AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 4: The Early National Era – Democratic Rights/Free Speech

*Alexander Hamilton*, **Argument in People v. Croswell** (1804)[[1]](#footnote-1)

*Harry Croswell was the publisher of* The Wasp*, a newspaper in Hudson, New York. In 1802, Croswell declared that Thomas Jefferson paid another journalist, James Callender, to write articles claiming that George Washington was a “traitor” and John Adams a “hoary-headed incendiary.” Jefferson’s supporters in New York arrested Croswell and charged him with criminal libel. During his trial, Croswell sought to call Callender to the stand to testify about his financial dealings with Jefferson, but the judge ruled that Callender’s testimony would be irrelevant. Truth was not a defense to criminal libel in the state of New York. Moreover, the trial judge held that whether a particular article was libelous was a legal question to be determined by the judge, leaving the jury to determine only whether or not Croswell had published the article in question. After his conviction, Croswell appealed to the state supreme court, which divided on the question. The case was later dropped by the prosecutors. The state legislature subsequently changed the law of libel by statute to allow juries to rule on the law as well as facts and to allow truth as a defense when published with good motives and for justifiable ends. Alexander Hamilton served as Croswell’s attorney in the case and offered the constitutional and legal arguments that were ultimately adopted by Judge James Kent on appeal and incorporated into state statute by the Jeffersonian majority in the state legislature.*

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The Liberty of the Press consists in publishing with impunity TRUTH with good motives, and for justifiable ends, whether it related to men or measures. To discuss measures without reference to men was impracticable. Why examine measures but to prove them bad, and to expose their pernicious authors, so that the people might correct the evil by removing the men? There was no other way to preserve liberty and bring down a tyrannical faction. If this right be not permitted to exist in vigor and in exertion, good men would become silent. Corruption and tyranny would go on, step by step, in usurpation, until at last nothing that is worth speaking or writing, or acting for, would be left in our Country.

But he did not mean to be regarded as the advocate of a press wholly without control. He reprobated the novel, the visionary, the pestilential doctrine of an unchecked Press; and ill-fated would be our country, if this doctrine were to prevail. It would encourage vice, compel the virtuous to retire, destroy confidence, and confound the innocent with the guilty. Single drops of water constantly falling may wear out adamant. The best character of our country, he to whom it was most indebted, and who is now removed beyond the reach of calumny, felt its corrosive effects. . . . No, I do not contend for this terrible liberty of the Press; but I do contend for the right of publishing Truth with good motives, for justifiable ends, although the censure may light upon the Government, the magistracy, or individuals.

The check upon the Press ought to be deposited, not in a permanent body of magistrates, as the Court, but in an occasional fluctuating body, the Jury, who are selected by lot. Judges might be tempted to enter the views of Government, and to extend, by arbitrary constructions, the law of libel. In the theory of our Government, the Executive and Legislative departments are operated upon by one influence, and act in one course by means of popular elections. How, then, are our Judges to be independent? How can they withstand the combined force of the other departments? The Judiciary is less independent here than in England; and therefore we have the more reason and a stronger necessity to cling to the trial by Jury, as our greatest protection.

Men in elevated stations are not to be implicitly trusted. The experience of mankind teaches us that persons have often arrived at power by means of flattery and hypocrisy, but instead of continuing to be humble lovers of the people have become their most deadly persecutors. . . . *A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous or malicious intent, towards government, magistrates, or individuals.*

According to Blackstone, it is a malicious defamation made public, with intent to provoke or expose to public hatred or ridicule. The malice or intent enter into the essence of the crime, and must be proved, and to be left to the Jury, as parcel of the fact.

This definition of Lord Coke is not inconsistent with this conclusion. He speaks of a libel as having a tendency to break the peace. This also, is a fact, to be proved to the Jury, for the tendency depends upon time, manner, circumstance; and must of necessity, be a question of fact.

Texts taken from the holy Scriptures, and scattered among the people, may in certain times, and under certain circumstances, become libelous, nay treasonable. These texts are innocent, libelous, or treasonable according to the time and intent; and surely, the time, manner and intent, are matters of fact for a Jury. It is the intent that constitutes the crime. This is a fundamental principle of jurisprudence. If we run through the several classes of offenses, we shall perceive that in every instance, the intent constitutes and varies the crime.

Homicide is not of itself Murder. Killing in battle or in self-defense is lawful. Murder depends upon the malicious intent. Nothing is criminal, *per se*, which admits of a lawful excuse. Whether crime, or not, will always depend upon intent, tendency, quality, manner; and these must be matters of fact for the Jury.

The law cannot adjudge a paper to be a libel until a Jury have found the circumstances connected with the publication.

But it is not only the province of the Jury in all criminal cases to judge of the intent with which the act was done, as parcel of the fact; they are also authorized to judge of the law as connected with the fact. . . .

[I]n criminal cases, the law, and fact are necessarily blended by the general issue, and a general verdict was always final and conclusive, both upon the law and the fact. . . .

In England, trial by jury has always been cherished as the great security of the subject against the oppression of government, but it never could have been a solid refuge, and security, unless the Jury had the right to judge of the intent and the law.

Undoubtedly, the Jury ought to pay every respectful regard to the opinion of the Court; but suppose a trial in a capital case, and the Jury satisfied from the arguments of Counsel, the authorities, and their own judgment upon the application of the law to the facts (for the criminal law consists in general or plain principles) that the Law arising in the case is different from that which the Court advances, are they not bound by their oaths, by their duty to their Creator, and to themselves, to pronounce according to their own convictions?

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TRUTH is a material ingredient in the evidence of intent. In the whole system of law there is no other case in which the truth cannot be shown; and this is sufficient to prove the proposition which denies it in the present case, to be a paradox.

The Roman law permitted the truth to be adduced to justify an alleged libel. The ancient English Statutes prove also, that in the root and origin of our Law, falsity was an ingredient in the crime, and those statutes were declaratory of the common law. The ancient records and precedents prove the same thing, and they are the most authoritative evidence of the ancient law. . . .

The right of giving the truth in evidence in cases of Libel is all important to the LIBERTIES of the people. Truth is an ingredient in the eternal order of things, in judging of the quality of acts. He hoped to see the axiom, that truth was admissible, *recognized by our Legislative and Judicial bodies*. He always had a profound reverence for this doctrine; and he felt a proud elevation of sentiment in reflecting, that the act of Congress [the Sedition Act of 1798], which had been the object of so much unmerited abuse, and had been grossly misrepresented by designing men, established this great vital principle. It was an honorable, a worthy, a glorious effort in favor of Public Liberty. . . .

He maintained that the Common Law applied to the United States. The Common Law was principally the application of natural law to the state and condition of society. The Constitution of the United States used terms and conveyed ideas which had reference only to the Common Law, and were inexplicable, without its aid. . . . The Constitution would be frittered away or borne down by factions, the evil genii, the pests of Republics, if the Common Law was not applicable to it. Without this guide, any political tenet or indiscretion might be made a crime, or pretext to impeach, convict, and remove from office, the Judges of the Federal Courts. If we depart from Common Law principles, we shall degenerate into anarchy, and become the sport of the fury of conflicting passions. The transition from anarchy was to despotism – to an armed master.

The real danger to our liberties was not from a few provisional troops. The road to tyranny will be opened by making dependent judges; by packing juries; by stifling the press; by silencing leaders and patriots.

My apprehensions are not from a single acts of violence. Murder rouses to vengeance. It awakens sympathy and spreads alarm. But the most dangerous, the most sure, the most fatal of tyrannies was, by selecting and sacrificing single individuals, under the mask and forms of law, by dependent and partial tribunals. Against such measures we ought to keep a vigilant eye, and take manly stand. Wherever they arise, we ought to resist – and resist – and resist – until we have hurled the demagogues and tyrants from their imagined thrones.

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1. Excerpt taken from John Church Hamilton, *Life of Alexander Hamilton*, vol. 7 (Boston: Houghton, Osgood and Company, 1879), 727. [↑](#footnote-ref-1)