Trials for Treason and Sedition, 1792–1794

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The Trial of John Frost, for Seditious Words (1794)
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CONTENTS OF THE EDITION

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Volume 1

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ABBREVIATIONS

BW	*The Works of the Right Honourable Edmund Burke*, new edn, 14 vols (London, F. C. and J. Rivington, 1815–22).
Blackstone	Sir William Blackstone, *Commentaries on the Laws of England*, 11th edn, 4 vols (London, T. Cadell, 1791).
Coke	Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London, W. Lee and D. Pakeman, 1644).
Foster	Sir Michael Foster, *A Report of Some Proceedings ... to which are added Discourses upon a few Branches of the Crown Law* (Oxford, Clarendon Press, 1762).
Hale	Sir Matthew Hale, *The History of the Pleas of the Crown*, ed. Sollom Emlyn, 2 vols (London, F. Gyles, T. Woodward and C. Davis, 1736).
IKD	John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide 1793–1796* (Oxford, Oxford University Press, 2000).
LCS	London Corresponding Society.
PCW	*The Complete Writings of Thomas Paine,* ed. Philip S. Foner, 2 vols (New York, Citadel Press, 1945).
PH	*The Parliamentary History of England*, 36 vols (1806–20).
SCI	Society of Constitutional Information.
ST	*A Complete Collection of State Trials*, William Cobbett and T. B. Howells, 33 vols (London, Longman, Hurst, Rees, Orme and Brown, 1816–26).
Thale	Mary Thale (ed.), *Selections from the Papers of the London Corresponding Society 1792–1799* (Cambridge, Cambridge University Press, 1983).

INTRODUCTION

The Movement for Parliamentary Reform

In the early 1790s the Friends of the People, a group of more or less aristocratic liberals on the left of the Whig party and many of them members of parliament, issued a report which catalogued the extraordinary anomalies and abuses in the British electoral system. MPs were elected to represent either counties or boroughs, and it was the abuses in borough representation that especially concerned the Friends. In twenty boroughs, each returning two members to the House of Commons, there were twenty or fewer electors – in the notorious, depopulated borough of Old Sarum, but also in the flourishing town of Marlborough, there were only seven. In Cornwall twenty-one boroughs returned forty-two MPs, more than the very much more populated boroughs of Yorkshire and Lancashire combined. Altogether, of the 513 MPs sitting for constituencies in England and Wales, representing (it was believed) a population of about eight million, over half were returned by a mere 11,000 electors in all. The situation in Scotland was, if possible, still more scandalous. Of the forty-five Scots MPs, thirty sat for the counties, and were elected by a total of barely more than 2,500 electors across the country; the fifteen burgh members were returned by ninety-eight electors.[1]

The trials collected in these volumes all arise out of the movement for parliamentary reform in Britain in the early 1790s, when for the first time its membership became overwhelmingly made up of working men – artisans, shopkeepers, small tradesmen of various kinds – rather than of the gentlemen who formed the Friends of the People, or those who had initiated the reform campaign of the late 1770s and early 1780s. The earlier, more genteel phase of the movement had been prompted by the concern among the Whig élite that throughout the reign of George III the power of the Crown had been relentlessly increasing. Much more than half of all constituencies were entirely under the influence of 'patrons', the majority of them members of the

House of Lords, who nominated the parliamentary candidates, had the money and influence to guarantee their election, and had come to regard the constituencies as their own property. There were more than 160 such patrons in England and Wales in the early 1790s, many of them 'owning' several seats, and they effectively appointed at least 300 MPs, a substantial majority of the House of Commons. Thomas Oldfield, to whom we owe most of our information on the state of the representation in Britain in the 1790s, believed that all the members for Scotland were sent to the Commons 'under the influence of individuals'.[2] The inevitable result of this situation was the corruption not just of the electoral process but also of the constitutional position of the House of Commons itself. The 'boroughmongers' could sell the votes of the members they controlled in exchange for the lucrative pensions and offices, many of them sinecures, in the gift of the Crown; the Commons, instead of acting as a check on the power of the executive, had become its mainstay.

The reformers of the 1780s disagreed amongst themselves on what kind of reform of parliament would be necessary to restore the Commons to what they believed was its true place in the constitution. Christopher Wyvill, the leader of the influential Yorkshire Association, and William Pitt, who became Prime Minister in 1783, were wary of attacking borough corruption directly, and, instead of attempting to redraw the constituency boundaries, proposed to increase the number of seats in the Commons by 100, mainly with the aim of increasing the number of the county members as a check on the influence of the boroughmongers.[3] More radical reformers, such as the Duke of Richmond and John Cartwright, one of the founders of the Society for Constitutional Information, proposed a much more thoroughgoing reform programme which would in the 1790s be adopted by the 'popular' reform movement: the payment of MPs, an end to corruption and patronage in parliamentary elections, annual parliaments (partly to enable the speedy removal of corrupt MPs) and, preeminently and most controversially, universal manhood suffrage. Both Pitt and Richmond attempted to persuade parliament to accept their different versions of reform, but neither the 'more gentle' proposal of Pitt nor Richmond's more radical plan could make headway against the vested interests of the boroughmongers, and by the mid 1780s the reform movement had run into the sand. There was not 'the least ray of hope', wrote Richmond, that the House of Commons would adopt any reform at all. 'IT IS FROM THE PEOPLE AT LARGE THAT I EXPECT ANY GOOD'.[4] Those words were to provide the impetus for the

revived reform movement in the 1790s, when France appeared to have shown what could be achieved by 'the people at large'.

Events in France from the storming of the Bastille in July 1789 reinvigorated and radicalized the pressure for reform in Britain. Initially the response of the British government to events in France was not hostile. For pragmatic reasons as much as anything else, Pitt was not eager to involve himself in the internal affairs of Britain's old adversary, especially when those affairs seemed likely to keep France from being a major player on the international stage for some time. Many others in Britain welcomed the Revolution as a movement from French despotism towards something like the British settlement of 1689, which provided for a 'mixed' system predicated on checks and balances supposedly operating between the Crown, the Commons and the Lords. More radical opinion saw the French Revolution not as an imitation of that settlement, but as an example pointing to how it might be reformed, or how ancient liberties regarded as lost or eroded might be restored. Among this last group was the dissenting minister Richard Price, who in a millenarian sermon welcomed the Revolution in France as the reincarnation of a spirit of liberty that had emerged in the former American colonies and might now extend across the world (catching fire also, by strong implication, in Britain).[5] Price's sermon brought an angry response from the Whig politician Edmund Burke, formerly widely regarded as someone sympathetic to reform. His *Reflections on the Revolution in France* was cast as an answer to a young Frenchman who had written to him on the assumption that Burke would have welcomed events in France. Instead the pamphlet, published in November 1790, took the form of a warning that the Revolution was a dangerously unprecedented phenomenon, a rupture with the French political system so fundamental that it challenged the legitimacy of government throughout the continent. Burke understood the Revolution as a decisive and tragic break with the authority of traditional political élites whose responsibility it was to protect the rights of the people. Government by the dubious and unstable will of the people themselves, in his opinion, was a travesty of the Whig idea of liberty.

Although it was supported by the king and government-financed newspapers such as *The Times*, Burke's *Reflections* provoked a storm of protest. A pamphlet war ensued in which he was widely portrayed as betraying Whig principles. Among the earliest of these rebuttals, written astonishingly quickly, was Mary Wollstonecraft's *Vindication of the Rights of Man* (1790) and among the most applauded by the literary classes was James

Mackintosh's *Vindicae Gallicae* (1791), but none of the answers to Burke enjoyed the popularity or influence of Thomas Paine's *Rights of Man*. In Part I of his pamphlet, published in February 1791, Paine contested the sanctity of the settlement of 1689, and asserted that Britain, far from enjoying a perfectly designed and balanced constitution, had no constitution at all. British liberties, he claimed, had never had any substantive legal form. Paine's political vision was predicated not upon precedent, but upon what he deemed natural rights, and among those rights, regardless, he believed, of the settlement of 1689, was the right of the people to change their government. Paine quickly became the *bête noire* of conservative opinion, not least because he wrote in a manner and style intended to widen participation in political debate, an issue that was to lie at the heart of his trial at the end of 1792. Throughout 1791 his name was barely out of the newspapers, and the appearance of the second part of *Rights of Man* was awaited with eagerness, scorn and trepidation.

It was partly in response to Paine's book that popular reform societies began to be formed across the country, of which the most important were the Sheffield Society for Constitutional Information and the London Corresponding Society. The latter seems to have first met in January 1792 amid the heady expectancy surrounding the publication of the second part of *Rights of Man*. Paine's writings were vigorously promoted by the SCI, which had been more or less moribund since the early 1780s, but now sprang back to life under the direction of the veteran reformer John Horne Tooke. But whereas the SCI was made up chiefly of polite men of letters, and charged a serious subscription fee, LCS membership came cheap at one penny, and its charter declared the Society open to all; like the Sheffield Society its members were drawn from the lower reaches of the middle classes and the more literate of the working classes, shopkeepers, artisans, clerks and so on. Paine responded to this new audience by looking to circulate his ideas in ever more accessible forms, a tactic travestied at his trial by the Attorney-General's claim that even children's sweetmeats were distributed wrapped in pages torn from the pamphlet.[6] Although the LCS came to be regarded by the government as revolutionary in nature, its declared aims were the diffusion of political knowledge in the interests of informing the people. Its official reform programme – annual parliaments and universal manhood suffrage – was derived from the Duke of Richmond's plan; it stopped well short of Paine's republicanism, though no doubt many of its members were privately in favour of the extinction of the monarchy.

Initially little notice seems to have been taken of the LCS either by the government or in the press. The government was sceptical about the ability of working men to act on their own, and Pitt's primary concern was with the emergence in April 1792 of the élite Society of the Friends of the People, which included Charles Grey, who as Earl Grey would be Prime Minister at the passing of the Reform Act of 1832, the dramatist Richard Brinsley Sheridan and the great liberal barrister Thomas Erskine. Though the Friends intended to push only for a moderate reform, the most prominent member of the Whig left, Charles James Fox, held himself aloof from what he regarded as a rash action on the part of younger members of his party. Both the SCI and the LCS welcomed the new society. The *Argus* newspaper, close to the LCS, reported hopefully that 'the ASSOCIATION, called, The Friends Of The People, will probably give rise to a greater number of similar societies throughout the country ... and the result will be a FAIR AND EQUAL REPRESENTATION OF THE PEOPLE'.[7] The spectre of a reformist élite working in concert with more popular societies and of the increasing circulation of cheap editions of Paine's pamphlet, together with fear of French interference in Britain's internal affairs, prompted the royal proclamation against seditious writings of 21 May, calling on the nation to be on its guard against 'wicked and seditious writings'. Magistrates were enjoined to 'carry the laws vigorously into execution'.[8] The chief legal instrument for putting the proclamation into effect – used alongside many and various informal means of harassing radical opinion – was to be the laws governing seditious libel and uttering seditious words. The Court of King's Bench had witnessed on average two prosecutions a year for seditious libel and seditious words earlier in the eighteenth century, but ongoing research suggests there were well over one hundred around the country in the 1790s (with at least nineteen in 1792 alone), not to mention related prosecutions for lesser offences and other forms of legal harassment.[9]

The Law of Libel

Prosecutions for seditious libel and seditious words had been the primary means of controlling political opinion ever since parliament had refused to renew the Licensing Act in 1695. The lapsing of this act had meant an end to the censorship of writings prior to their publication, but there had remained a strong perceived need for opinion to be controlled by the state. Fundamental to

the law of libel in general was the aim of preventing breaches of the peace caused by defamation of character. The extension of this idea to sedition was predicated on the notion that libelling the king or the state would provoke tumult and dissension on a public scale. The doctrine had developed in the despotic context of the Star Chamber of the Tudors and Stuarts (a fact frequently used in the eighteenth century to discredit it as a legal doctrine out of step with enlightened times), but for it to serve as a legal means of controlling public opinion it had to be brought into line with the common law and its traditions. The result had been various anomalies that dogged the application of the law governing seditious libel, especially after 1760 with the rise of opposition to what was perceived as the extension of royal influence in political affairs.[10]

The most fraught of these issues was that of the relative roles of the judge and jury. The majority of the judiciary, especially Lord Chief Justice Mansfield, insisted that whether or not a publication was a libel was a matter of law to be determined by the judges alone. But such was the purchase of the idea of the liberty of the press that by the late eighteenth century public opinion seemed to demand that juries should decide whether opinion ought to be punished. During a parliamentary debate on what came to be known as the 'Mansfield doctrine' in 1770, Alexander Wedderburn, later Lord Loughborough, insisted that only juries – as the true representatives of the people – had the authority to make a verdict: 'So changeable is the nature of a libel? so much does it assume the cameleon, and suit its colour to the complexion of the times! in short its libellous quality is founded entirely on popular opinion. There is no other standard, by which it can be measured or ascertained. Who, then, so proper as the people to determine the point?'[11]

Mansfield did not invent the doctrine that came to bear his name, but he gave it its most authoritative statement in his judgment in the case of Henry Woodfall (1770) and reiterated it in 1784 in the case of William Shipley, Dean of St Asaph, for publishing Sir William Jones's *The Principles of Government, in a Dialogue between a Gentleman and a Farmer*. Mansfield insisted that matters of law were the exclusive province of the judge, although he acknowledged that the jury had exclusive authority over matters of fact. For Mansfield there were only two matters of fact at issue in trials for seditious libel. The first was the fact of publication: the simple question of whether the defendant published or caused to be published the alleged libel, which was very rarely a matter of dispute. The second was the truth of the *innuendos* or *averments* stated in the indictment or information,

in particular the glosses provided by the prosecution of figurative, ironic or otherwise ambiguous expressions in the publication alleged to be a libel. Once it was satisfied of these matters of fact, the jury, according to Mansfield, must bring in a verdict of guilty, without considering the main question, whether the publication was a libel or not. This question was to be determined by the judges in the Court of King's Bench when it met to pass sentence. The benefit of this way of proceeding, defenders of the doctrine somewhat disingenuously claimed, was that matters of law were kept clearly separated from matters of fact, so that at times of political turmoil, when public feeling was running high, the defendant would have the benefit of the wisdom of impartial judges. Those who attacked the Mansfield doctrine took juries to be more likely to uphold the liberty of the press than judges, who were appointed and paid by the Crown and who might see their future preferment as dependent on their willingness to support the Crown on all occasions.

Juries frequently proved themselves resistant to Mansfield's doctrine in the 1770s and 80s. In a series of high profile cases, they refused to convict on the basis of publication alone, several times bringing in verdicts in the form 'guilty of publishing', or 'guilty of publishing only', which affirmed the fact of publication but implicitly denied the libel. Opponents of the Mansfield doctrine pointed out that juries could hardly be expected to leave this issue to the judges, when prosecuting counsels invariably did everything they could to convince the jury that what they were considering was a seditious libel, in the process seeming to ask the jury to decide exactly what the judges would then announce was none of their concern. Arguing for a retrial of the Dean of St Asaph, Erskine had insisted that there was not 'one single reason good or bad, why the *tendency* of a paper to stir up discontent against government ... ought to be considered as an abstract question of law'.[12] Critics of the doctrine also pointed out that there was anyway a lack of clear legal principle as to what actually constituted seditious libel. Tests existed, such as whether the alleged libel was a speculative essay in political principles rather than a polemical attempt to stir up opinion, or whether it was addressed to educated men of ideas or to the general populace supposed to be inclined to riot – both crucial to the trial of Paine. But the application of these tests to particular cases depended on largely contextual judgments about facts rather than legal principles. In this circumstance, Mansfield's opponents argued, the question of whether the paper was a libel or not had to be a matter for the jury to decide by making a judgment about the nature of the world beyond the courtroom.

According to Mansfield, the criminal intent of a supposed libeller was a matter of law to be inferred as a necessary consequence from the publication of what the judge deemed to be a libel; according to Erskine, it was a matter of fact, to be inferred by the jury from the evidence, the text itself and the context of publication. He used an analogy with the law of treason to argue this case. In the commonest form of treason, that of 'compassing and imagining the king's death', the guilty intention was itself the crime, the fact the jury was required to ascertain; the acts from which the treason was inferred were only evidence of that guilty intention. It would be impossible to convict a defendant of high treason merely by proving that he had published a paper; it was necessary to prove to the satisfaction of the jury that this act had been performed in pursuit of a design on the king's life. But, Erskine argued, the essence of every crime was the guilty intention; by analogy, therefore, seditious libel could not be proved by the mere fact of publication of a paper: the culpability or otherwise of the act of publishing had to be determined by the jury. Erskine's defence provoked a spate of pamphlets; and in the landmark case of John Stockdale, who was tried in 1789 for libelling the House of Commons by publishing John Logan's *Review of the Principal Charges against Warren Hastings*, Erskine again insisted that there existed no rule for deciding whether a paper was seditious 'in the *abstract*'. It 'must be judged of in the *particular instance*', he told the jury, 'and consequently upon this occasion must be judged of by you, without forming any possible precedent for any other case'.[13] The jury responded in the Dean of St Asaph's case by bringing in a verdict of 'guilty of publishing only'. Stockdale was acquitted on the grounds that the pamphlet did not refer to the House of Commons as a whole, but only to particular persons, the kind of technicality with regard to the innuendos that was to play an important role in the trial of Daniel Isaac Eaton in 1794.

Neither side in the controversy over the Mansfield doctrine was pleased with the verdict of 'guilty of publishing only'. Mansfield and his allies regarded it as incomplete, and usually argued for it to be understood as a straight 'guilty' verdict. After the Woodfall case, Mansfield declared that the verdict could not have been affected by any doubts the jury had about the libel, for that was none of their business, but tried to avoid controversy by ordering a new trial (which did not take place) on the unlikely grounds that the jury had possibly doubted the accuracy of the innuendos. Opponents of the Mansfield doctrine warned juries that 'if they found a verdict of publishing, and left the criminality to the judge, they had to answer to God and their consciences for the

punishment that might, by such judge, be inflicted on the defendant'.[14] They made several attempts to bring the principle that juries were fully competent to judge as to whether a paper were libellous or not into law, including a parliamentary motion for a change in the law, proposed in 1771 with Burke's support. But the principle was only finally affirmed in Fox's Libel Act of June 1792. Fox introduced his bill in the commons, seconded by Erskine, late in May 1791, and it was passed in June with the support of Pitt, although the Attorney-General Sir Archibald Macdonald and Solicitor-General John Scott tried hard to obstruct its passage. The Lords debated the bill in the more febrile atmosphere of the following year, after the publication of the second part of Paine's *Rights of Man*. There it met a stormy passage. When it finally passed, a protest was entered signed by, among others, Lord Chancellor Thurlow and Lord Kenyon, Lord Chief Justice of the King's Bench. The first section of the act stated that the jury had the right to give a general verdict rather than just decide on the fact of publication or the sense of the information. The second section acknowledged that the judge was free to give his opinion to the jury on the matters at issue as in any other criminal trial.[15]

Although the Libel Act is often presented as an unequivocal triumph for the liberty of the press, prosecutions for sedition increased after it passed, and the judges used their freedom to give their opinion to the jury on the context and tendency of the libel to great effect. Possibly, juries were returning to their traditional deference for the authority of judges now that the legal situation had been clarified, although the context of the royal proclamations of May and December 1792 and the fear of revolution spread by the government have to be taken into account, not to mention the constitution of the special juries, vetted in advance by the authorities, used in *ex officio* prosecutions. The pressurized context of the trials of 1792–4 owed much as well to the emergence of the Association for the Preservation of Liberty and Property against Republicans and Levellers. Founded on 20 November 1792 by John Reeves in the Crown and Anchor tavern on the Strand, the Association worked zealously to give bite to the royal proclamations by harassing radicals, by bringing charges against them, and by persuading the authorities to prosecute them. Scholars remain divided about the extent of government involvement in the formation of the Association, but given that the government exhibited some anxiety about being seen to prosecute men for their political opinions, it would not be surprising if they used a front organization to do their dirty work for them, even to the extent of the Association sometimes

preparing indictments.[16] Where there was a risk of acquittal or adverse publicity with a well-known defendant who had good access to the booksellers and newspapers, the government's preference seems to have been to use non-legal means to get rid of opponents: the delays in the prosecutions of Paine, Frost and Eaton all provide cases in point.

The Trials of Paine, Frost and Eaton

Prosecutions for publishing *Rights of Man* seem to have been discussed among the law officers as early as April 1791, but not until 14 May 1792, a couple of weeks before the first of the proclamations against seditious writings, was its publisher J. S. Jordan indicted. Jordan at first pleaded 'not guilty', but later changed his plea to 'guilty', under pressure, Paine claimed later, from the Treasury Solicitors.[17] A summons was issued to Paine on the same day as the first royal proclamation, but the government did nothing much about it apart from tailing Paine and routinely abusing 'Mad Tom' in the newspapers it funded. In June, the Home Secretary, Henry Dundas, announced the postponement of the trial until December. These delaying tactics eventually paid off: on 13 September Paine left for France. He was harassed at Dover, but, predictably enough given the government's strategy, was allowed to leave the country at dawn the next day. Now the government could prosecute without the risk that Paine would use the occasion as a political platform.

The trial finally took place on 18 December in front of a special jury at the London Guildhall. Erskine's defence, later published as a separate pamphlet, argued that *Rights of Man* ought not to be regarded as seditious rabble-rousing, but part of a long and respectable British tradition of political enquiry.[18] His lengthy quotations from John Milton, John Locke and David Hume were designed to convince the jury to use its recently confirmed powers to deem Paine's pamphlet a contribution to a long-term debate about rights, and as part of the more recent controversy initiated by Edmund Burke. The more the pamphlet could be regarded as part of a literary debate, the less could it be deemed an attempt to spread disaffection among the populace: 'A disposition in a nation to this species of controversy', argued Erskine, 'is no proof of sedition or degeneracy, but quite the reverse, as is mentioned by Milton'. The Attorney-General, for his part, emphasized the audience and style of the pamphlet. He had not at first moved to prosecute Part I, he explained, because it could be given the ben-

efit of the doubt and regarded as part of a philosophical debate; but once Paine encouraged its circulation in cheap editions, then it could be seen as an attempt to stir up readers 'whose minds cannot be supposed to be conversant with subjects of this sort'.[19] With Paine in France, of course, it was easier for the prosecution to present him as a revolutionary activist, although – as Erskine pointed out – matters that did not appear in the information, such as his conduct in France, could not really form part of the prosecution's case. The jury, however, had made its mind up about Paine long before the trial was over. Before the Attorney-General could rise to rebut Erskine's case, it informed the judge that there was no need for the trial to proceed: Paine was guilty.

For our knowledge of Paine's reception in Calais and at the National Convention, we are partly indebted to the account forwarded to John Horne Tooke by John Frost.[20] Frost was an attorney, Solicitor to the Lottery in the Stamp Office, and, like Tooke and Paine, a member of the SCI. He had been involved in the Society from the early reform agitation of the 1780s, and had even been in friendly correspondence with Pitt on the issue. Frost left England for France with Paine in September, but he soon returned, and on 6 November he attended the annual dinner of a society for agricultural improvement in a private room above the Percy Street coffee house, just off Oxford Street. Since the proclamation in May, book shops, taverns and coffee houses were being watched by informers and by men of property alarmed by the spread of popular radicalism. At the end of his dinner, Frost had to descend into the coffee house proper to leave the building. On his way out, he encountered an acquaintance, Matthew Yateman, who asked him about events in France. Their exchange grew heated as Frost made his sympathies for the new republic known and was heard to declare himself for 'Equality, and No King'. The disagreement escalated further when his words were overheard by customers elsewhere in the coffee house, who interceded. Frost eventually extracted himself from the situation, under threats of violence, and left the coffee house.

On 15 November Frost attended a meeting of the 3rd division of the LCS at the Green Dragon near Golden Square, where he was heard by the government spy Monro, who described him as one of the few genteel speakers there.[21] By 22 November he was in Paris again – followed by Monro – to present the SCI's address to the National Convention. He returned to Paris unaware that the day after the altercation at the Percy one or more of those involved had made a formal complaint against him. An indictment was not drawn up until he was known to be in France,

when the government declared him an outlaw. The government's policy seems to have been to discourage his return rather than seek the public prosecution of a man who had been involved with Prime Minister Pitt in the reform campaign of the 1780s. The ministerial newspapers began suggesting that he had left to avoid debts. Refusing to bow to government pressure, Frost returned in February, satisfied his creditors, and then – forcing the issue – voluntarily surrendered himself into the custody of the authorities. When a trial was still not forthcoming, Sheridan suggested that Pitt was too embarrassed by his former association with Frost to proceed.

The government was compelled to act, and Frost was brought to trial on 27 May. Frost engaged Erskine, who provided his usual defence that there had been no seditious intent behind his client's words. Quite apart from the fact that he had been in drink after indulging at the upstairs dinner, said Erskine in extenuation, Frost had been provoked into expressing his sentiments in the heat of argument (just as, at a literary level, he had represented Paine as responding to Burke rather than seeking to stir up trouble on his own initiative). Erskine also set out another argument. How could anyone intend to stir up the public with words spoken in what Erskine deemed a private space of leisure? Once again the government's case partly depended on matter not included on the information, including Frost's participation in events in France. The Attorney-General effectively argued that Frost was a man whose seditious intent was carried with him wherever he went. The idea that the coffee house was somehow a private space he dismissed as fanciful, implicitly admitting that only home and hearth were safe from spies and informers. The summing up by Lord Kenyon stressed the importance of context in coming to a decision: 'if you think those words were spoken *in seasons, when seditious words might be the forerunners of seditious acts, and that men's spirits were inflamed, and might from small beginnings take fire and might be brought into action, it adds most immensely to the criminal construction you ought to put upon the words*'.[22] His opinion secured a conviction from the special jury.

The complaint made against Frost seems to have preceded the formation of the Association for the Protection of Liberty and Property, but the latter's activities brought an intensification of the campaign against the radical movement and with it an increase in prosecutions for seditious libel. While Frost was in Paris with Paine, over the winter of 1792–3, pressure was applied in earnest to the radical societies both through the prosecution of publishers, such as James Ridgway and H. D.

Symonds, both sent to Newgate in 1793 for publishing Paine's works and Charles Pigott's *The Jockey Club*, and by various unofficial means of applying pressure, such as threatening landlords who allowed radical societies and debating clubs to meet on their premises. A bill sticker called Carter was prosecuted for seditious libel early in January 1793 simply for posting a bill, written by the barrister Felix Vaughan on behalf of the LCS, which criticized Reeves and his association. Radicals believed they were witnessing 'the institution of a system of TERROR, almost as hideous in its features, almost as gigantic in its stature, and infinitely more pernicious in its tendency, than France ever knew'.[23]

During this period, John Thelwall, like Vaughan another protégé of Tooke's, emerged as one of the key players of the popular radical movement in London, initially in the struggle against the Lord Mayor's attempt to suppress the Society of Free Debate that had met at Coachmaker's Hall. Such societies had been a feature of London life for decades, including the one at Coachmaker's Hall, frequently complained of by *The Times* and other newspapers, but only seriously pressured by the authorities after they began debating political matters in earnest over 1791–2. In April 1792 the landlord of Coachmaker's Hall told Thelwall that he had been threatened with the loss of his lease 'unless we would covenant not to bring forward any questions of a political matter'.[24] Driven from Coachmaker's Hall by the beginning of the new season, the society was pursued by the Lord Mayor from venue to venue until it was finally closed down in December 1792, after a fracas probably provoked by a government agent. Although 'opposed and personally abused by the timid members', Thelwall set out on a campaign to raise political matters in those more 'select' debating clubs which had covenanted with the local authorities to steer clear of contentious topics.[25] In November 1793, at a debate held at Capel Court, he made a speech which included an anecdote about a tyrannical gamecock, 'King Chanticleer', beheaded for its despotic behaviour. Thelwall's speech was quickly printed by Daniel Isaac Eaton in his periodical *Politics for the People*. Eaton was one of the few important radical publishers not in Newgate at the time, despite attempts to prosecute him twice earlier in 1793. Eaton was arrested on 7 December 1793 on the basis of an indictment claiming that Thelwall's gamecock was a reference to George III. Eaton was kept in prison for three months, itself an attempt to destroy his livelihood, before finally being brought to trial on 24 February 1794. John Gurney, Eaton's attorney, argued that the allegory had been a blameless comment on tyranny in general or

the King of France in particular. He was shocked by the innuendos identifying the gamecock as George III (a defence, of course, that would have been available even before the passage of Fox's Libel Act). Gurney went so far as to cheekily suggest that it was the Attorney-General who was guilty of seditious libel; by supplying those innuendos he, not Eaton or Thelwall, had represented George III as a tyrant. The government was humiliated in a courtroom convulsed with laughter. A major victory had been scored in the courts.

The acquittal of Eaton was met with jubilation and provided a great boost to the radical societies, whose memberships seem to have stagnated over the course of 1793 (the year that seems to have seen most prosecutions for seditious writings and seditious words). As for Thelwall, he turned to the political lecturing that cemented his importance to the radical movement. If over the course of 1793 Thelwall and the LCS had found it difficult to find places in London where they could debate political matters, however, the struggle for reform had carried on by other means throughout the country by a series of petitions in support of a moderate motion for reform brought in by Charles Grey and his supporters in the Society of the Friends of the People in May 1793.

Petitions and Conventions

In the early years of the 1790s, the radical reform movement attempted to achieve its aims by petitioning parliament. Few radicals imagined that petitioning would achieve much, and many found it objectionable, believing, as the activist Henry Yorke would later put it, that 'the people ought to demand as a *right*, and not petition as a *favour*, for universal representation'.[26] Petitioning however, if only as a first step towards universal suffrage, had a number of apparent advantages. The more cautious reformers may have favoured it as the only incontrovertibly legal means of exerting extraparliamentary pressure on the government, one moreover which would keep the popular radical movement on good terms with the Friends of the People. As we have seen, the Friends had done much to publicize the corruptions in the electoral process, and, though certainly not in favour of universal suffrage, were seen by many as the grouping most likely to achieve some version of reform, however limited. More militant reformers, on the other hand, were prepared to join the petitioning campaign because, when it failed as

it seemed certain to do, they would find it easier to persuade the reform movement that universal suffrage could be obtained only by some more urgent, more confrontational means, and by 'the people at large'.

By May 1793 thirty-six petitions, from London, Norwich, Sheffield, Nottingham and elsewhere, but mainly from Scotland, had been sent to Westminster, where some were rejected for being insufficiently humble in their tone or for more technical breaches of proper form. They were intended to support Grey's reform motion, proposed in the Commons on 6 May. In the event, Grey introduced this motion with almost as little enthusiasm as it was received by the House. He declared his hostility to universal suffrage, paid scant attention to the petitions which appeared to favour it, and yet made clear his opposition to any other form of extraparliamentary action. He proposed no specific measures, and merely asked the House to take into consideration the possibility that it might reform itself. By a huge majority the House declined to do so, and it became clear, just as many radicals had believed it would, that at least for as long as the war with France continued, or any fear remained among loyalists that the democratic and republican doctrines of the French might cross the channel, parliament would be able to resist reforming itself on apparently more principled grounds than a desire to continue to enjoy the fruits of corruption. If there were any possibility of achieving universal suffrage, it would have to be by bringing greater pressure to bear on parliament than could ever be exerted by petitioning.

In the correspondence conducted among the reform societies prior to Grey's motion the alternatives to petitioning had been energetically discussed. There was wide agreement that the most likely to succeed would be to summon a convention of delegates representing 'the great Body of the People'. If petitions could always be dismissed by parliament as expressing only the wishes of unrepresentative malcontents, it would be impossible, or so it was argued, for parliament to ignore a convention with a genuine claim to speak the will of the majority of the people, and almost impossible to resist its demands. This means of proceeding, however, was more difficult than the radical societies ever acknowledged. For how could such a convention possibly be convened? How could truly representative delegates be elected? By what constituencies? And how could it be both representative and in favour of universal suffrage, when the majority of the people of Britain, perhaps even the great majority, appeared indifferent or positively hostile to the idea? And even if all these problems could somehow be overcome, the undertaking would be

fraught with danger. Though there was no positive law prohibiting the summoning of conventions, it was clear that an assembly of delegates claiming to represent the people might come to be regarded as something like an alternative parliament, and as establishing an alternative sovereign power – the people – against the sovereign established by the constitution. It could succeed only by 'over-aweing' parliament, in effect by forcing parliament to grant a reform by an implied threat of what would happen if it did not. And if parliament refused to be overawed, what would follow? Would the delegates accept that the game was up, and return meekly to their homes? Or would they sit tight, provoking the government to attempt to disperse them, and threatening resistance if the attempt was made?

In the summer of 1793,[27] as much stimulated as daunted by these difficulties and dangers, and convinced, justifiably enough, that a convention of 'the whole people', supposing it could be assembled, would be far more genuinely representative than the corrupt parliament at Westminster, the officers of the London Corresponding Society determined to pursue the idea. The chairman Maurice Margarot and the secretary and founder Thomas Hardy wrote to William Skirving in Edinburgh to ask his advice. Skirving was secretary of the Friends of the People in Scotland – not to be confused with the élite society to which Grey belonged – and the Friends had already held two conventions in favour of moderate reform in late 1792 and early in 1793. Skirving advised a 'general union' of reform societies, to be cemented at a general convention. This convention was arranged in a hurry, and when it met in Edinburgh in late autumn, though the numerous branches of the Scottish Friends were well represented, only three English reform societies, the LCS, the SCI and the Sheffield Society for Constitutional Information, managed to send delegates.[28] When they arrived, the convention, which had already sat for a week, had dispersed; it was reconvened, and soon began to assume a new character. It styled itself the 'British Convention', as if it were in some way an equivalent of the French National Convention. It introduced a new revolutionary calendar, dating its proceedings as taking place 'in the first year of the British Convention'. The delegates began addressing each other as 'citizen', and adopted many of the procedures and the vocabulary of the convention in France. It dressed itself up, in short, not as a mere deliberative assembly but as a legislative body, a revolutionary anti-parliament.

There was however a considerable gap between its style and its substance. The SCI had originally seen the convention as an opportunity to resume the petitioning campaign, and many of

the Scottish delegates were still committed to petitioning. Some wanted to petition parliament; some advised petitioning the king to summon a convention of the whole people to consider their grievances, a move which, though it would have no chance of succeeding, would have demonstrated that the convention was no antiparliament and no challenge to the sovereignty of the king. The LCS delegates, however, Margarot and Joseph Gerrald, would have none of this. They urged, on the basis of some wildly inflated estimates of membership, that the radical societies already represented a significant proportion of the adult males in Britain. If the societies' programme of political education were strenuously continued, it would soon produce a majority in favour of reform. It would then be possible to summon a genuinely national convention, whose demands the government 'would not dare to refuse'.[29] These disagreements were still unresolved when the authorities in Edinburgh arrived to disperse the convention and arrested several of its leaders. Early in 1794 Skirving, Margarot and Gerrald were tried on a charge of sedition, and were sentenced to fourteen years' transportation to Botany Bay.

These unprecedentedly harsh sentences shocked liberal and radical opinion throughout Britain. Skirving had been the first to be tried, and as soon as news of his sentence reached London, the SCI passed a resolution which seemed to hint at the need to move from peaceful to insurrectionary politics. It declared that if Britons were to preserve their ancient liberties, they might soon be required 'to oppose tyranny by the same means by which it is exercised'.[30] At a general meeting of the LCS a few days later an address was agreed that appeared to announce that the compact between the government and the governed was now broken. 'We are at issue', it declared.

> We must have redress from our own laws, and not from the laws of our plunderers, enemies, and oppressors.
>
> THERE IS NO REDRESS FOR A NATION CIRCUMSTANCED AS WE ARE, BUT IN A FAIR, FREE, AND FULL REPRESENTATION OF THE PEOPLE.[31]

This was probably intended as a simple statement that, in the new situation created by the events in Edinburgh, the need for a thorough reform of parliament, by which the people would be able to make their 'own' laws, was more urgent than ever. It would be understood quite differently, however, by the government and the law officers of the Crown, who interpreted it as meaning that the LCS was intending to usurp the powers of government by convening a new convention, elected by universal

manhood suffrage, which would attempt to act as a revolutionary legislature.

Before the Edinburgh convention had been dispersed, the delegates had passed a secret motion, not entered in its minutes, which set out a series of eventualities in which the convention would be reconvened. The introduction of a 'convention bill', making assemblies of the people unlawful; a bill for suspending habeas corpus, permitting imprisonment without trial; the landing of foreign mercenaries in Britain or Ireland, presumably in order to intimidate the reform societies; and perhaps (the wording of the motion was ambiguous) a French invasion – any of these would be a signal for the delegates to meet again to consider the new situation that would then exist.[32] In late January, as if to test the resolve of the LCS, the government announced that, as a precaution against sickness, a small body of Hessian troops had been disembarked and stationed on the Isle of Wight and at Portsmouth. The LCS promptly formed a secret committee to prepare its response, and composed a circular letter which, probably at the beginning of March, was sent under Hardy's signature to most of the reform societies in Britain, urging them to attend 'another British Convention'. Exactly what the reconvened convention was to do, other than simply assert its right to convene, was never entirely clear. The letter itself claimed that the convention was intended simply to cement the links between the various reform societies, to compare their various views, and to advise on future action.[33] The government chose to believe that this convention, though it was obviously not the assembly representative of the whole people the LCS was hoping one day to convene, was itself intended to usurp power, to dictate to parliament, and even to institute a republic. The most likely explanation, advanced by members of the LCS over the succeeding months, was that its main business would have been to discuss how to arrange that convention of 'the great Body of the People' which would, reformers believed, have the authority and weight to extort a reform from parliament.

Hardy's proposal did not attract much support. Only one society outside London, in Strathaven, agreed to send delegates to a new convention. The societies in Norwich did not believe the time was ripe to reconvene, nor did the Sheffield SCI, which thought a new convention should be summoned only when the reform societies had completed the task of 'enlightening the public mind'.[34] The Bristol Constitutional Society asked for a clearer statement of its purpose, as did the societies in west Yorkshire, which, though willing in principle to participate, believed that there should first be a delegate meeting to decide the agenda,

function and status of the future convention. In London, the Friends of the People, of course, were against the idea, believing that it would alienate moderate reformers, and the SCI, though it agreed to support the proposal, for prudential reasons wanted the convention to be described simply as a 'meeting'. While waiting for replies from the provincial societies, the LCS and the SCI established a 'committee of conference' or 'committee of co-operation' to plan the details of the new convention, but it seems to have met only twice, and by the middle of April, when the LCS held its next general meeting, the plan for a new convention, if not explicitly abandoned, was no longer being treated as a matter of urgency.

The government, however, acted in the belief that it was: on 12 May, Hardy and Daniel Adams, secretary of the SCI, were arrested on suspicion of 'treasonable practices' in conspiring to assemble 'a pretended general convention of the people, in contempt and defiance of the authority of parliament, and on principles subversive of the existing laws and constitution, and directly tending to the introduction of that system of anarchy and confusion which has fatally prevailed in France'.[35] Over the next two or three months, over thirty members of five reform societies were arrested, some in order to face prosecution, some as reluctant witnesses against their co-reformers. Six members of the SCI were arrested on warrants alleging treasonable practices, including Tooke, the novelist and dramatist Thomas Holcroft, and Jeremiah Joyce, a Unitarian minister and tutor to the eldest son of the radical Earl Stanhope. Including Hardy, thirteen members of the LCS were arrested on similar warrants, among them Thelwall, Thomas Spence, the bookseller and pamphleteer, and John Baxter, a silversmith and later a historian.

The government established two secret committees, in the Lords and Commons, to examine the papers seized from those arrested and to inform parliament of the nature of the supposed conspiracy. The first report of the Commons committee was produced a few days after the arrests, and on the basis of its findings the government introduced a bill to suspend habeas corpus, allowing those arrested on suspicion of high treason or treasonable practices to be held without bail or charge until February 1795. The committee issued a second report in June, finally concluding that the radical societies had been planning what amounted to high treason. At the very least, they were intending to achieve a reform of parliament by over-aweing the sovereign power, which would be tantamount to a temporary deposition of the king; at worst, they were planning a full-scale revolution involving the institution of a French-style republic. To achieve

either of these aims, of course, the societies would need a very considerable quantity of arms, and the reports claimed that there was abundant evidence that they were attempting to assemble a large armoury. This armoury, however, was never found, though the Privy Council interviewed dozens of members of the reform societies in an attempt to find evidence of it. A handful of members of the LCS did turn out to own muskets and a few had ordered pikes, but altogether they could not have held a street against the army, let alone succeeded in a *coup d'état*. Arming had never been official LCS policy, and there is much evidence of its members refusing the opportunity to acquire arms.[36]

Some additional support, however, for the government's claim that the reform societies were planning an armed insurrection came from Scotland. A few days after the first arrests in London, an Edinburgh wine-merchant, Robert Watt, was discovered to have sixteen pikeheads in his house. It soon emerged that in his capacity as chairman of a secret committee of the Edinburgh Friends of the People, Watt had proposed a plan to seize Edinburgh castle and to issue a demand to the king to dismiss his ministers and end the war with France. He had been working as a government spy, and it never became clear whether, in proposing his plot, he had been acting as an *agent provocateur* or had been converted to the radical cause. At his trial, the prosecution summoned informers from London in an attempt to connect Watt's plot with the LCS, and at the trial of Hardy members of the Edinburgh secret committee were be produced in an attempt to cement this connection. Their evidence failed to do so, however, and the judge advised the jury to ignore it. The LCS was as ignorant of Watt's scheme as were the vast majority of the radicals in Edinburgh.

The Law of Treason

The government was clearly anxious to break the popular reform movement by convicting its leaders, as Watt was convicted, on a charge of high treason, the most serious crime on the statute book and one punished with exemplary cruelty. It was not easy to see however how the actions of Hardy, Tooke and the rest could be brought within the scope of the law of treason. In Scotland Skirving, Margarot and Gerrald had been charged only with sedition for organizing and attending a supposedly revolutionary convention. The law of treason was the same in Scotland and England; but the Crown lawyers in Scotland had repeatedly stated that,

heinous though the crimes of the conventionists were, they did not – quite – amount to treason. In England, therefore, the law officers were faced with the problem of arguing that what it had been no more than sedition to do late in 1793, it was now high treason merely to plan to do in 1794; and this obliged them, as we shall see, to invent some novel legal arguments.[37]

The crime of high treason was defined by an act of 1351, passed in the reign of Edward III. Among the various treasons it listed, only the two referred to in the indictments of Hardy and the others concern us here. It is treason, said the act, to 'compass and imagine' the death of the king, and it is treason to 'levy war' against the king. To understand the trials of 1794, we need to understand some of the meaning and history of these two treasons and of the relation between them.

The words 'compass' and 'imagine', as they are used in this statute but almost nowhere else, are both taken to mean 'intend', and the law against compassing and imagining the king's death is most unusual in that the crime it defines is not an action but merely an intention. You cannot be charged in English law with killing the king, only with intending to kill him, and if you do actually kill him, that act is regarded in law simply as evidence of your prior criminal intention. The point is to cut off conspiracies against the king as soon as evidence of them is discovered; and the king is given this far greater degree of protection than his subjects enjoy because the safety of the state itself is involved in his survival. If you buy a knife with the intention of killing an ordinary person, you commit no crime until you actually attempt to kill someone. If you buy the same knife with the intention of killing the king, then you have already committed the treason of compassing and imagining his death, whether or not you then attempt to cut his throat.

To prove an intention to kill the king, it was necessary to prove that a defendant had committed some palpable action, some 'overt act' in which that intention was manifested. Exactly what constituted an overt act of treason was a complicated question, however, and almost all arguments about the meaning of the statute of treasons turned on this question. By 1794, all major commentators on the law of treason had long agreed with the early seventeenth-century jurist Sir Edward Coke, that conspiracies to depose or imprison the king, as well as to assassinate him, were overt acts that could be laid as evidence of compassing and imagining his death. The king's life would inevitably be put at risk by such conspiracies, and the conspirators should obviously be regarded as intending the probable or at least foreseeable consequences of their actions. Following Coke, however, legal

commentators had progressively extended the notion of what could constitute an overt act. In the late seventeenth century Sir Matthew Hale described an overt act of compassing and imagining as *any* act that '*must* induce' the death of the king. Early in the following century, William Hawkins defined overt acts more capaciously, as any that 'shew a Design as cannot be executed without ... *apparent Peril*' to the king's life. By the mid century, Sir Michael Foster was willing to go still further: overt acts of treason, he declared, included 'every thing Wilfully and Deliberately done or attempted, whereby his [the king's] life *may be endangered*' (my emphases).[38] It had been perfectly reasonable to regard overt acts as intending the king's death if that was their probable and foreseeable consequence; but in Foster's definition the locus of the treasonable intention had shifted, so that overt acts now appeared to include intentional actions whose indirect, unintended and not easily foreseeable result may have been to put the king in danger.

Perhaps the most significant development, however, concerning the doctrine of overt acts, had involved the clause in the statute which made it high treason to levy war against the king. The meaning attributed to this clause too had developed considerably in the last two centuries, and by the late seventeenth century lawyers distinguished two kinds of levying war. On the one hand was 'direct' levying, armed rebellions and insurrections with the aim of coming into the king's presence and killing, deposing or imprisoning him; on the other was 'constructive' levying, aimed not against the king himself but his government, his 'majesty', and intended to achieve some reformation in the law, or to 'reform' or 'new-model' the government. Both these kinds of levying war were high treason, and the difference between them was important only when a conspiracy to levy war was discovered before it could launch an actual armed rebellion. An unfulfilled conspiracy to levy war was not in itself high treason; and though most authorities agreed that a conspiracy to levy direct war against the king could be laid as an overt act of imagining his death, since it clearly risked endangering the king's life, a conspiracy to levy 'constructive' war could not, and for the obvious reason that 'the King of Constructive Treason', as one lawyer put it, was immortal. 'Treason itself cannot kill him', for the government and majesty of the Crown do not die when the king dies but immediately pass to his successor.[39]

The Treason Trials

During the summer and autumn of 1794, a campaign in the loyalist press had represented the case against the defendants as overwhelming. To the government and the law officers, however, it must have been evident that it would not be straightforward for the prosecution to argue that the reform societies had deliberately intended the king's death, or even his deposition or imprisonment. Some of their members were no doubt republicans, but there was very little evidence that was likely to persuade a jury that the societies had been directly intending to remove George III from the throne and establish a republic. In his charge to the grand jury when the defendants were indicted, Lord Chief Justice Eyre, who presided over the treason trials, repeated an argument that had been advanced by loyalist politicians and writers prior to the trials and would be repeated endlessly after them; that the societies might have committed a distinctively 'modern', or 'French' treason. In previous cases of high treason, the argument went, the defendants had been seeking to remove one dynasty from the throne to replace it with another; but 'modern' treason – the attempt to establish universal suffrage by over-aweing the sovereign power – aimed at overthrowing the whole constitution, in which the king was included. The direct intention may not have been to remove the king, but the effects of either universal suffrage itself, or the methods adopted to achieve it, might well include that result. Modern French treason, it seemed, was different from, was worse than, old-fashioned English treason; but perhaps therefore 'modern' treason did not fall within the scope of the act of Edward III.

In the event, the Attorney-General Sir John Scott, who would lead the prosecution of Hardy and Tooke, decided to base the indictment on the charge that the societies had been engaged in a conspiracy to levy war against the king; that they intended to subvert the constitution, to depose the King, and put him to death; and for that purpose, and '*with Force and Arms*', they conspired to excite insurrection and rebellion. There were however several difficulties in the way of substantiating this charge. The societies would claim that the evidence of their proceedings would clearly show they had not aimed to subvert the constitution at all and had never so much as contemplated endangering the king's life; indeed, that their scheme of parliamentary reform went no further than the plan put forward in 1780 by the Duke of Richmond (now a convinced anti-reformer and member of Pitt's cabinet), and that their plan for a convention of delegates was borrowed from a similar plan advanced by Pitt

himself. There was no evidence that the radicals had been contemplating an armed insurrection: the evidence of arming, as we have seen, was weak, and there was no such evidence in the case of Tooke. Even if the jury could be persuaded that the societies had intended an armed insurrection, it might be hard to persuade them that it was aimed directly, rather than constructively, against the king, and so could be laid as an overt act of imagining the king's death.

Scott opened for the prosecution in the first trial, of Thomas Hardy, in a speech that lasted no less than nine hours. The extraordinary length of this speech, when all previous trials for high treason had been concluded in a single day, was sufficient to persuade the former Lord Chancellor Lord Thurlow that 'there was no treason':[40] for jurists believed that treason should 'stand out', should be established by clear and obvious proofs, not by elaborate concatenations of evidence that required lengthy interpretation or by complicated legal arguments. Coke had insisted that a treasonable intention was to be made out 'not upon conjecturall presumptions, or inferences, or strains of wit, but upon good and sufficient proof'. Hale had gone further, declaring that it was exceptionally dangerous 'to depart from the letter of the statute, and to multiply and inhanse crimes into treason ... by construction and analogy where the letter of the law has not done it'; such a method, he argued, 'admits of no limits or bounds, but runs as far as the wit and invention of accusers ... will carry men'.[41] Over the length of the treason trials, the prosecution attempted to show that the societies had been engaged in a treasonable conspiracy by developing a range of arguments which Erskine, who again led for the defence, would repeatedly denounce as based on 'strains of wit' or on its late eighteenth-century equivalent, the imagination. Playing with the words of the statute, he claimed that the defendants, far from imagining the king's death, had never so much as *imagined* it. It was the prosecution who, by imagining the possible consequences of the possible consequences of actions which were in themselves perfectly innocent, were 'imagining' the death of the king.

Some of the arguments invented by the law officers and other lawyers who appeared for the Crown were certainly novel, and became more so in the last two trials where the prosecution was less able to rely on the evidence of arming. The notion that the societies had 'imagined' in the sense of 'intended' the king's death came to depend still more than it had for Foster on the indirect consequences of the overt acts set out in the indictment. Overt acts were now not just actions that 'must' or 'may' endanger the king, but that possibly 'might' endanger him. An intriguing

argument was advanced to show how what 'might' put the king's life at risk would in fact be certain to do so. By the Coronation Oath Act, the king was obliged to swear to govern 'according to the statutes in parliament agreed on, and the laws and customs of the same'. This act had always been understood as setting limits to the powers of the king; it was fundamental to the constitutional monarchy that distinguished Britain from the absolute monarchies of Europe. According to the law officers, however, the point of this act was to oblige the king to defend the laws and the constitution, to resist any attempt to put pressure on him and his parliament, by force (or, as we shall see, by 'implied' force), even at the hazard of his life. Thus anyone who conspired to levy war for such purposes *must* be regarded as imagining the king's death, for he *must* foresee that the king will be bound by his oath to oppose him, and that in the ensuing struggle the king's life *must* be put at risk. The aim of this argument was to argue away the distinction, which had been reaffirmed as recently as 1780 by the greatest of eighteenth-century judges, Lord Mansfield, between conspiracies to levy direct, treasonable war against the real king, and conspiracies to levy constructive war against his 'majesty' or government, which were not treasonable at all.

Once the law officers had discovered this argument they were at liberty to acknowledge just how constructive, how indirect, the conspiracy to levy war really was. They could deal with the fact that there was no real evidence of an intention to depose the king by arguing that, if the proposed convention had been successful in over-aweing king and parliament into granting a reform against their will, they would have 'virtually' restrained the king from acting according to his will, and so would virtually have deposed him for as long as it took him to give his assent to a reform bill. They dealt with the fact that the societies were supposed to have conspired to levy war without the 'force of arms' necessary to do so by another equally novel argument. To conspire to overawe the king and parliament, even by an unarmed convention, was still a conspiracy to levy war, because the whole aim of the project was to show that a majority of the people wanted a reform; and to demand universal suffrage with the backing of most of the population was to bring to bear an 'implied' force on the government. In short, the prosecution were sometimes prepared to go so far as concede that the societies were levying a merely virtual war with a merely virtual force and were imagining only a virtual deposition and death of the king of constructive treason; for they could still insist that, by the terms of the coronation oath, all this amounted to a compassing and imagining of the real death of the real king.

For the defence, Erskine, supported by Vicary Gibbs, dealt with these arguments partly by relying on the precedents that the prosecution were trying to argue away, partly (as we have seen) by claiming that the effect of the prosecution case was to turn high treason into a kind of figurative crime: it was the prosecution, they claimed, not the defendants, who were 'imagining' the king's death. Throughout the trials Erskine and Gibbs insisted that the defendants should be tried against the simple, unelaborated, unambiguous letter of the law. The statute declared that it was high treason to 'compass' and 'imagine' – to intend – the real death of the real king. The very arguments by which the prosecution was attempting to prove the treason showed that, as Thurlow had claimed, 'there was no treason'. Much of what the prosecution must have hoped would be the most damaging evidence against Hardy, in particular the evidence of arming, came from some of the many government spies who had infiltrated the LCS. In what would come to be recognized as a classic demonstration of the arts of the defence counsel, Erskine cross-examined these witnesses in a tone of contemptuous disbelief and managed to discredit much of their evidence. Spies were not called as witnesses in Tooke's trial, but two of those who had given evidence against Hardy seem to have been regarded by the prosecution as having been too much damaged by Erskine to be used in the third and last trial, that of John Thelwall. In that trial, only two spies were called, and Erskine managed to show that one was perjuring himself and the other was withholding evidence favourable to Thelwall, on the grounds that he did not think it 'material'.

Almost all the novel arguments put forward by the Crown came to be endorsed in the course of the trials by Lord Chief Justice Eyre. It is more than likely, indeed, that he had been consulted about them by the law officers prior to the trials. After trials of unprecedented length, however, Hardy and Tooke were acquitted, and following Tooke's trial the other members of the SCI in custody were discharged. But the law officers went ahead with the trial of Thelwall, amid suggestions in the loyalist press that the evidence against him was unusually compelling. He too was acquitted. It was now clear that it would be impossible to convict any of the other LCS prisoners, and over the next weeks and months the charges against them were dropped.

The acquittals were greeted by radical and liberal opinion with enthusiastic delight. The independence of the jury and the brilliance and courage of Erskine were warmly celebrated even by those who still had serious doubts about what the societies had been up to; for many, however, the outcome of the trials

seemed to offer unequivocal proof that there had been no conspiracy against the constitution. Membership of the LCS, which had melted away in the summer and autumn, began to increase again, and in the following months was greater than it had ever been.

The government, however, and loyalist opinion inside and outside parliament refused to acknowledge the innocence of the defendants. The Secretary at War, William Windham, 'wished them the joy of an acquitted felon', and both Pitt and the Attorney-General insisted that, though they had not been found guilty in law, they were still 'morally' guilty.[42] The Solicitor-General agreed: a 'not guilty' verdict, he said, was not a declaration of innocence; it meant nothing in law except that a defendant found not guilty could not be tried again for the same offence.[43] The government even tried to represent the outcome of the trials as a kind of one-all draw: the defendants had been found not guilty by the trial juries, but guilty by the grand jury that had indicted them. This was an extraordinary distortion: the grand jury, of course, had had knowledge only of the case for the prosecution, and on that basis had decided no more than that there was a case to answer.

There was widespread agreement, however, among loyalists, that the defendants had been acquitted because the statute of Edward III, though adequate to catch old-fashioned English treason, was not easily adapted as a weapon against the much more dangerous and insidious 'modern' treason. There were demands for a new law of treason, and late in October 1795 the government saw the chance to introduce one. The king was insulted and pelted in his coach on the way to open parliament, by a 'mob' demanding peace and bread. George himself believed that an actual attempt had been made on his life. The government promptly introduced two bills which stifled the reform movement for a generation. One, the Seditious Meetings Bill, was designed to make it impossible for the reform societies to hold meetings of over fifty persons. The other, the Treasonable Practices Bill, was to run only for the duration of the king's life, but paradoxically the government claimed it was in effect a declaratory act, and did no more than clarify the law of treason as it then stood. In fact, however, it converted what had previously been overt acts which could be laid as evidence of treason into substantive treasons, and the effect of this on future trials threatened to be considerable. In the 1794 trials, Erskine had been able to argue that even if the prosecution succeeded in proving the overt acts stated in the indictment, it was still a matter of fact, to be decided by the jury, whether those acts amounted to high treason. Under

the new bill that issue could be withdrawn from the consideration of the jury. An even greater innovation was unveiled at the committee stage of the bill, when the government added a new clause against 'modern treason', making it a substantive treason to conspire to levy war in order to intimidate, overawe or put any force or constraint upon parliament, including, so the government intended, 'implied force'. If this had been the law a year earlier, it would have been impossible for Erskine to mount the defence he did in the trials reprinted in this collection.

Trial Literature

The trials collected in these volumes are not unmediated transcriptions of what went on in court. Unlike the Cobbett and Howells edition of *State Trials*, published between 1816 and 1826, often collating different accounts, these facsimiles reproduce versions first published in the immediate aftermath of the trials themselves. Official court reporting was still in its nascence in the late eighteenth century, and case histories used by professionals were usually the products of commercial enterprise, often drawing on the notes of those directly involved in court, but frequently published only after their deaths. Only slowly did court reporting move towards verbatim accounts, for instance in the sessions papers of the Old Bailey published in periodical form from the 1680s. Quite apart from the professional market for case histories, however, there was an avid readership for trial proceedings throughout the eighteenth century, for whom they formed a sub-genre of crime literature, taking its place with last dying speeches, confessions and breathless accounts of lives of crime. Even the bulky 1730 collection of *State Trials*, intended primarily for students of Law, presented itself as retailing 'Instruction and Entertainment'.[44]

The most popular genres of the cheaper pamphlet versions of trials were those for murder and adultery (or 'criminal conversation' as it was known), especially where the crimes involved those from high life. Publishing trials for adultery could involve an element of social criticism, but it was also catering for the expansive eighteenth-century market in pornography; often the two impulses mixed together. The publisher James Ridgway was involved equally in the market for the criminal conversation trials and those for sedition. He was imprisoned in 1793 for selling Paine's *Rights of Man* and *Address to the Addressers*, and Charles Pigott's *The Jockey Club*. The last was as much a

salacious exposé of aristocratic adultery as a political tract. In Newgate, Ridgway formed a partnership with Henry Delahay Symonds, and they published versions of many of the trials for sedition, including Frost's in this volume, as well as other radical tracts. Thomas Erskine often starred as a barrister in both adultery trials and those for sedition. His involvement could be an important selling point for trial literature, and his speeches were often printed and sold separately. In 1810, Ridgway gathered Erskine's speeches together in an edition used for cross reference by the editor of the *State Trials*, and his speeches were usually represented as important contributions to political debates on freedom of speech and the rights of the subject.[45] When these issues were topical, as they were in the 1770s and again in 1792–4, political trials could eclipse the turnover in trials for murder and adultery, although for *The British Critic* trials for adultery and sedition were both merely signs of the degeneracy of the public taste in dangerously democratic times: 'As Trials for Adultery are made vehicles for lewdness, so are Trials for Sedition employed to circulate disaffection. A published trial, should be a plain report of what was said in Court: This is a flourished account, adorned with capitals, italics and notes, tending to accuse the Judge, Counsel, Jury, &c. We may well doubt whether any part of such a publication contains a fair report.'[46] Usually political trials were published by those sympathetic to reform, no doubt as part of the campaign to spread political information being conducted by the SCI and the LCS. Erskine wrote to Thomas Walker, acquitted on a charge of treasonable conspiracy early in April 1794, urging him to publish the notes of his trial in Lancaster: 'Your friends here are much disappointed at not seeing your trial published, and there are catchpenny things circulated to pass for it. It certainly throws great light upon the businesses which agitate the public at this moment, and its appearance now would be useful.'[47] The Tory press was more likely to complain of the circulation of trials 'augmented in the style of Messrs. Ridgeway and Symonds', that is, with their radical message pointed up by typographical and other means.[48] More liberal reviews, such as the *Analytical* and the *Monthly*, welcomed the trials as useful additions to political knowledge, generally laying the emphasis on the accuracy of the shorthand taker, a matter that the professional needs of lawyers had made of increasing importance as the century went on.

In the cases of Paine, Hardy, Tooke and Thelwall, there were competing versions of the trials, using different shorthand accounts. Eaton published his trials himself, but we do not know from whose shorthand. The version in *State Trials* is from the

notes by Joseph Gurney, but whether these were directly available or mediated through Eaton's pamphlet is unclear.[49] More intriguingly the editor considered there to be no sufficiently accurate extant record of Thelwall's trial 'for insertion in the present volume'.[50] Paine's trial came out in the most bewildering variety of forms, from hostile one-page broadsides to different more or less full transcriptions. Of Hardy's trial there are at least four versions. J. S. Jordan brought out the first of a two-volume set soon after the trial based on the notes of 'the professor of Shorthand' Manoah Sibley. By 1792 Sibley's notes were being used for the official proceedings of the Old Bailey published every session, but Gurney was usually described as the 'official' shorthand writer to the court. Probably by this time Gurney was only turning out for major trials rather than the thefts and other matters covered in the proceedings. Although *State Trials* does note differences between his version of Tooke's trial and that taken by Blanchard and published by Jordan (the version in Tooke's library at his death),[51] most reviewers acknowledged Gurney's pre-eminence, and we have consistently preferred his versions of trials where they are available; otherwise we have chosen to reprint what appear to be, or were accepted by contemporaries as, the most accurate versions of the trials.

For defendants, trial literature offered an opportunity to take their political message to a wider public, whatever the outcome of the case: one obvious reason why the government may have been keen not to have Paine in court when he was tried. Indeed there was a whole sub-genre of speeches that were never made, either because a case was dismissed, as with Holcroft; or the case itself never came on, as with Charles Pigott; or the defence was taken out of the hands of the defendant (as with John Thelwall).[52] Margarot's defence was clearly made with publication in mind: 'What I say this day will not be confined within these walls, but will spread far and wide'.[53] Generally speaking, no steps seem to have been taken to prevent the proceedings reaching the public, despite their propaganda value. Although in the past consent from the court had been sought for the publication of court proceedings, the idea that they might have been liable to prosecution for contempt seems never to have been seriously entertained. In Scotland, where the legal system was different, publishers may have felt less secure. *The Critical Review* certainly saw some reticence in the version of T. F. Palmer's trial, taken down, like Frost's trial, by Ramsey: 'The eminent shorthand writer, who reports this trial, appears to have acted under the impulse of some very extraordinary fears, as a great part of the speeches are given in such a state of mutilation, that he

must have supposed it treason to record the words of the Scotch judges'.[54] When he was prevented from addressing the jury after his acquittal, Holcroft told Eyre that he would 'take some other means of publishing what I think of the business'. Although Eyre warned him that he had 'better take care, Sir, or you may bring yourself into another scrape', Holcroft went ahead and published his *Narrative of Facts* (1795) anyway.[55] Perhaps no legal action needed to be taken against him: Holcroft found it almost impossible to earn a living as a dramatist after the trials and was effectively forced into exile in Germany.

The trials for sedition and treason over 1792–4 offer a remarkable record of the struggle over freedom of speech and parliamentary reform fought out both in the courtroom and in the press. The government was never able to free itself from the constraints of the rule of law, but did everything it could both to manipulate the legal system and exploit more covert forms of harassment. Radicals, for their part, used a variety of means to perpetuate the diffusion of political knowledge, including the medium of the courtroom itself. Publishing the trials was an obvious way of keeping this process alive. This collection is designed to allow scholars and general readers in our own time access to the arguments over freedom of speech and democracy fought out in the courts in the 1790s.

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1 *The State of the Representation of England and Wales* (1793). The member for Edinburgh was elected by the thirty-three members of the town council. The remaining sixty-five burghs were grouped into fourteen districts, each of which returned one member, chosen by an electoral college consisting of single delegates nominated by each town council in the district. The members of the councils totalled 1,220, nominating sixty-five delegates, so that, in total, including Edinburgh, the fifteen burgh members were returned by ninety-eight electors.

2 See A. Aspinall and E. Anthony Smith, *English Historical Documents, Vol. 11* (London, Eyre and Spottiswoode, 1959), p. 236, n. 5.

3 See Volume 2, note to p. 141, l. 33.

4 *A Letter from his Grace the Duke of Richmond to Lieutenant Colonel Sharman of the Irish Volunteers* (1792), pp. 5–6.

5 Richard Price, *A Discourse on the Love of our Country, delivered on Nov. 4, 1789* (1790).

6 See below, p. 51.

7 *The Argus*, 8 May 1792.

8 *By the King. A Proclamation* (1792), single sheet.

9 The question of the exact numbers prosecuted and their significance has been the subject of dispute among historians: see, especially, Clive Emsley, 'An Aspect of Pitt's "Terror": Prosecutions for Sedition during the 1790s', *Social History*, 6:2 (1981) pp. 155–84, Emsley, 'Repression, "Terror" and the Rule of Law in England during the Decade of the French Revolution', *English Historical Review*, 100 (1985), pp. 801–26; Steven Poole, 'Pitt's Terror Reconsidered: Jacobinism and the Law in Two South-Western Counties, 1791–1803', *Southern History*, 17 (1995), pp. 65–87. Poole points out that arrests for seditious libel or seditious

words sometimes ended up in prosecutions for lesser offences, such as profane swearing, or short periods of imprisonment followed by release without trial if the authorities decided that a conviction would be difficult to obtain for the more serious offences or that sufficient example had been made of the offender. Any period in prison could cause severe financial difficulties and the government was particularly adept at using the threat of bankruptcy on radical publishers.

10 On the development of law on seditious libel from the lapsing of the Licensing Act up to our period, see Philip Hamburger, 'The Development of Seditious Libel and the Control of the Press', *Stanford Law Review*, 37 (1985), pp. 661–765.

11 *PH*, vol. 16, cols 1288–9.

12 *ST*, vol. 21, col. 1009.

13 *ST*, vol. 22, col. 282.

14 *PH*, vol. 29, col. 730

15 32 Geo. III, c. 60 (1792).

16 On the formation of the Association, see Austin Mitchell, 'The Association Movement of 1792–3', *Historical Journal*, 4 (1961), pp. 56–77; Eugene Charlton Black, *The Association: British Extra-Parliamentary Political Organization 1769–1793* (Cambridge, MA, Harvard University Press, 1963); D. E. Ginter, 'The Loyalist Association Movement of 1792–3', *Historical Journal*, 9:2 (1966), pp. 179–90; R. R. Dozier, *For King, Country, and Constitution: the English Loyalists and the French Revolution* (Lexington, KY, University Press of Kentucky, 1983); and David Eastwood, 'Patriotism and the English State in the 1790s' in Mark Philp (ed.), *French Revolution and British Popular Politics* (Cambridge, Cambridge University Press, 1991), pp. 146–8.

17 Paine gave his version of these events in his *Address to the Addressers*, published after he had left for France: see *PCW*, vol. 2, pp. 493–4.

18 *The Celebrated Speech of the Hon. T. Erskine, in Support of the Liberty of the Press. Delivered at Guildhall, December 18, 1792* (1793).

19 See below, pp. 51, 196.

20 'J. F. to Horne Tooke, Paris, 20 September 1792' in National Archive, London, TS 11/951/3495.

21 Thale, pp. 27–8

22 See below, p. 254.

23 *The Cabinet*, 3 vols (1795), vol. 1, p. iv.

24 John Thelwall, *Political Lectures (No. I.) On the Moral Tendency of a System of Spies and Informers* (1794), p. iii.

25 Thelwall, *Lectures*, p. 8.

26 Henry Yorke, *Fast Day, as Observed at Sheffield ... February 28, 1794*, 6th edn (1794), p. 11.

27 For a fuller narrative of the events leading up to the treason trials of 1794, see *IKD*, pp. 127–284, from which this abbreviated account is taken.

28 For the British Convention, see G. Pentland, 'Patriotism, Universalism and the Scottish Conventions, 1792–1794', *History*, 89:295 (2004), pp. 340–60.

29 See *IKD*, pp. 150–3.

30 See Volume 3, p. 102.

31 *At a General Meeting of the London Corresponding Society, held at the Globe Tavern, Strand; on Monday the 20th Day of January, 1794* (1794), pp. 6–7.

32 *ST*, vol. 23, col. 611.

33 *Citizens! The Critical Moment is Arrived* (1794), single sheet.

34 *Proceedings of the Public Meeting held at Sheffield, in the Open Air, on the Seventh of April 1794* (1794); see Volume 3, p. 207.

35 *PH*, vol. 31, col. 471.

36 See *IKD*, pp. 210–30.