

*PEOPLE V. CROSWELL: LIBELOUS TRUTH, THE COMMON LAW, AND  
BATTLEFIELD OF THE BLOODLESS REVOLUTION*  
**Samuel A. Schwartz**

The case of *People v. Croswell*<sup>1</sup> will forever stand for the spirited arguments by leading legal minds about the legality of using truth as a defense to criminal libel, establishing the common law, and determining the role of the jury. But it is the story of Harry Croswell, young firebrand Federalist editor of *The Wasp*, that provides an insightful view into the turbulent political scene that stormed fiercely across the United States at the turn of the nineteenth century.

**I. HISTORICAL AND FACTUAL BACKGROUND**

**A. Political Turmoil and the Press**

The great unity of the American Revolution quickly gave way to partisan discord as the fragile formation of the nation was threatened by intense political strife.<sup>2</sup> With the nature of the new nation’s governance on the line, the Federalist and Anti-Federalist political parties stood diametrically opposed.<sup>3</sup> Led by Alexander Hamilton, the Federalists staunchly believed in strong national government and broad federal powers. Conversely, Thomas Jefferson’s Anti-Federalists, also known as Democratic-Republicans, Republicans, or Jeffersonians, steadfastly believed in state’s rights and limited national government.<sup>4</sup>

Spurred on by Jefferson, Republican editors began waging a war of words against the Federalists after Jefferson had openly complained that George Washington’s presidency was “galloping fast into monarchy” while a member of Washington’s cabinet.<sup>5</sup> Lambasting Federalist

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<sup>1</sup> *People v. Croswell*, 3 Johns. Cas. 337 (1804).

<sup>2</sup> Paul McGrath, *People v. Croswell: Alexander Hamilton and the Transformation of the Common Law of Libel*, 7 JUD. NOTICE 5 (2011).

<sup>3</sup> McGrath, *supra* note 2, at 6.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

principles in print, the Republican press also began to criticize the character of prominent Federalists, including President John Adams and Alexander Hamilton.<sup>6</sup>

Scottish-born James T. Callender was one of the inflammatory Republican editors of the time.<sup>7</sup> In a pamphlet called *The Prospect Before Us*, Callender wrote that “Mr. Washington has been twice a traitor” and that John Adams was a “hoary headed incendiary.”<sup>8</sup> Reporting in the *Richmond Examiner*, Callender also savagely attacked the character of leading Federalists, and was the first to expose Alexander Hamilton’s affair to the public.<sup>9</sup> Callender’s actions reflected the goal of the Republican press: to deflate and discredit the Federalist party, both ideologically and individually.<sup>10</sup>

The ruling Federalist party did not take the Republicans’ insulting and derogatory mudslinging lightly.<sup>11</sup> In response to the contemptuous press, the Federalist-dominated government passed the Sedition Acts of 1798.<sup>12</sup> Specifically, the Sedition Act made it a crime for anyone to publicly criticize the President or any other government official, and the punishment was a severe fine and up to two years in prison.<sup>13</sup>

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<sup>6</sup> *Id.* President Washington had already become canonized in the public eye by this time, so the republicans focused on other federalists such as Adams and Hamilton. *Id.*

<sup>7</sup> McGrath, *supra* note 2, at 6; THOMAS FLEMING, *JEFFERSON VERSUS HAMILTON* 4 (2017) (eBook).

<sup>8</sup> McGrath, *supra* note 2, at 6.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 7.

Attempting to quiet the rancorous Republican press, Federalists indicted dozens of Jeffersonian editors under the Sedition Act, convicting Callender, Charles Holt, and a few others.<sup>14</sup>

The sedition trials generated great political animosity.<sup>15</sup> Claiming that the Federalists were destroying the First Amendment right to a free press, the Jeffersonians were outraged at the broad assertion of federal power that the Adams Administration had assumed in passing the Sedition Act.<sup>16</sup> Legislators in Virginia and Kentucky went as far as to pass a resolution to the effect that the Sedition Act did not have authority in their states.<sup>17</sup> With well over a hundred indictments pending, the Adams Administration abandoned the sedition trials after a mere ten convictions.<sup>18</sup>

Stopping these prosecutions did not remove the issue of free press from the public mind, however, and the political uproar caused by the sedition trials largely defeated the Federalists in the next presidential election, as Thomas Jefferson won the presidency in the election of 1800.<sup>19</sup>

Out of power, the Federalists began utilizing the press to fight back against the Jeffersonians.<sup>20</sup> Federalist newspapers across the country took up the charge, including the Philadelphia *Port Folio*, Baltimore *Anti-Democrat*, and South Carolina *Charlestown Courier*.<sup>21</sup> In New York City, Alexander Hamilton and a wealthy group of Federalists sponsored the *New York*

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<sup>14</sup> Fleming, *supra* note 7, at 4; Morris D. Forkosch, *Freedom of the Press: Croswell's Case*, 33 *FORDHAM L. REV.* 415, 418 (1965); 1 JULIUS GOEBEL JR., *THE LAW PRACTICE OF ALEXANDER HAMILTON* 776 (1964).

<sup>15</sup> Goebel, *supra* note 14, at 775.

<sup>16</sup> Fleming, *supra* note 7, at 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> McGrath, *supra* note 2, at 7; Fleming, *supra* note 7, at 4.

<sup>20</sup> McGrath, *supra* note 2, at 7.

<sup>21</sup> Fleming, *supra* note 7, at 5.

*Evening Post*, with publisher William Coleman receiving his editorial material directly from Hamilton.<sup>22</sup>

Writing with particular vengeance was James Callender.<sup>23</sup> Pleased by his role in Jefferson's victory, Callender had asked Jefferson to be installed as the Federal Postmaster for Richmond, Virginia, but was denied.<sup>24</sup> In true unsavory form, Callender, who as a loyal Jeffersonian had gone to jail because of his writings against the Federalists, now began to disparage Jefferson in print.<sup>25</sup>

Callender began publishing damaging stories about Jefferson's public and private actions in the *Richmond Recorder*.<sup>26</sup> His personal attacks on Jefferson included the 'vitriolic prose' about Jefferson's fathering children with his slave, Sally Hemings, and a 'juicy tale' about Jefferson attempting to seduce the wife of a close friend, Mrs. John Walker.<sup>27</sup>

Publicly attacking Jefferson's allegiance to George Washington, Callender revealed that Jefferson had paid Callender \$100 to belittle Washington in Callender's pamphlet *The Prospect Before Us* to sway public opinion.<sup>28</sup> Admitting to paying Callender the \$100, Jefferson claimed that the money was a charitable contribution towards Callender's legal fees associated with his ongoing prosecution.<sup>29</sup>

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<sup>22</sup> Fleming, *supra* note 7, at 5. *The Evening Post* is still in business today as *The New York Post*. *Id.*

<sup>23</sup> McGrath, *supra* note 2, at 7.

<sup>24</sup> Fleming, *supra* note 7, at 5.

<sup>25</sup> McGrath, *supra* note 2, at 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> McGrath, *supra* note 2, at 7–8.

<sup>29</sup> *Id.* at 8.

News of Callender's accusations about Jefferson's loyalty and Jefferson's attempted justification spread like wildfire amongst the Federalist publishers.<sup>30</sup> Fanning the flames in Hudson, New York was Harry Crosswell.<sup>31</sup>

### **B. *The Wasp* and *The Bee***

Hudson, New York was a bustling, thriving, and popular city at the turn of nineteenth century, serving as the shipping center for western Massachusetts and northern Connecticut.<sup>32</sup> Nestled alongside the Hudson River, and only 28 miles downriver from the state capital in Albany, Hudson and the surrounding Columbia County were entrenched with Republicans and Federalists.<sup>33</sup> So was the press.<sup>34</sup>

The moderate Federalist newspaper in Hudson at the time was called *The Balance and Columbian Repository*.<sup>35</sup> To counter *The Balance*'s influence, local Jeffersonians brought in Republican editor Charles Holt.<sup>36</sup> A hero of the press for the Jeffersonians, Holt had spent several months in jail after being convicted of libeling Alexander Hamilton in Holt's *New London Bee* in April of 1800, and came to Hudson to reestablish *The Bee*.<sup>37</sup>

In open hostility to *The Bee*, Harry Crosswell began publishing *The Wasp* under the name "Robert Rusticoat" on July 7, 1802.<sup>38</sup> Not mincing words in explaining the purpose of his four-

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Harry Crosswell developed his political philosophy while studying at the home of Noah Webster, an old school Federalist, at a young age. Fleming, *supra* note 7, at 5.

<sup>32</sup> Fleming, *supra* note 7, at 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Fleming, *supra* note 7, at 5; McGrath, *supra* note 2, at 8. Crosswell was a junior editor for *The Balance*, starting in that position at the age of 22. Fleming, *supra* note 7, at 5.

<sup>36</sup> Fleming, *supra* note 7, at 5; Goebel, *supra* note 14, at 776.

<sup>37</sup> Forkosch, *supra* note 14, at 418; Fleming, *supra* note 7, at 5; Goebel, *supra* note 14, at 776.

<sup>38</sup> Goebel, *supra* note 14, at 776.

page *Wasp*, which carried the phrase “to lash the rascals naked throughout the world” as its masthead,<sup>39</sup> Croswell’s opening issue declared:

Wherever the Bee ranges, the Wasp will follow over the same fields and the same flowers. Without attempting to please his friends, the Wasp will only strive to displease, vex and torment his enemies . . . The Wasp has a dirty and disagreeable job to perform. He has undertaken the chastisement of a set of fellows who are entrenched in filth—who like lazy swine are wallowing in a puddle. He must therefore wade knee-deep in smut before he can meet his enemies on their ground.<sup>40</sup>

And that’s what Croswell’s *Wasp* did, attacking members of the Republican Party from President Jefferson down to the local sheriff and editor Holt.<sup>41</sup>

Croswell got right to work in No. 4 of *The Wasp* publishing, on August 12, 1802, an article called “A Few ‘Squally’ Facts.”<sup>42</sup> The article attacked Jefferson’s record before becoming president and listed five counts of Jefferson’s actions that did not comport with the Constitution, ending as follows:

It would be an endless task to enumerate the many acts, in direct hostility to common sense and the constitution, of which the “*man of the people*” has been guilty. These are facts, and I now ask his friends and foes—every American—do you not blush, for your country and your President?—Do you not in all this plainly perceive the little arts—the very little arts, of a very little mind—“Alas! What will the world think of the fold if such is the shepherd.”<sup>43</sup>

While the Federalist press was spreading James Callender’s accusations against Jefferson’s allegiance to Washington like wildfire during the summer of 1802, the Republican press was trying to douse the flames with Jefferson’s explanation.<sup>44</sup> Charles Holt’s *Bee* published an article entitled

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<sup>39</sup> McGrath, *supra* note 2, at 8.

<sup>40</sup> Goebel, *supra* note 14, at 776; Fleming, *supra* note 7, at 5–6.

<sup>41</sup> Goebel, *supra* note 14, at 776.

<sup>42</sup> *Id.* (citing *The Wasp*).

<sup>43</sup> *Id.* at 777 n.8.

<sup>44</sup> Goebel, *supra* note 14, at 778 n.13; McGrath, *supra* note 2, at 8.

“Mr. Jefferson’s Charity to Callender” on August 17, 1802 explaining Jefferson’s actions.<sup>45</sup> This article in *The Bee* incensed Croswell and Croswell published a stinging response:<sup>46</sup>

[I]t amounts to this then. He [Jefferson] read the book [*The Prospect Before Us*] and from that book inferred that Callender was an object of charity. Why! One who presented a face bloated with vices, a heart black as hell—one who could be guilty of such foul falsehoods, such vile aspersions of the best and greatest man the world has yet known—he is an object of charity! No! He is the very man, that an aspiring mean and hallow hypocrite would press into the service of crime. He is precisely qualified to become a tool—to spit the venom and scatter the malicious, poisonous slanders of his employer. He, in short, is the very man that a disassembling patriot, pretended ‘man of the people’ would employ to plunge for him the dagger or administer the arsenic.<sup>47</sup>

Croswell followed up his savage attack on Jefferson’s explanation of payments to Callender with: “Will the reader turn to that inaugural speech of 1801 and see how this incarnate [Jefferson] speaks of Washington. There he makes him a demigod—having already paid Callender for making him a devil . . . . Will the word hypocrite describe this man? There is not strength enough in the term.”<sup>48</sup>

Holt’s *Bee* retorted by disparaging Callender’s character.<sup>49</sup> A furious Croswell then turned on Holt:

About the time of Callender’s trial, you [Holt] printed a paper in New London—in that paper Callender was extolled to the skies. He was then an ‘excellent Republican,’ a ‘virtuous man,’ a ‘good citizen,’ a ‘suffering patriot.’ . . . if there is anything on earth to be pitted, it is a miserable editor constantly tumbling into the mire; and whose every struggle but sinks him deeper.<sup>50</sup>

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<sup>45</sup> Goebel, *supra* note 14, at 778.

<sup>46</sup> *Id.*

<sup>47</sup> McGrath, *supra* note 2, at 8; Goebel, *supra* note 14, at 778 (quoting *The Wasp*).

<sup>48</sup> Fleming, *supra* note 7, at 6.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (quoting *The Wasp*).

Croswell's stinging editorials continued in No. 7 of *The Wasp*, on September 9, 1802:

Holt says, the burden of the Federal song is, that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false. The charge is explicitly this: Jefferson paid Callender for calling Washington a traitor, a robber, and a perjurer; For calling Adams, a hoary headed incendiary; and for most grossly slandering the private characters of men, who he well knew were virtuous. These charges, not a democratic editor has yet dared, or ever will dare to meet in an open [and] manly discussion.<sup>51</sup>

Croswell next turned his political ire on local Jeffersonians, targeting New York Attorney General Ambrose Spencer of Columbia County with a nasty poem in the September 9, 1802 issue of *The Wasp* after Spencer, a one-time Federalist, had defected to Jefferson's camp:

Th' attorney general chanc'd one day to meet  
a dirty, ragged fellow in the street  
A noisy swaggering beast  
with rum half drunk at least  
Th' attorney, too, was drunk—  
but not with grog,  
Power and pride had set his head agog.<sup>52</sup>

Worried about the effect of the Federalist press on his chances for reelection in 1804, Jefferson sent word to prominent and influential Republicans to pressure the press by prosecuting a few Federalist editors.<sup>53</sup> Jefferson's letter to New York Governor George Clinton encouraged "prosecutions of the most prominent offenders . . . not a general prosecution, for that would look like a persecution; but a selected one."<sup>54</sup>

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<sup>51</sup> Goebel, *supra* note 14, at 777 n.9.

<sup>52</sup> McGrath, *supra* note 2, at 8; Fleming, *supra* note 7, at 6–7.

<sup>53</sup> Fleming, *supra* note 7, at 7; Peter Hess, *The Albany Connections of Burr, Hamilton, and Schuyler*, *THE NEW YORK HISTORY BLOG* (May 14, 2015), <https://newyorkhistoryblog.org/2015/05/the-albany-connections-of-burr-hamilton-and-schuyler/>.

<sup>54</sup> Fleming, *supra* note 7, at 7; Hess, *supra* note 53 (quoting Jefferson's letter to Gov. Clinton).



Republican prosecutors got right to work, charging Joseph Dennie, prominent Federalist editor of the Philadelphia *Port Folio*, with seditious libel.<sup>55</sup> Smarting from the personal accusations against his character, Attorney General Spencer chose to prosecute Harry Crosswell.<sup>56</sup>

## II. LEGAL BACKGROUND

Adopting Roman-era legal sources, the early English common law viewed defamation, libel, and slander as offending the public peace, and allowed civil and criminal actions for them, with an important distinction.<sup>57</sup> Since public libels threatened the public peace regardless of their veracity, the truth of the libel was not allowed to be presented into evidence as justification in criminal prosecutions.<sup>58</sup> Civil libel actions, however, which were more private in nature, did allow the defendant to justify the libel by presenting evidence of the truth of the charge.<sup>59</sup>

The earliest recorded seditious libel cases came from the Court of Star Chamber in 1606.<sup>60</sup> Housed in Westminster Palace, the Star Chamber protected the sovereign from breaches of the peace and insurrection by trying seditious libel and treason cases.<sup>61</sup> Promulgating the apparent common law rule, the Star Chamber considered any disparaging statement to be seditious libel regardless of its truthfulness.<sup>62</sup>

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<sup>55</sup> Fleming, *supra* note 7, at 7.

<sup>56</sup> *Id.* at 7–8.

<sup>57</sup> 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 25 (12th and 13th ed. 1884) [hereinafter KENT'S COMMENTARIES].

<sup>58</sup> KENT'S COMMENTARIES, *supra* note 57, at 25.

<sup>59</sup> KENT'S COMMENTARIES, *supra* note 57, at 25; Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day*, 20 CARDOZO J. INT'L & COMP. L. 771, 779 (2012).

<sup>60</sup> Samson, *supra* note 59, at 777.

<sup>61</sup> Samson, *supra* note 59, at 778 n.39.

<sup>62</sup> KENT'S COMMENTARIES, *supra* note 57, at 25; Samson, *supra* note 59, at 778.

Parliament abolished the Star Chamber in 1641 after the Star Chamber became notorious for ruling in favor of Charles I.<sup>63</sup> Yet, despite changes to the English political system, the criminal law of libel established by the Star Chamber remained.<sup>64</sup> Substantively, the truth was inadmissible as a defense to seditious libel and it was up to the judge to decide if an item was libelous.<sup>65</sup> Jurisprudentially, however, the jury still had an important role in criminal libel cases.<sup>66</sup> While all that was technically left for the jury to decide was whether the defendant had published the libel, the jury was allowed to disregard the judge's instructions and find the defendant not guilty on the whole.<sup>67</sup>

In the American colonies, which followed the English common law, Zenger's case presented an important development in criminal libel law.<sup>68</sup> In colonial court on August 4, 1735, John Peter Zenger was charged with seditious libel for criticizing colonial governor William Cosby in Zenger's *New York Weekly Journal*.<sup>69</sup> Andrew Hamilton defended Zenger, strenuously arguing against the English common law.<sup>70</sup> Instructing the jury in accordance with the English common law, Chief Justice Delancey did not allow the truth to be asserted as a defense and asked the jury to decide if Zenger had published the material but not to give a general verdict.<sup>71</sup> Responding to

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<sup>63</sup> Samson, *supra* note 59, at 778.

<sup>64</sup> *Id.*

<sup>65</sup> Bernard L. Sheintag, *The Struggle for a Free Press*, 17 N.Y. ST. B. ASS'N BULL. 62, 63 (1945). Interestingly, the truth of the matter was admissible for sentencing. *Id.*

<sup>66</sup> Sheintag, *supra* note 65, at 63.

<sup>67</sup> *Id.*

<sup>68</sup> Sheintag, *supra* note 65, at 64; Samson, *supra* note 59, at 780; Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 485 (2012).

<sup>69</sup> Samson, *supra* note 59, at 779; Sheintag, *supra* note 65, at 64.

<sup>70</sup> Samson, *supra* note 59, at 779. Andrew Hamilton is not related to Alexander Hamilton. Sheintag, *supra* note 65, at 64.

<sup>71</sup> Sheintag, *supra* note 65, at 64.

Andrew Hamilton’s stirring closing argument, the jury disregarded their instructions and found Zenger not guilty, much to popular delight.<sup>72</sup>

Back in England, the Dean of St. Asaph’s case, *Rex v. Shipley*, challenged the common law rule in 1784.<sup>73</sup> William Shipley, the Dean of St. Asaph’s cathedral, was charged with seditious libel for reprinting a pamphlet.<sup>74</sup> Thomas Erskine, one of the leading barristers of the time, defended Shipley.<sup>75</sup> Referencing *Zenger*, Erskine argued that the jury should determine whether the pamphlet was libelous and not the judge.<sup>76</sup> Rejecting Erskine’s arguments in favor of the established common law, Lord Mansfield and the other judges on the King’s Bench ruled on the libelous implications of the pamphlet and found Shipley guilty.<sup>77</sup>

The *St. Asaph* case led to convincing popular condemnation of the common law doctrine, spearheaded by Erskine and leading statesman.<sup>78</sup> Against the opposition of Lord Mansfield’s court and many lawyers, Fox’s libel act—“An Act to Remove Doubts with Respect to the Functions of Juries in Cases of Libel”—passed Parliament in 1792.<sup>79</sup> The Act gave the jury the right to decide a general verdict of guilty or not guilty, instead of just deciding on the publication, but did not address whether the truth or justifiable motives could be used as a defense.<sup>80</sup>

The enshrinement of the freedoms of speech and the press in the Bill of Rights in 1791 did not stop the young American Congress from passing the Sedition Act in 1798, criminalizing public

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<sup>72</sup> Sheintag, *supra* note 65, at 64; Samson, *supra* note 59, at 780.

<sup>73</sup> Volokh, *supra* note 68, at 485.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 485 n.100.

<sup>77</sup> Volokh, *supra* note 68, at 485.

<sup>78</sup> Sheintag, *supra* note 65, at 63–64.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

criticism of government officials.<sup>81</sup> Importantly, the Sedition Act expressly gave the jury the right to return a general verdict and allowed the truth to be admissible as a defense.<sup>82</sup>

The abuse of and the countering attack on the Sedition Act by both political parties, however, cast a dark cloud over the legality of the Sedition Act, leaving the American common law of criminal libel in flux.<sup>83</sup>

### III. THE CASE

#### A. The Trial

The local Republican sheriff was sent to summon an all-Republican jury, and Croswell was indicted on two counts of seditious libel on January 10, 1803.<sup>84</sup> The next day, Croswell appeared in front of the three Republican judges of the local Court of General Sessions of the Peace for Columbia County in Claverack, New York.<sup>85</sup>

Attorney General Spencer led Croswell's prosecution, assisted by local Columbia County District Attorney Ebenezer Foote.<sup>86</sup> Spencer's appearance as the lead prosecutor in a local inferior court was unusual for the Attorney General, but not without explanation.<sup>87</sup> Spencer had started his career in Hudson, and Columbia County was Spencer's political stronghold after switching his political allegiances to join the Republican party in 1798.<sup>88</sup>

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<sup>81</sup> Sheintag, *supra* note 65, at 64; Samson, *supra* note 59, at 779; McGrath, *supra* note 2, at 6–7.

<sup>82</sup> McGrath, *supra* note 2, at 6–7; Sheintag, *supra* note 65, at 64.

<sup>83</sup> KATE E. BROWN, ALEXANDER HAMILTON AND THE DEVELOPMENT OF AMERICAN LAW 204 (2017).

<sup>84</sup> Forkosch, *supra* note 14, at 418; Goebel, *supra* note 14, at 779.

<sup>85</sup> Forkosch, *supra* note 14, at 418; Goebel, *supra* note 14, at 779.

<sup>86</sup> McGrath, *supra* note 2, at 8.

<sup>87</sup> Goebel, *supra* note 14, at 779.

<sup>88</sup> *Id.*

Not surprisingly, the Federalists despised Spencer for what they viewed as nothing short of treason, and Croswell had expressed the Federalist frustrations with Spencer by penning a piercing poem about the Attorney General's political loyalties.<sup>89</sup> Spencer's intentional choice to personally prosecute Croswell, an obscure upstate printer, as opposed to more prominent and influential Federalist editors in New York, and Spencer's relentless prosecutorial tactics throughout the proceedings, show the extent of Spencer's personal animosity towards Croswell.<sup>90</sup>

Croswell's first indictment was based on Croswell's "A Few 'Squally' Facts" about Jefferson.<sup>91</sup> The second and more important charge was for seditious libel for Croswell's editorial about the Jefferson-Callender scandal.<sup>92</sup>

Leading Federalist lawyers rushed to Croswell's defense from near and far, including Elisha Williams, Jacob Rutsen Van Rensselaer, and William W. Van Ness.<sup>93</sup> The young and brilliant Van Ness from Columbia County was renowned for his friendly courtroom manner, often asking the jury foreman for a chew of tobacco during his arguments.<sup>94</sup>

Several rounds of preliminary motions commenced.<sup>95</sup> Croswell's counsel demanded copies of the indictments and requested a postponement of the trial until the next time a supreme court justice would be in Claverack on circuit due to the complexity of the case.<sup>96</sup> Spencer objected to both motions, and both were denied.<sup>97</sup>

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<sup>89</sup> *Id.* See *supra* text at note 52.

<sup>90</sup> *Id.* See *infra* text at notes 187–89.

<sup>91</sup> McGrath, *supra* note 2, at 8. This indictment was never pursued at trial and was only briefly mentioned in the local press. *Id.*

<sup>92</sup> *Id.* See text accompanying notes 45–48.

<sup>93</sup> McGrath, *supra* note 2, at 9; Fleming, *supra* note 7, at 8.

<sup>94</sup> Fleming, *supra* note 7, at 8.

<sup>95</sup> McGrath, *supra* note 2, at 9.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Uncovering the crux of the case, the defense next motioned to postpone the trial so that they could bring in James Callender to testify that the supposed libel was true.<sup>98</sup> Spencer strenuously objected to the postponement, claiming that Callender's testimony was not relevant, as the common law of New York followed the established English common law that truth was not admissible in a criminal libel case.<sup>99</sup> In Spencer's view, all that the state had to prove was that Crosswell published the statements and that the statements defamed Jefferson.<sup>100</sup> Countering for Crosswell, Williams argued that the constitutional nature of 'the people as sovereign' demanded that the people be allowed to publish the truth in order to control the people's government.<sup>101</sup> But the motion was denied.<sup>102</sup>

The trial was eventually postponed to the next circuit by agreement of the parties after Crosswell filed an affidavit that he expected to be able to prove the truth of the second charge.<sup>103</sup> Still fighting, Spencer attempted to set bail for the exorbitant sum of \$500, but the court denied the request, agreeing with Crosswell's counsel that it would be an unlawful restriction of the press to do so.<sup>104</sup>

The trial began in the Circuit Court for Columbia County on July 11, 1803, with the Chief Judge of the Supreme Court of Judicature, Morgan Lewis, a Republican, presiding.<sup>105</sup> Renewing the legal debate, the defense motioned to postpone the trial to bring Callender to testify, either in

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> McGrath, *supra* note 2, at 9.

<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> McGrath, *supra* note 2, at 11; Forkosch, *supra* note 14, at 418.

person or by affidavit.<sup>106</sup> The Chief Judge denied the motion, unequivocally stating that the law seemed settled that the truth was inadmissible as evidence.<sup>107</sup>

The trial proceeded without fanfare.<sup>108</sup> Croswell admitted to publishing the issue of *The Wasp* and Chief Judge Lewis, having already announced his view of the law, instructed the jury to decide if Croswell had published the material and whether the article was defamatory.<sup>109</sup> Retiring at sunset with almost nothing to debate, the jurors were out the whole night and returned at eight o'clock the next morning with the verdict: guilty.<sup>110</sup>

## **B. The Appeal**

Before the judgment could be pronounced, Croswell's counsel moved for a new trial, arguing that the truth should have been admitted into evidence and that the court had misdirected the jury.<sup>111</sup> The motion for new trial would be heard in front of the entire Supreme Court of Judicature sitting in Albany, with arguments eventually taking place on February 13 and 14, 1804.<sup>112</sup>

Enter Alexander Hamilton for the defense. Hamilton had played an advisory role during the trial but took over the case on appeal, dramatically changing the nature of the case.<sup>113</sup> The highly political nature of Croswell's case likely encouraged Hamilton to take the case, giving him

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<sup>106</sup> McGrath, *supra* note 2, at 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* The jury may have been considering disregarding the judge's instructions and finding Croswell innocent generally, as in the *Zenger* case.

<sup>111</sup> McGrath, *supra* note 2, at 11–12.

<sup>112</sup> Goebel, *supra* note 14, at 797; McGrath, *supra* note 2, at 12.

<sup>113</sup> Forkosch, *supra* note 14, at 418; McGrath, *supra* note 2, at 12. Federalists had tried to recruit Hamilton for the trial by asking Hamilton's father-in-law, Philip Schuyler, to intercede in a letter on June 23, 1803. Hamilton could not make it for the trial but seemed to play an advisory role. McGrath, *supra* note 2, at 12.

a high profile chance to demonstrate his legal brilliance as a thinker and orator, further his constitutional views of freedom of the press, and regain some lost popularity for himself and the Federalist party at the expense of the Jeffersonians.<sup>114</sup> And, possibly, Hamilton chose to represent Croswell because Croswell was on trial for libeling Holt, the same Holt who had been convicted in April of 1800 for libeling Hamilton in the *New London Bee*.<sup>115</sup>

To represent Croswell in Albany, Hamilton retained the services of William W. Van Ness, who had represented Croswell at trial, and recruited Richard Harrison, a former assistant attorney general during Washington's administration and old friend of Hamilton, to join the cause.<sup>116</sup>

As oral argument approached,<sup>117</sup> Spencer was elevated to the Supreme Court of Judicature, replacing the resigning Jacob Radcliff, but continued to argue the case for the State in front of his colleagues on the bench, alongside fellow Jeffersonian George Caines.<sup>118</sup>

Spencer arguing for the State, only four of the five members of the Supreme Court of Judicature heard Croswell's case.<sup>119</sup> Notwithstanding the fact that the court was reviewing his decision at the trial, Chief Judge Lewis sat alongside fellow Republicans Brockholst Livingston and Smith Thompson.<sup>120</sup> James Kent was the only Federalist.<sup>121</sup>

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<sup>114</sup> McGrath, *supra* note 2, at 12.

<sup>115</sup> Forkosch, *supra* note 14, at 418.

<sup>116</sup> McGrath, *supra* note 2, at 13.

<sup>117</sup> In an interesting development, the Federalists' potential star witness James Callender died on July 17, 1803. Amid a drinking spree, Callender either fell or was pushed out of a boat during a scuffle and found a final resting place in 'congenial mud'. This did not ruin the federalist's case in the event of a new trial though because Callender's papers had survived and could be used in evidence. McGrath, *supra* note 2, at 12; Sheintag, *supra* note 65, at 62.

<sup>118</sup> McGrath, *supra* note 2, at 13; Goebel, *supra* note 14, at 793 n.60.

<sup>119</sup> McGrath, *supra* note 2, at 13.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*



Oral argument lasted two days.<sup>122</sup> Opening for the defense, Van Ness peppered the bench with ancient sources, showing that truth had always been a defense to libel and that the truth defense was a necessary part of a free country's elective system.<sup>123</sup> Van Ness, and later Harrison, expounded on the jury's right to decide on both the law and fact of a libel case, quoting the relevant Sedition Act provisions as declaratory of the common law.<sup>124</sup> Croswell's counsel continued to challenge the *Dean of St. Asaph's* ruling with a historical argument that the common law of libel had been perverted by the Star Chamber.<sup>125</sup> Because the prevailing practice was that the parties did not exchange briefs before oral argument, Spencer and Caines were unprepared and unable to respond to Croswell's historical arguments.<sup>126</sup>

Responding for the State, Caines' argument mirrored the judge's instructions to the jury in *Zenger's* case, that the greater the truth the greater the libel, as well as that judges decide the law while juries decide the facts.<sup>127</sup> Spencer commented that the defense had not attempted to bring Callender to testify at the trial with due diligence, and, more importantly, that the common law was settled that the truth could not be admitted into evidence.<sup>128</sup> In this common law argument, Spencer insisted that the Sedition Act and Fox's Libel Act, which both allowed the truth to be

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 13–14.

<sup>124</sup> McGrath, *supra* note 2, at 14.

<sup>125</sup> Goebel, *supra* note 14, at 795.

<sup>126</sup> Goebel, *supra* note 14, at 796. While the main arguments had been developed at trial and were familiar to both parties, it was Hamilton's and Harrison's use of legal sources that predated the Star Chamber to prove the original common law rule that caught Spencer unaware. Spencer's response was to ignore the ancient historical precedents, focusing instead on the Star Chamber's rulings and subsequent development of the law. *Id.*

<sup>127</sup> McGrath, *supra* note 2, at 14.

<sup>128</sup> *Id.*

admitted in libel cases, were not declaratory of the common law, arguing that Crosswell had violated the law as it was and not what it perhaps should be.<sup>129</sup>

With the conclusion of the other arguments, Hamilton rose to close as most of the members of the state senate and assembly packed into the courthouse.<sup>130</sup> Hamilton's masterful oratory was not the only draw for state legislators; a bill had recently been presented that would allow evidence of the truth to be presented in criminal libel cases.<sup>131</sup>

Presenting a slew of historical and modern precedents, Hamilton passionately argued that the common law demanded that the veracity of the libel be admitted into evidence as a defense, and gave the jury the right to determine the intent of the publication.<sup>132</sup> Extolling the virtues of a free press as a check on free government, Hamilton insisted that the purpose of a free press was to allow the "publishing of truth with good motives;" but, the "pestilential doctrine of an unchecked press" was abhorrent to liberty.<sup>133</sup> It was the jury's role to provide that check on government and the press, not appointed judges.<sup>134</sup> This line of argument led Hamilton to digress:

[I]nto a pathetic, impassioned, and most eloquent address on the danger to our liberties, not from a few provisional armies, but from *dependent* judges[,] from *selected* juries, from *stifling* the press and the voice of leaders and patriots. We ought to *resist—resist—resist* til we hurl the demagogues and tyrants from their imagined thrones.<sup>135</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> Goebel, *supra* note 14, at 796; McGrath, *supra* note 2, at 14–15.

<sup>131</sup> McGrath, *supra* note 2, at 15.

<sup>132</sup> Fleming, *supra* note 7, at 11; McGrath, *supra* note 2, at 15. For a complete version of Hamilton's speech see Goebel, *supra* note 14, at 805–39.

<sup>133</sup> McGrath, *supra* note 2, at 15; Fleming, *supra* note 7, at 11.

<sup>134</sup> McGrath, *supra* note 2, at 15.

<sup>135</sup> Goebel, *supra* note 14, at 839 (quoting Kent's Notes on the Judicial deliberations in *People v. Crosswell*).

Turning back to *Croswell*'s case, Hamilton asserted that the nation had a right to know whether Jefferson had slandered Washington.<sup>136</sup> A description of Washington's noble character led Hamilton into a passionate eulogy of Washington that was "never surpassed, never equaled."<sup>137</sup> Hamilton's "sublimely eloquent"<sup>138</sup> performance was "the greatest forensic effort he ever made."<sup>139</sup> After six hours of Hamilton's dazzling oratory and two days of argument, the case was submitted.<sup>140</sup>

#### IV. THE COURT'S DELIBERATIONS AND DECISIONS

The court split evenly—Judges Kent and Thompson agreed with the *Croswell* defense on both points, while Chief Judge Lewis and Judge Livingston did not agree with either—but not without the raging politics infiltrating the halls of judgment.<sup>141</sup> Providing a behind the scene view of the deliberations, Judge Kent's notes describe that the judges were initially aligned 3-1 to grant a new trial: Lewis, unsurprisingly, would not retract his steadfast opinion at the trial; Livingston wanted to quickly reverse on the jury instructions; and Kent, with Thompson in agreement,<sup>142</sup> sought to delay the decision to publish a more thorough opinion of both issues.<sup>143</sup>

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<sup>136</sup> Fleming, *supra* note 7, at 11.

<sup>137</sup> Goebel, *supra* note 14, at 838 (quoting Kent's Notes on the Judicial deliberations in *People v. Croswell*).

<sup>138</sup> *Id.* at 837.

<sup>139</sup> McGrath, *supra* note 2, at 15 (quoting Kent's letter to Hamilton's widow years later).

<sup>140</sup> Fleming, *supra* note 7, at 11; McGrath, *supra* note 2, at 15.

<sup>141</sup> Goebel, *supra* note 14, at 843 (printing James Kent's Notes on the Judicial deliberations in *People v. Croswell*).

<sup>142</sup> Thompson's view of the law and respect for Kent was likely impacted by Thompson's three-year clerkship with Kent. Roper, *infra* note 168, at 226 n.14.

<sup>143</sup> Goebel, *supra* note 14, at 843 (printing James Kent's Notes on the Judicial deliberations in *People v. Croswell*).

During the next term, Croswell began attending court daily to await his verdict.<sup>144</sup> This continued until one day when Lewis was away on circuit, and Livingston agreeing with Kent and Thompson that a new trial was warranted, the judges released Croswell on bail and ordered him to appear for a new trial during the next circuit when their decision would be explained.<sup>145</sup>

Surprising his colleagues, Livingston switched his vote towards the end of the term with a brief explanation that he was satisfied by Chief Judge Lewis' opinion.<sup>146</sup> Kent believed that Republican pressure had caused Livingston to change his vote, and not the merits.<sup>147</sup>

The Chief Judge announced the divided court's decision on the last day of the term.<sup>148</sup> Livingston did not appear in court that day, and apparently never took the time to read Kent's opinion.<sup>149</sup> At the bench, Kent wanted to announce his reasoning and read his opinion out loud, but Lewis demurred.<sup>150</sup>

Years later, court reporter William Johnson published the two opinions in 1812.<sup>151</sup> Echoing Hamilton's arguments, Kent's opinion concluded that the jury should decide on the accuracy of the libel and that truth of the libel is admissible into evidence.<sup>152</sup> Lewis' opinion, predictably,

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Forkosch, *supra* note 14, at 445; Fleming, *supra* note 7, at 12.

<sup>148</sup> Goebel, *supra* note 14, at 844 (printing James Kent's Notes on the Judicial deliberations in *People v. Croswell*).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *People v. Croswell*, 3 Johns. Cas. 337, 376–77 (1804) (“My conclusion on this first point then, is, that upon every indictment or information for a libel . . . the jury have a right to judge, not only of the fact of the publication, and the truth of the innuendoes, but of the intent and tendency of the paper, and whether it be a libel or not[.]”); *Id.* at 393 (“The true rule of law is, that the intent and tendency of the publication is, in every instance, to be the substantial inquiry

buttressed his decision at the trial, referencing many English cases to the extent that the veracity of the libel was irrelevant in criminal libel cases.<sup>153</sup>

## V. LEGAL IMPACT AND ANALYSIS

The *Croswell* arguments—whether the defendant could show evidence of the truth of the libel and whether the jury could determine the intent of the libel—reverberated throughout the Union, with different results.<sup>154</sup>

In the 1811 case of *State v. Lehre*, the South Carolina Court of Appeals unanimously held that a defendant did not have a right to submit evidence of the truth of the libel as a justification, reasoning that this was in accordance with the settled law of England, Europe, and most of America.<sup>155</sup> Similarly, Massachusetts courts held that the well-grounded public policy of restraining breaches of the peace and preventing private animosity and revenge fortified the law that malicious libel was an offense regardless of the veracity of the libel.<sup>156</sup> Louisiana courts, as well, declared that truth was inadmissible in criminal cases, although it may be used in civil cases.<sup>157</sup> However, in 1827, the Massachusetts legislature passed an act that allowed the truth to

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on the trial, and that the truth is admissible in evidence, to explain that intent, and not in every instance to justify it.”).

<sup>153</sup> *Id.* (“Had the examination I have given this subject, eventuated in the conviction that I had mistaken, the law, I should, without hesitation, have renounced my error. The result being the reverse, and it being the duty of a judge to pronounce the law as he finds it, and to leave the alteration of it, when found inconvenient to that body to whom the constitution has confided the power of legislation, I am constrained to declare, I think the defendant not entitled to a new trial on either of the grounds on which his motion is rested.”).

<sup>154</sup> KENT’S COMMENTARIES, *supra* note 57, at 25.

<sup>155</sup> 2 Tread. 809 (S.C. Const. App. 1811).

<sup>156</sup> *See, e.g.*, Commonwealth v. Chase [Clap], 4 Mass. 163 (1808); Commonwealth v. Blanding, 3 Pick. 304 (1825).

<sup>157</sup> KENT’S COMMENTARIES, *supra* note 57, at 30.

be given into evidence in libel cases, but the truth of the matter would only be a justification if it was published with good motives and for justifiable ends.<sup>158</sup>

Yet, at the same time, other states relied on *Croswell*, and a steady stream of cases, statutes, and state constitutions followed.<sup>159</sup>

Back in New York, a stalemate in court did not inhibit *Croswell* from having an immediate impact on the law of libel.<sup>160</sup> Now a member of the state legislature, William W. Van Ness introduced a bill called the Libel Act which was enacted on April 15, 1805.<sup>161</sup> The Libel Act incorporated Hamilton’s arguments and Kent’s opinion, allowing the truth to be given into evidence and the jury to determine the intent.<sup>162</sup> Similar language was later formally written in to the New York State Constitution in 1821: “in all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury, that the matter charged as libellous, is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.”<sup>163</sup>

Other state constitutions followed.<sup>164</sup> The Pennsylvania, Delaware, Tennessee, Kentucky, Ohio, Indiana, and Illinois state constitutions all include a provision that in cases of libel against public officials in public conduct truth can be given into evidence when it is proper public

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<sup>158</sup> *Id.* at 26–27.

<sup>159</sup> Eugene Volokh, *Melville B. Nimmer Memorial Lecture: The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1390 n.115 (2016). See generally Kyu Ho Youm, *The Impact of People v. Croswell on Libel Law*, 113 JOURNALISM MONOGRAPHS 8–15 (1989) (detailing the effect of the *Croswell* decision in many states).

<sup>160</sup> KENT’S COMMENTARIES, *supra* note 57, at 31–32.

<sup>161</sup> KATE E. BROWN, ALEXANDER HAMILTON AND THE DEVELOPMENT OF AMERICAN LAW 203–05 (2017); KENT’S COMMENTARIES, *supra* note 57, at 31–32.

<sup>162</sup> Samson, *supra* note 59, at 781; Brown, *supra* note 161, at 204; KENT’S COMMENTARIES, *supra* note 57, at 31–32.

<sup>163</sup> KENT’S COMMENTARIES, *supra* note 57, at 30; Brown, *supra* note 161, at 204.

<sup>164</sup> KENT’S COMMENTARIES, *supra* note 57, at 26–27.

information.<sup>165</sup> Extending that right to allow the truth to be presented in all libel prosecutions, public and private, were New Jersey, Mississippi, and Missouri.<sup>166</sup> And the Pennsylvania legislature expanded the constitutional protection, permitting evidence of the truth to be presented in all criminal libel cases.<sup>167</sup>

### **A. Limitations on the Freedom of the Press**

Expanding *Croswell*'s case past defamatory libel, Hamilton and Kent were able to lay a significant layer of foundation for the freedom of the press later embodied by the American people.<sup>168</sup> Establishing the truth defense to criminal libel was a formal break from the English law, and eventually led to the *New York Times v. Sullivan* standard for libel—actual malice and reckless disregard for the truth.<sup>169</sup>

But has the freedom of the press gone too far? Hamilton and Kent, the orchestrators of the *Croswell* doctrine, emphatically emphasized that they were not proposing an unchecked press. Freedom of the press, in Hamilton's view, allowed the "publishing of truth with good motives" but the "pestilential doctrine of an unchecked press" was destructive to liberty.<sup>170</sup> Similarly, while explaining his reasoning for holding that the truth is admissible into evidence, Judge Kent proclaimed that:

The founders of our governments were too wise and too just ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 27.

<sup>167</sup> KENT'S COMMENTARIES, *supra* note 57, at 27; *see generally* Kyu Ho Youm, *The Impact of People v. Croswell on Libel Law*, 113 JOURNALISM MONOGRAPHS 8–15 (1989).

<sup>168</sup> Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUPREME COURT REV. 109, 150–59. *But see* Donald Roper, *James Kent and the Emergence of New York's Libel Law*, 17 AM. J. LEGAL HIST. 223 (1973) (disagreeing with Kent's commitment to true freedom of the press).

<sup>169</sup> Samson, *supra* note 59, at 780–81.

<sup>170</sup> McGrath, *supra* note 2, at 15; Fleming, *supra* note 7, at 11.

the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society.<sup>171</sup>

True freedom of the press, rather, contains “the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.”<sup>172</sup>

Chastising the freedom-of-the-press trend towards “destroying every obstacle or responsibility in the way of the publication of the truth,”<sup>173</sup> Chancellor Kent, in his *Commentaries on American Law*, warns that:

The subject is not without its difficulties, and it has been found embarrassing to preserve equally, and in just harmony and proportion, the protection which is due to character, and the protection which ought to be afforded to liberty of speech, and of the press. These rights are frequently brought into dangerous collision, and the tendency of measures in this country has been to relax too far the vigilance with which the common law surrounded and guarded character, while we are animated with a generous anxiety to maintain freedom of discussion.<sup>174</sup>

In Kent’s view, the political and public policy choices surrounding the evolution of the freedom of speech doctrine reflected a societal change from revering good character to worshipping freedom of discussion at the expense of personal dignity.<sup>175</sup>

## **B. Hamilton’s Impact on the Common Law**

Besides impacting the law of libel, Hamilton’s arguments in *Croswell* had a powerful, yet subtle, impact on the American legal system, inconspicuously transforming the common law.<sup>176</sup>

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<sup>171</sup> *People v. Croswell*, 3 Johns. Cas. 337, 376 (1804) (opinion of Kent, J.).

<sup>172</sup> *Id.*

<sup>173</sup> KENT’S COMMENTARIES, *supra* note 57, at 31–32.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Brown, *supra* note 161, at 204. *See also* Kate Brown, *Rethinking People v. Croswell: Alexander Hamilton and the Nature and Scope of “Common Law” in the Early Republic*, 32



Instead of just applying a strict series of rules and precedents, Hamilton's common law argument in *Croswell* incorporated the entire English legal tradition.<sup>177</sup> Using a broad legal tradition view of the common law, Hamilton was able to combine various laws and procedures from different times, jurisdictions, and institutions to prove his points.<sup>178</sup> And prove them he did.

Without disrespecting traditional common law rights, Hamilton's expansive view welcomed more discretion and diversity in applying the common law.<sup>179</sup> For if the body of relevant legal material is much greater, then arguments that had not been previously supported by specific cases were now accessible.<sup>180</sup> However, this was not without some danger, as encouraging a broad understanding of the common law allowed legal arguments to be tailor made to advocate for public policy choices or resist them, for better or for worse.<sup>181</sup>

Additionally, Hamilton's treatment of the common law as a flexible framework of legal principles and precedents gave judges new authority to adopt, adapt, and declare substantive, non-statutory law as common law.<sup>182</sup> But this authority also contained a responsibility: to use the common law to protect American rights and liberties.<sup>183</sup>

## VI. AFTERMATH

Procedurally, with the court's split, *Croswell*'s motion for a new trial was denied and the prosecutor could move for judgment.<sup>184</sup> Perhaps recognizing that the legal battle was causing the

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LAW & HIST. REV. 611 (2014), for a detailed description of how the arguments in *Croswell* reflected a fight over the future of the common law.

<sup>177</sup> Brown, *supra* note 161, at 204.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Brown, *supra* note 161, at 204.

<sup>184</sup> Goebel, *supra* note 14, at 844.

Republicans to lose the political war, no such motion was ever made.<sup>185</sup> With the passage of the Libel Act of 1805, Croswell was unanimously granted a new trial but the prosecutor never attempted to retry him.<sup>186</sup>

Croswell's legal troubles did not end there, though, as Spencer and Foote each brought civil libel actions against him for his publications, with Spencer obtaining a verdict of \$126.<sup>187</sup> Foote, on the other hand, was accosted by a host of witnesses that testified that he was a swindler and cheated at cards while trying to prove the integrity of his character.<sup>188</sup> Foote recovered 6 cents.<sup>189</sup>

Croswell continued publishing his Federalist views in various papers, until, in 1811, a Federalist benefactor had Croswell thrown into debtors' prison for not repaying his debts.<sup>190</sup> Disgusted with politics, Croswell took Episcopalian orders and moved to Connecticut.<sup>191</sup> He never discussed politics again.<sup>192</sup>

Days after announcing the decision in *Croswell*, Morgan Lewis entered the New York gubernatorial race, and won.<sup>193</sup> Brockholst Livingston was elevated to the Supreme Court in 1807;<sup>194</sup> as was Smith Thompson; James Kent became the Chancellor of New York and later authored his acclaimed *Commentaries on American Law* after his retirement; Ambrose Spencer

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<sup>185</sup> *Id.*

<sup>186</sup> McGrath, *supra* note 2, at 11.

<sup>187</sup> Goebel, *supra* note 14, at 844.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Fleming, *supra* note 7, at 12.

<sup>191</sup> Forkosch, *supra* note 14, at 448.

<sup>192</sup> Fleming, *supra* note 7, at 12.

<sup>193</sup> Forkosch, *supra* note 14, at 448.

<sup>194</sup> *See* McGrath, *supra* note 2, at 18 (Speculating that Jefferson rewarded Livingston for switching his vote in *Croswell* by appointing him to the Supreme Court soon after.)

assumed his seat on the Supreme Court of Judicature, later serving as chief judge; and William Van Ness, after a stint in the state assembly, joined the Supreme Court of Judicature as well.<sup>195</sup>

Hamilton's involvement in *Croswell* led to his early death.<sup>196</sup> While in Albany for the case, Hamilton made some withering remarks about Aaron Burr who was then running for governor of New York.<sup>197</sup> Word slipped out, damaging Burr's chance at the governorship.<sup>198</sup> Furious, Burr eventually challenged Hamilton to a duel.<sup>199</sup> And as the rocky heights of Weehawken were bathed in the early morning sun on July 11, 1804, Burr's bullet ended Hamilton's life.<sup>200</sup>

## VII. CONCLUSION

The powerful blend of legal and political significance that *People v. Croswell* symbolizes is reflected in the opening lines of Chief Judge Lewis' opinion:

This cause has assumed an air of importance which I should be disposed to ascribe, in a great measure, to the spirit of the times, rather than to its intrinsic merits, did not the characters of the counsel who appear in support of the motion now under consideration preclude the idea. A printer, charged with a libelous and malicious publication, has called forth, in his defense, the gratuitous exertion of the choicest talents that grace this bar. This circumstance would impose a belief that questions of high importance are involved, and, under this impression, I have given them a careful examination.<sup>201</sup>

Hamilton and Kent fought valiantly for a freedom of the press that allowed publications with good motives for justifiable ends and not anything more sinister. Cleverly using *Croswell* as a springboard, Hamilton's last large-scale public appearance catapulted the freedom of the press

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<sup>195</sup> Forkosch, *supra* note 14, at 448.

<sup>196</sup> Fleming, *supra* note 7, at 12.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Fleming, *supra* note 7, at 12; Sheintag, *supra* note 65, at 68. William P. Van Ness, a relative of William W. Van Ness who argued for *Croswell*, was Burr's second at the duel. *Id.*

<sup>201</sup> *People v. Croswell*, 3 Johns. Cas. 337, 394 (1804) (Opinion of Lewis, C.J.).

forward while clandestinely changing the nature of the common law. And Kent leaves us with a warning: 'the people' must warily decide how far the freedom of the press can go and at what expense to personal dignity.