loyal British subjects and not raising the specter of republicanism by flouting the common law or overly stressing the individual's right to self-expression.

American scholarship on freedom of expression tends to concentrate on a certain subset of the range of possible proceedings – court cases over libel, and especially reported criminal ones – undoubtedly largely because of the present-day importance of judicial interpretations of the First Amendment, but also because it was struggles over truth that animated libel law, certainly in Massachusetts. This book adds to the conversation about the regulation of expression in the early republic.

During the revolutionary period, the American colonies turned to the idea of fundamental, natural rights and the separation of powers, enshrined in written constitutions, to provide limits on legislative power. The Massachusetts constitution of 1780 followed – but not exactly – the English model in its treatment of expression and legislative privilege. It pronounced freedom of the press "essential to the security of freedom in a State" so that it "ought not, therefore, to be restrained in this commonwealth." Individual freedom of

[22] Letter to the editor, *Novascotian* (Halifax), October 17, 1832.

[23] Ducharme, *Idea of Liberty*, 25–26. Ducharme describes the different institutional arrangements the British "moderns" came up with to preserve liberty, the key point being a division of power (*ibid.* 30–32).

"deliberation, speech, and debate" was guaranteed only in the legislature: only the assembly itself could discipline its members' speech, and such speech was protected from legal action in courts. Outside the walls of the assembly, people had a right only "in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." The Massachusetts bill of rights thus provided no general guarantee of freedom of expression. Among the wrongs for which all citizens were entitled to a legal remedy were wrongs to "character" – defamation proceedings had constitutional sanction.[24] However, the constitution did not provide the legislature with the power to imprison libelous critics, an omission later interpreters thought was meant to protect the individual expression necessary in a republic and move such disputes into courtrooms.[25]

The written constitution and the role it required courts to play fundamentally reshaped individual rights in the United States, a process that took place over many years and coincided with the rise of the idea that self-governing republican citizens ought to be able to speak or publish truth without criminal sanction, at least if animated by "good motives and justifiable ends." This conviction became fundamental to conceptions of the rights of individuals and the press around the turn of the century, as newspapers multiplied and emerging party politics produced heated political and religious debates. Indeed, First Amendment scholarship has tended to focus on the fortunes of the "truth defense" as *the* marker of a commitment to free expression in American history.

In Massachusetts, despite the legislature's attempt to carve out a larger role for truth in civil and criminal defamation cases, judges were apprehensive about letting evidence of truth into the courtroom because of the risk that it would expose aspects of men's private lives that would undermine their authority both in the household and in society more broadly. Judges curtailed the use of truth through rulings

[24] Constitution of the Commonwealth of Massachusetts, part I, articles XI, XVI, XIX, XXI, printed in *General Laws of Massachusetts*.
[25] *Ibid*. part II, chapter I, section III, article X.

on both procedure and substantive law. On the other hand, claiming legal powers and immunities on the basis of status – that is, claiming privilege as a defense – probably sat uneasily in the popular republican conscience. Indeed, in 1808, in resisting a claim to an absolute privilege for a remark made in a legislature, counsel observed that privilege had been called "an odious plea."[26] In slander and libel cases in Massachusetts, defenses based on an inherent right to publish truth, or one's own truth, were more ideologically comfortable. The defense of "privileged communication" did come to be recognized in Massachusetts law, and the legislature had necessary privileges, but these were bounded. Offended people could turn to courts.

As this book shows, the conflicts of the 1830s show the increasing emphasis, in public discourse, on an individual's right to speak truth in Massachusetts, at times against the threat of violence. In Nova Scotia, the emphasis was on properly balancing the power among different institutions, which included building protection of the press into the common law of libel, without as much emphasis on individual rights. Differences between the two jurisdictions as to the centrality of courts and of truth are evident in civil defamation as well. The regulation of expression was fundamental to the self-understandings of these two polities, as they worked through the implications of their own versions of democracy.

## Strategies and Choices: Interpreting and Applying the Law

This book is primarily concerned with the arguments that ran through three types of proceedings that could be taken against individuals whose expression caused offense: legislative contempt proceedings, criminal prosecutions over texts, and civil defamation suits. The principles governing these three types of action overlapped, and all were concerned with "libels," so it is necessary to consider them together. By 1820, all were affected by a mixture of British and more local interpretive traditions and practices. Legislators turned chiefly to the records of their own proceedings to determine the extent of their privilege, probably supplementing these understandings with personal recollections from newspapers and the accounts of travelers who had

[26] *Coffin v. Coffin*, 4 Mass. 1, 6 (1808).

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watched Parliament or other assemblies in action. The instructions earlier governors had received and passed along provided some guidance in Nova Scotia, as did Thomas Jefferson's *Manual of Parliamentary Practice* in Massachusetts. Judges and lawyers, too, evaluated the prescriptions in the books and journals they could put their hands on, and the uptake or rejection of English common law happened case by case, rule by rule, sometimes by well-read members of the bench and bar and sometimes by those, like magistrates in rural Nova Scotia, without much legal training, who turned to texts such as manuals for justices of the peace. These texts relied on older books and were to some extent out of date. The transmission of reformist thinking from both sides of the Atlantic also influenced the evolution of law.

Strategic considerations affected the measures chosen in particular cases. If the Nova Scotia legislature wanted to silence a critic allied with the council, contempt proceedings could be much more attractive than turning the affair over to the Crown-appointed attorney general. But sometimes it was best to do nothing. Taking any proceedings over reputational harm could be viewed as an illegitimate, elitist move to avoid the cut and thrust of public debate.

Once lawyers were consulted, a number of different factors might influence the choice between civil and criminal proceedings if the objectionable text was printed or written. In neither jurisdiction do the records show evidence of private prosecutions for these kinds of cases. Most obviously, therefore, the state bore the cost of proceeding in criminal actions, which it would seek from the defendant upon conviction;[27] whereas in civil suits, the plaintiff bore the court costs up front and might recover them (aside from lawyers' fees in

[27] In England, individual complainants could obtain criminal informations from King's Bench to prosecute for libels without the intervention of the attorney general, after swearing that the objectionable words were false. Thomas Starkie explained that even though the defendant could not raise a defense of truth, the procedure was useful because it averted violence. The plaintiff got a chance to swear solemnly and publicly that the statements were untrue, without the defendant being then obliged to take up pistols to demonstrate his courage. Instead, the proceedings offered the opportunity for explanation and reconciliation: *Treatise on Slander* (1830), 1:cxlviii–cxlix. Similarly, Henry Brougham noted in 1816 that this manner of proceeding tended to be used for libels among men "acting in a public capacity or tending to produce a duel": "Liberty of the Press," 105. These types of proceedings did not take place in Massachusetts or Nova Scotia, where libel cases always began with an indictment brought by a grand jury.

Massachusetts) if successful. Civil suits offered the possibility of damages, which must have appealed to some plaintiffs, but others probably feared being seen as opportunists willing to sully their reputations further through the pursuit of lucre. In neither place were such suits perceived to interfere with freedom of speech or of the press. In Massachusetts, civil suits were much more commonly brought than in Nova Scotia, especially when women were involved. In that state, not only was the prospect of a windfall higher than in Nova Scotia and the costs of suit lower, but civil suits began with the attachment of the defendant's goods, chattels and lands up front for the whole amount of the claim; a defendant with insufficient assets could be jailed until trial. The strategic possibilities undoubtedly appealed to some Massachusetts plaintiffs. Nova Scotian plaintiffs could not attach assets in defamation suits but could until the mid-1820s in other suits with which defamation could be entangled. Once pre-trial civil attachment became rare in Nova Scotia, the number of defamation suits brought fell considerably.

Another factor in the calculation over civil versus criminal proceedings was the possibility of using the trial to air one's views to the public. In Nova Scotia, where truth was known to be no defense to a charge of criminal libel, there was something suspect in bringing criminal libel charges – the complainant might after all be objecting merely to the airing of the truth – but in Massachusetts, that taint probably did not bother most would-be complainants, since it was widely (though not exactly accurately) supposed that truth would exonerate the innocent. Evidentiary rules had strategic implications. Parties to civil causes could not testify under oath in either place. In criminal trials, the complainant, being a witness, could testify under oath, but the offender could not. In both places unrepresented parties could address the court unsworn, and self-represented litigants tended to be afforded considerable latitude to present their own cases. Self-representation was risky, however, in a cause of action as legally subtle as libel. Almost all criminal libel defendants and parties to civil actions had counsel in these cases, and indeed so did one complainant in a Massachusetts criminal action. The strategic risk a Massachusetts complainant faced in a criminal action was that unexpected evidence of the truth of the allegation might be brought forward by an enterprising defendant. Criminal procedure changed in 1834 to protect

complainants from this kind of development, one of the ways in which truth became harder for those accused of criminal libel to deploy to their advantage. Surprise was less of a problem for plaintiffs in civil suits because truth had to be specially pleaded and because Massachusetts courts interpreted the pleas in defamation suits in a way that made truth risky to raise. One other factor that likely played a role in the decision to sue versus prosecute, which is difficult to tease out from cases, was an aggrieved person's view of the magistrate who would receive the initial complaint or the prosecuting lawyer who would conduct the case. After all, the list of potential prosecutors was short: the attorney general, the solicitor general (occasionally) and the county or district attorney in Boston's municipal court and in courts of common pleas elsewhere.[28] These various factors played out differently in different situations.

The common law contained traps for the unwary, and the propriety of various rules of law and procedure was contested, especially in Massachusetts. There, in the realm of defamation law, there was considerable uncertainty about what kind of intent a prosecutor or plaintiff had to prove before a jury could bring in a verdict of guilty. Some thought it a fundamental principle of criminal law that no one accused of a crime could be convicted without the state proving intent to cause harm. Others argued that criminal intent was present – that malice was an automatic presumption of law – if the defendant had simply intended to perform the act or omission that ultimately caused the harm, in this case the publication of the objectionable words to a third party. This was the intent requirement in civil cases. If the only intent the prosecutor or plaintiff had to prove was the intent to publish,

[28] *Stimpson's Boston Directory*, 1835, 9, identifies four officers of the municipal court of Boston: the judge (Peter Thacher), the attorney (Samuel D. Parker), the clerk and the crier. After 1832, Massachusetts had a district attorney for each of its four districts plus Boston, each of whom reported to the attorney general: Austin, "Annual Report," 482. I have encountered no prosecution conducted by anyone other than these officers. The law officers drew up at least a significant number of the indictments. The court clerk, commenting on upcoming cases in 1826, observed, "The Solicitor General is now at my Elbow, drawing the Indictments"; the grand jury was to convene later that day: J.H. Peirce to Austin, August 7, 1826, James Trecothick Austin papers, Ms. N-1789, Massachusetts Historical Society ["MHS"], Boston. The same papers contain a pleading letter from Alexis Eustaphieve to James T. Austin in 1824 about the prosecution of Joseph T. Buckingham, a letter that signals Eustaphieve's awareness of the vicissitudes of prosecutorial decision-making.

the defendant certainly had the more difficult case, needing to prove some other set of facts to defeat the claim for liability. Uncertainties about intent were the product of the previous centuries' English jurisprudence on civil and criminal causes of action that were based sometimes on the common law and sometimes on statutes. R.H. Helmholz has argued that intent-based arguments are evident in the pleadings of seventeenth-century English civil defamation suits but that as pleading practices changed, the arguments were still made but ceased to leave traces in the records. According to Helmholz, defendants' intentions and what effect they should have on liability were matters for juries until judges in the eighteenth century began limiting juries' jurisdiction and subjecting intention to a more fine-grained analysis.[29] Paul Mitchell observes that evidence of certain kinds of intent rebutted the presumption of malice that arose from the fact of publishing a defamatory allegation. Words spoken in grief and sorrow or in confidence and friendship had been found protected.[30] Whether or not the jury in a criminal trial could determine intent was also hotly contested in prosecutions for seditious libels in the seventeenth century and through most of the eighteenth. English reformer Charles Fox's Libel Act in 1792 gave the whole case to the jury, which in the privacy of the jury room could decide what it thought of the defendant's intentions and the other elements of the case.[31]

In the early nineteenth century in Massachusetts, the debate about the nature of criminal intent influenced the way that evidence of truth was permitted to operate in criminal libel cases. By the late 1790s, many American legal commentators were persuaded that a republican citizen could not rightly be punished for publishing the truth. At common law – and in Nova Scotia – truth was no defense to criminal libel charges because the gravamen of the offense was threatening the

[29] "Civil Trials and the Limits of Responsible Speech," 6–17, 20–21.

[30] *Making of the Modern Law of Defamation*, 145–46.

[31] *An Act to Remove Doubts Respecting the Functions of Juries in Cases of Libel* (U.K.), 1792, 32 Geo. III, c. 60 [aka "The Declaratory Act" or "Fox's Libel Act"]. On this statute and its origins and purposes, see Green, "The Jury, Seditious Libel, and the Criminal Law," 41–45; Lobban, "From Seditious Libel to Unlawful Assembly," 310–21. See also *R. v. Shipley* (1784), 4 Doug. 73, to which Fox's Libel Act responded, in which King's Bench, per Mansfield CJ, restricted the jury's scope to determining the facts and retained for the bench the question of guilt and the relevance of good intent.

public peace by potentially inciting the one libeled to violence, including duels. Blackstone declared that freedom of the press meant no censorship prior to publication, but that individuals could certainly be punished for abusing this freedom by publishing material that might corrupt morals or lead to violence or other harms.[32] In the United States, however, the risk of occasional violence was an acceptable price for necessary criticism. How to slot truth into a criminal libel case, however, was not entirely clear, and truth's role evolved in Massachusetts from 1808 to 1834. Initially, on the theory that the prosecution had to prove actual intention to cause harm, the defense could lead evidence of truth – in certain kinds of cases and under certain circumstances – to show good intention instead. The difficulty that then appeared was that if good intentions could exonerate a defendant from criminal liability, then falsity could be excused as well. As reformers weighed into public life, making allegations about the private lives of prominent men, this could not be borne. In 1834, evidence of truth was finally safely cabined: the prosecution would prove intent to publish, and the defendant could try to prove factual truth – along with good intentions – to rebut the charges. As well, before or at the start of the trial the defendant had to provide the Commonwealth with particulars, a list of the facts or incidents that grounded the supposedly true allegations.

Disagreement about the role of truth characterized civil defamation trials in Massachusetts as well, probably more than in Nova Scotia, although that colony's records are too spare for absolute certainty. At common law, truth was a defense to a civil cause of action, on the theory that a plaintiff should not be able to recoup damages for injury to an undeservedly pristine reputation. Unlike other defenses, however, a plea of truth had to be set out separately in the pleadings in a "special plea." In the 1830s, Massachusetts law regarding the legal inferences to be drawn from pleading of truth in civil cases diverged from that of other states in ways that made the plea riskier to Massachusetts defendants by reducing their ability to rely on other defenses. Even when the legislature abolished special pleading in 1836, judges continued to insist that for the defense to be valid, the same risky admissions and assertions had to be on the record.

[32] Blackstone, *Commentaries*, 4:151–52.

At the same time that the truth defense was emerging in Massachusetts criminal law, the defenses of privilege – absolute or qualified – were being worked out and systematized in civil and criminal cases in England. The idea that a combination of intent and context could protect a defendant against liability is deeply embedded in the history of the various forms of action that fed into the "law of libel," as it took shape in the treatises of the early nineteenth century. Paul Mitchell, in his *Making of the Modern Law of Defamation*, may take Thomas Starkie's assertions about the early nineteenth-century coherence of libel law with somewhat less salt than is necessary, but rationalizing the law around intent and malice was certainly part of Starkie's project. Mitchell argues that over the course of the nineteenth century the disappearance of the defendant's fault from the case the plaintiff had to make – which turned defamation into a tort of essentially strict liability – was the result of judges' distrust of the popular press.[33] The recognition and articulation of the qualified privilege defense, with its focus on the defendant's duty in providing the information and the hearer's interest in receiving it, made the defendant's state of mind relevant only to the plaintiff's rebuttal of the defense. Qualified privilege was a new doctrine, though, and it made cases more complicated to argue. It was a challenge both for litigants and lawyers to put forward and for judges to wrap into their reasoning.

The judges who shaped qualified privilege into a defense that marginalized the defendant's actual (presumably good) intentions were evidently cut from similar cloth to the Massachusetts judges who constrained the use of truth. In the early nineteenth century, though, privilege was still a powerful legal concept that seemed a promising approach to protecting freedom of expression. As Nova Scotian newspaperman Joseph Howe asserted of qualified privilege in 1835, quoting Thomas Starkie, "[t]he constituting a large and extensive barrier for the legal protection and immunity of those who act bona fide and sincerely according to the occasion and circumstances in which they are placed, is not only just in a moral point of view, and advisable as a measure of policy, but is absolutely

[33] Mitchell, *Making of the Modern Law of Defamation*, 101, 120.

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necessary for the purposes of civil Society."[34] Just as absolute privilege protected proceedings in legislatures and much of what was said in courtrooms, qualified privilege protected the needs of commerce and social life and – Howe hoped – newspapers.

The last area of civil defamation law that produced a good deal of unease in Nova Scotia concerns the tort liability of newspaper editors and others who innocently republished defamatory material. The common law by the 1820s contained much scope for confusion, and Joseph Howe was concerned about rationalizing it in favor of editors. Massachusetts legal commentators paid little attention to this dimension of defamation law, as perhaps is consistent with the surprisingly frequent republication of notorious texts in that state. It seems that publishers were more concerned about profits than potential tort liability, and the law, such as it was, probably favored them.

As well as defamation, three other species of criminal libels also attracted prosecution in the 1820s and 1830s in these places, and they too were being shaped by the concerns of the period. Blackstone mentioned "instances" of "blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels" punished by English law, but not all of these varieties were in use by 1820.[35] Among the handful of criminal libel prosecutions in Nova Scotia were two for seditious libel. Rivalries among different branches of Christianity were at issue in some cases in both places, but since no single church had control of political power in either place, "schismatic" libels were far less of a problem. Blackstone's last four types of libels tended to manifest themselves as attacks on prominent individuals; however, by 1820 in Massachusetts, criminal defamatory libel proceedings seldom contained even overtones of treason, sedition or scandal regarding men holding high office. Most criminal libel cases in Massachusetts were framed as defamation, and the vast majority concerned men of middling social standing. One case of blasphemous libel was prosecuted in the 1820s and 1830s, in Massachusetts, but a new category of libel was increasingly prosecuted, especially in the

[34] "Supreme Court. Hilary Term. The King vs. Joseph Howe. Trial before the Chief Justice and a Special Jury, for a Libel on the Magistrates of Halifax," *Novascotian* (Halifax), March 12, 1835, quoting Starkie *Treatise on Slander* (1830), 1:cxli.

[35] Blackstone, *Commentaries*, 4:151.

early 1820s and mid-1830s: obscene libel. This offense came to be recognized and prosecuted as the sexual morals of the politically mobilized populace started to seem relevant to the integrity of public life. The newness of this varietal of criminal libel is evident in lengthy pleadings, through which counsel sought to cover all of the possible objections to their cases. Charges in the early 1820s over John Cleland's pornographic classic *Memoirs of a Woman of Pleasure* (aka *Fanny Hill*) displayed uncertainty about how much of the offending text should be reproduced in the court's records and whether or not publication to a particular person had to be proven for such a text. In the mid-1830s, the Boston clergyman and editor Abner Kneeland was prosecuted on charges derived from the comparatively new common law of obscene libel, the much older common law of blasphemous libel, and a decades-old blasphemy statute; but as the case moved tortuously through trial after trial, the state dropped many of the charges, partly for strategic and evidentiary reasons and partly because Kneeland's arguments that freedom of conscience ought to protect him from persecution for his religious opinions drew increasing public support. Criminal libel had been shaped to fit the concerns of the day.

Another constitutional current also shaped these cases. In Massachusetts, the debates of the revolutionary period and the rising status of the Jacksonian individual rendered legally and constitutionally salient the potential conflict between the majority and the individual rights-holder. If the people were the source of constitutional power, could they also interpret the constitution? Could the mob legitimately take action against expression it disliked? The treatment of violence is one of the notable differences in the legal and constitutional thought of Massachusetts and Nova Scotia in the 1820s and 1830s. Preventing violence – breaches of the peace – was the main reason English writers of treatises on libel law during the period gave for criminalizing the publication of defamation and sedition.[36] In Massachusetts, however, the risk that violence would arise from expression was a consideration to be weighed against two other factors: the violence inherent in slavery, which arguably demanded

[36] See e.g. Holt, *Law of Libel* (1812), 33, 54, 104; Starkie, *Treatise on Slander* (1813), 485.

sustained critical attack, and a deep commitment to the idea that truth as a matter of conscience was an ideal to be pursued at all cost. In the tempestuous 1830s, individualist understandings of constitutional rights became increasingly salient in the face of public tolerance of mob actions, especially against abolitionists, and the activities of prominent members of society both as participants in antislavery mobs and as advocates of majoritarian rationales for taking collective action against abolitionists as inciters of violence and disunion. In Nova Scotia in the same period, violence was characterized as unacceptable and not particularly important to the constitutional theory around free expression. Instead Nova Scotian understandings of freedom of the press and of expression were shaped by demands for political reform. Nova Scotian writers tended to characterize free speech for individuals as a necessary component of a particular political and institutional order, which was itself shifting into a more democratic, self-governing shape. To protect liberties, writers in this tradition looked to the legislature and hoped for sensible compromises within the common law.

## This Book

Ultimately this study describes the evolution of the body of law most explicitly concerned with expression, as two places with diverging constitutional traditions worked through the implications of the democratic institutions they were developing. In Massachusetts, courts were key theatres for addressing conflicts involving reputation, through both civil suits and criminal complaints. However, with majoritarian violence targeting growing movements like temperance, antimasonry and particularly abolition, the stakes for the stability of society and the union were rising. Visions of the public's best interests were contested, and women and the lower and middling sorts were claiming an entitlement to voice an opinion on the matter. Individuals' reputations were drawn into the resulting controversies, and the law was employed strategically by people with their own personal hopes, fears and goals. Judges responded warily, by curtailing the defensive utility of truth, even as claims to a broad right to free discussion grew louder and suspicions of the judiciary's claims to impartiality in criminal cases were voiced. Privilege arguments were seldom made,

but publishers nevertheless behaved as if they had the sorts of legal protections that could have been articulated in privilege defenses, and they were not prosecuted. Arguments in Nova Scotia, on the other hand, favored an understanding of freedom of the press and expression that protected the press as an institution. Individuals were understood to have the rights of Englishmen to express themselves on matters of public interest, but as the jurisdictional boundaries were being contested among colonial institutions, an idea that freedom of the press and individual freedom of expression too could be framed institutionally through the concept of privilege emerged as well. Without a written constitution, Nova Scotians could not turn to courts as arbiters of constitutional rights, and the scarcity of civil defamation suits suggests that they were disinclined to use courts this way anyway. The underlying story shows how the law's internal logic combined with the highly contingent variables of religion and morality, personalities and institutions, economics and voluntary life. The reach of freedom of expression was qualified by the peculiarities of place, time, publishing, power and personality, as well as by principles and traditions.

In Chapter 2, I take up the developments in the law pertaining to slander and various kinds of libels in the late eighteenth century and the first two decades of the nineteenth. The law and legal institutions of this period reveal the parting of ways between the unwritten and written constitutional traditions of Britain and the United States. The chapter introduces important doctrinal and political tensions in what had, by 1820, become a cohesive body of law. I move next to three challenges that transformed particular aspects of this law in the next two decades. The first, presented in Chapter 3, is the struggle over privilege, a core aspect of contempt actions and defamation cases as well as constitutional theory. The long process of working out the division of jurisdiction between courts, legislatures and the executive ultimately produced doctrinal changes in the defenses available to an individual who faced libel and slander proceedings. The second challenge, explored in Chapter 4, concerned the reorganization of sociopolitical and familial authority in Massachusetts, a preoccupation evident in debates about the truth defense. The third challenge, discussed in Chapter 5, was the tension, more pervasive in Massachusetts than Nova Scotia, between the individual's claim to a right to free

expression in matters of conscience and the majority's claim to a right to impose its will, which flared in cases about religion and sexual morality. This tension increased as antislavery and other reform-oriented expression encountered violent responses. Reformers' experiences in court raised concern about judicial neutrality and fidelity to law. Finally, in Chapter 6, I turn to the use of courts themselves through a consideration of civil cases, in which individuals, through their strategic decisions, demonstrated their understandings of the invitation offered by courts as fora for disputes about reputation and expression. The last chapter draws the threads together.