

LAW AND MEDICINE IN REVOLUTIONARY AMERICA

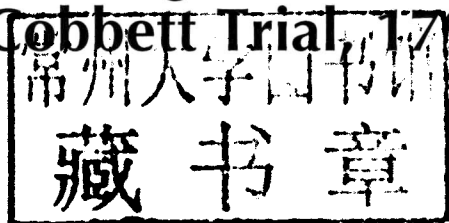
Dissecting the Rush v. Cobbett Trial, 1799



LINDA MYRSIADES

Law and Medicine in Revolutionary America

Dissecting the Rush v.
Cobbett Trial, 1799



Linda Myrsiades

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- 1 Photograph: Pennsylvania Supreme Court, in Independence Hall, Philadelphia. The courtroom was built on a plan drawn by Andrew Hamilton and was completed in the 1740s. Photograph by Kostas Myrsiades.

- 2 Print: Caricature Against Cobbett.
Legend: “See Porcupine in Colours just Portray’d,/Urged by Old Nick to drive his dirty trade,/Veil’d in darkness, acts the assassin’s part,/And triumphs much to stab you to the heart”; The Historical Society of Pennsylvania (HSP). M. L. E. Moreau, 1796.

The balloons read:

“Independence Declared 4 July 1776.”

“Sppllication 5,500000 Drs.”

“Appropriation.”

“1500 Ame’n seamen Impres’d by british.”

“No navy!!”

“Treaty with France 1778.”

“600 Ships adjudicated. Lost neutrality.”

The porcupine:

“Rights of Man. Common Sense. Volney. Swannick. Randolph’s defence. Gallatin. Madison. Peter Pindar.”

“I Hate this country & will sow the seeds of discord in it. These have too much merit.”

The lion:

“Go on dear Peter, my friend & I will reward you.”

“Treaty of... Treaty of Commerce with France.”

“Magna Charter.”

The devil:

“More scandal, let us destroy this Idol liberty.”

The jay:

“Treaty of Amity & Commerce 1795.”

- 3 Print: G. Washington in his last illness attended by Doc.rs Craik and Brown; “Americans behold & shed a grateful tear/For a man who has gained your freedom most dear/And now is departing unto the realms above/Where he may ever rest in lasting peace & love”; [1800]. Collection of the New York Historical Society.

- 4 Print: The Political Drama No. 61; Old Grill among the Paddies; [1832]. British Cartoon Prints Collection, Library of Congress. The text reads:

“Cobbett for ever!”

“He’s the boy for bewitching ’em.”

“Register.”

“Profits from Lectures.”

“Arrah! Go it ould boy, but don’t say anything against de Murphy, ye devil, or by Saint Patre we don’t carry ye no furdur at all, at all.”

“And sure isn’t he a broth of a boy!”

“Faith, and ye may say dat, Roomey Magrath, d’ye hear de ould darlint say dat he’s going to give us *Lectures*, and sure dat’s nothing less than something to ate; for isn’t he brought a dacent looking Gridiron wid him to broil it on, the Honey!”

“LIBERTY!”

“TOM PAIN.”

“Gentlemen—this is, indeed, cheering to me; to be received in such a flattering manner by the ‘Finest Pisintry in the world!’ as Dan has it, though bye-the-by it is no more than I am worthy of, considering the immense good I’ve done for Ireland, by my writings, see my Registers, price 1s. 2d. each, or thirteen for 14s. Was I not the main instrument thro’ whom you gained your Catholic Emancipation by my ‘*Protestant Reformation*,’ prices 3s. 6d. Have not I been one of the greatest enemies to that d——d ront the *murphy*, that’s been the cause of all your miseries. I recommend a substitution of my *Indian Corn* for it, price 16s. per bushel; which you, my boys, may have for 6d. less. I assure ye, my visit to your Emerald Isle is quite *disinterested*, & decidedly for your benefits. I intend to give *Lectures* in every town and muddy village I go through, upon the present condition of your impoverish’d country, & the admittance to each will be the small charge of 2s. for the front seats, and 1s. for the back seats, each person, which I don’t call out of the way at all.”

- 5 Print: What a Beastly Action; 1798. The event is a quarrel between Matthew Lyon and Roger Griswold in which they resorted to their fists in the House of Representatives. Congressman Lyon (depicted as a lion) was a republican and an Irish-American whom Cobbett attacked in his press. Courtesy of the Trustees of the Boston Public Library. The balloons read:
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“What a Beastly action.”
“A Ve....t POLITNESS.”
- 6 Print: Doctor Sangrado Curing John Bull of Repletion—a hint from Gil Blas—with the Kind Offices of Young Clysterpipe & Little Boney; James Gilray; 1803. Library of Congress. The balloons read:
“Courage.”
“Courage.”
“Warm Water.”
“Warm Water.”
“Reservoir for the Clysterpipe family.”
“Courage Johnny!”
“Courage John Bull-Courage!!!”
- 7 Print: Lawyers in term: Designed by Necessity, Executed by Rapacity; 1786. Print shows a defendant pulled from either side by lawyers for the defendant and the plaintiff. British Cartoon Prints Collection, Library of Congress. The text/balloons read:
“Others believe no voice t’an Organ
So sweet as Lawyer’s in his Bar-gown;
Until with subtle Cobweb-cheats,
Th’are catch’d in knotted Law, like Nets,
In which, when once they are imbrogled,
The more they stir, the more they’re tangled,
And while their Purses can dispute,
There’s no End of th’immortal Suit. Hudibras.”

“Get along to [Q]uot—you’re quite done over-ar’nt you-”
“Oh! The glorious uncertainty of the Law.”
“Yes, you have brought the cause to an Issue, and I am to pay all this merely to send the man to prison-this is recovery with a vengeance!”
“[Twobelly] against . . . Attorney’s Bill.”
“Part of Defendant.”
“As if a Defendant were dissected/To see how by Law he is affected.”
“Plaintiff’s Case.”

- 8** Print: The Company of Undertakers, whose motto is “Et Plurima Mortis Imago.” W. Hogarth; 1736. A group of 12 Quack-Heads examining the contents of a urinal, overseen by 3 figures: Dr. “Spot” Ward, Mrs. Mapp (known as crazy Sally), and Chevalier Taylor, a well-known quack. National Library of Medicine. The text reads:
 “Beareth [Sable], an Urinal proper, between 12 Quack-Heads of the [second] and 12 Cane Heads. One consultant. One Chief and [Nebulae], Ermine, One Compleat Doctor issuant, [checkie] sustaining in his Right Hand a Baton of the Second. On his [Darker] and sinister side two Demi-Doctors, issuant of the second, and two Cane Heads issuant of the third; the first having One Eye [conchant] toward the [Darker] side of the Escoccheon; the Second Faced [per pale] proper and [Gula, Guardent]. With this Motto ‘Et Plurima Mortis Imago’.”
- 9** Print: A case of infectious fever (from “81 South Street 4 doors from Callowhill Street” Philadelphia) before the New York Board of Health. University of Pennsylvania Archives. The balloons read:
 “It all arises from septic . . . generated by azote, it must be neutralized by lime or some ether of the alkalids.”
 “Ma for man cher docteur you ave raison! Beggar I tink de vite vash is von grand remede ontre de black vomit! Ha? Mais oui il faut apply him exterieurement dat is on de out side of de body ha!”
 “Don’t you think a little skull cap would be of service.”
 “A little foolscap you mean.”
 “Indeed Maybe it’s only de toast and today dat he is drink.”
 “[Do not tell me] . . . outlandish . . . of toast and toady. I say it’s the black vomit.”
 “Drunk drunk oh lord.”
 “He complains of great giddiness and weakness, being unable to stand, sickness of stomach, difficulty of . . ., the eyes very red, tongue thick and fuzzy, with disagreeable breath, and secretions; highly malignant and inflammatory see how red his nose is!!!”
 “A vastly pestiferous delirium.”
 “A feverish pulse doctor.”
 “Have him put on board a boat at NOON and send him down to the quarantine ground you understand.”
- 10** The Reward of Cruelty by William Hogarth, 1751
 Hogarth treated the life and death of the fictional thief Tom Nero in a set of four prints, of which the fourth, The Reward of Cruelty, presented the dissection of the executed thief’s body. Delivering the

bodies of convicted criminals to be anatomized by surgeons was encapsulated in the Murder Act of 1752 as punishment for murder. National Library of Medicine. The text of the print reads as follows:

Behold the Villain's dire disgrace!
 Not Death itself can end.
 He finde no peaceful Burial-Place,
 His breathless Corse, no friend.
 Torn from the root, that wicked Tongue,
 Which daily swore and curst!
 Those Eyeballs, from their Sockets wrung,
 That glow'd with lawless Lust!
 His Heart, expos'd to prying Eyes,
 To Pity has no Claims;
 But, dreadful! From his Bones shall rise,
 His Monument of Shame.

11 The Times: A Political Portrait

Anonymous, 1795. Collection of the New York Historical Society. The text reads,

Triumph Government: perish all its enemies.—Traitors be warned: justice though slow is sure.

George Washington is trying to move forward but is impeded by James Madison, underfoot, and Albert Gallatin, at the wheel, who is himself held back by Thomas Jefferson. (Caption: "Stop de wheels de gouvernement") The caption on the flag reads "Volunteers." In the background, the American eagle flies overhead as men are landing from ships. The caption reads "The cannibals are landing," a reference to Cobbett's *The Cannibal's Progress*.

Acknowledgments

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I express with this book my deep affection for the premier member of team Myrsiades, my husband Kostas, who has been my rock and my comfort over my career.

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Prolegomena

This study provides a textual reading of an important and largely unstudied eighteenth-century libel trial, *Rush v. Cobbett*, together with a cultural analysis in terms of how it affected or was affected by trial law, medicine, the press, and religion as they informed the trial, trial strategies, and the roles of Benjamin Rush and William Cobbett, the plaintiff and the defendant in the trial. The case arose out of the events of the 1797 yellow fever epidemic in Philadelphia and Cobbett's attacks in *Porcupine's Gazette* on Rush's heroic bleeding practices, practices that were as controversial in the medical community as they were widely adopted.

Rush was a leading republican in Philadelphia and a signer of the Declaration of Independence, which made him a prime target for a federalist journalist like Cobbett, who saw in Rush a figure who posed a danger to the health of the city as a medical man and to the health of the body politic as a political figure. Cobbett's preferred mode of attack was satire, a weapon he used to ridicule Rush relentlessly and which left him open to a libel charge by his victim. Rush's response was to file a civil action against the journalist, taking advantage of the opportunity to have the case heard by the prestigious Pennsylvania Supreme Court sitting *en banc* as a trier of the facts.

A rash of libel suits clogged Philadelphia courts at the time and was deplored by Rush's prosecution team and the presiding justices Edward Shippen, Jasper Yeates, and Thomas Smith. Libel suits were an issue of concern to legal figures, politicians, and the public at large for their tendency to fuel feuds and duels and to lead to mob actions, undermining the efficacy of the legal system and confidence in it. At the same time, the liberty of the press upon which Cobbett relied was itself threatened every time a publisher was taken to court for assailing government officials or private reputations, giving

rise to unpopular prosecutions aimed by federalists at the republican press at a time when the new republic was struggling to establish itself as a new nation.

The critical political events of the last two decades of the eighteenth century—Jay’s Treaty with England of 1795, diplomatic efforts to negotiate with the French in 1798 that resulted in the XYZ Affair, and the Alien and Sedition Acts of 1798—were all implicated in the issues addressed in the trial. *Rush v. Cobbett* occurred just at the cusp of the presidential election of 1800 and at the acme of the frenzied decades that produced the development of political parties, a partisan press, and political consolidation of the new republic. The trial embodied the republican-federalist contests of the period, pitted liberty of the press against the privacy interests of individuals, and engaged in the debate between Anglophiles and Francophiles whereby the two sides tried to drag America into the war declared by France against England in 1793. It raised questions about an emerging free enterprise medical marketplace that led to medical malpractice issues that would come to a boil with the turn of the century. The trial occurred at a time when American law had not yet become established as a unique entity distinguished from English common law, a particular problem for the Pennsylvania Supreme Court which had as well to address popular outrage against its adherence to the English law on libel, the very issue it was to try in the Rush case.¹ The case was, moreover, a stellar example of the rhetorical flourish and oratorical eloquence to which the late eighteenth century subscribed. It expressed the shift the nation was experiencing from a religious culture of biblical jeremiad and the evangelism of the Great and Second Awakenings to a secular culture of civic jeremiad and the political development of an American national identity. In every sense, the case was thus a crucible for testing critical issues of the times, even as it presented itself as a contest between the rights of individual reputation (on Rush’s side) and first amendment rights of the press (on Cobbett’s side) in the young republic.

As for the trial itself, *Rush v. Cobbett* was published in transcript at a time when American court records were not routinely collected. When they did appear they did so as abbreviated trial reports that preserved a judicial opinion.² Trial transcripts containing proceedings, like *Rush v. Cobbett*, were rare enough—they largely appeared with more sustained and extensive newspaper trial coverage after 1800³—and a trial taken down by a court reporter who ascribed his name as author was the rarest of all. Trials in the seventeenth and eighteenth centuries had been recorded by clergymen as exemplars (conversion or execution narratives, for example, as well as the Salem witchcraft trials) and in the nineteenth century by printers for popular consumption, but a trial transcript presumably taken down by a lawyer and intended for use by lawyers, rather than mere lawyers’ notes, was not a common practice until court reporters began to be assigned by legislatures.⁴ Massachusetts did so

in 1804, but Pennsylvania delayed until 1845.⁵ We are thus presented with a rare opportunity to access an important eighteenth-century trial through a period text that preserves not only the judge's charge to the jury and a record of the evidence and witness testimony, but legal arguments by six prosecution and defense counsel in a text that is sixty-seven pages in length. Such a text allows us to provide a focused analysis of *Rush v. Cobbett* that interrogates the trial in detail.

This study answers questions about the legal text and about its setting. Questions are raised about the provenance of the trial transcript, so that considerations related to how it was taken down, by whom, and to what purpose are addressed, as well as its status as a legal text. The study answers questions about the legal issues the transcript takes up, the body of law to which they belong, and how those issues were argued. How the legal subjects in the trial were constituted in the text is questioned in terms of how defense and prosecution arguments framed them. The jury's role in the trial and the jury's relationship to the community raise questions about the construction of the arguments and the conduct of the trial from the perspective of jurors as a target audience. Even as the study raises such questions, it does so by querying the themes, images, and language that make up the legal narrative and how the trial operated rhetorically as a persuasive modality.

In terms of the larger setting, this work raises questions about the critical inputs that inflected the trial and the informative outcomes that emanated from it. As a cultural study, the work anatomizes the trial from multiple disciplinary perspectives, asking what kind of statement discourses as different as law, medicine, religion, and politics offered and how the trial acted as a crucible to shape the convergence and divergence of disciplinary narratives. The conflicting vectors of libel law, medical malpractice, and the rights of the press detail the framing that emerged from medicine, religion, and the press. The study asks how developments in American legal practice affected the roles of counsel, the judge, jury, and accused; and, given that political parties and the partisan press had their origins in the same decade as the trial, it asks how they affected the trial as they emerged and grew. In the process of dissecting the trial and placing each of its organic parts, the study asks what serves as a connective tissue to give coherence to the whole. In what way did the role of medicine prove dispositive to the prosecution's argument and to its preemptive defense of Rush's medical practice? What did the alternative healing fiction of fever sermons contribute to the jeremiadic narrative and the greater civic myth used to explain and justify the plaintiff and how did the cultural artifacts—visual and verbal editorializing through prints, satires, and doggerel—add to our understanding of the reputations of the litigants and recriminations against them over their feuding?

The troubles began when William Cobbett, having emigrated from England, was drawn into a doctors' war over the treatment of yellow fever during the fever epidemic of 1797. The battle of words played out in pieces published in his newspaper *Porcupine's Gazette*, which he had begun in Philadelphia in that year. Together with the American John Fenno, publisher of another federalist paper *Gazette of the United States*, he began ridiculing Benjamin Rush's system of bloodletting and his attempts at puffing, a form of quackery or self-advertisement. He wrote a series of satiric letters about a tavern keeper turned bleeder, which clearly mocked Rush, and compared him to an infamous fictional bleeder, the Spanish physician Sangrado from Alain Rene Le Sage's novel *The Adventures of Gil Blas of Santillane*. Cobbett's accusation that Rush slew more patients than Samson slew Philistines had more bite than perhaps Cobbett intended, as it led to the charge that he had libeled Rush as a murderer. These were the pieces that provoked Rush to file charges in October 1797 against both Fenno and Cobbett, only to drop the charges against the American publisher.⁶

THE TRIAL TRANSCRIPT

Rush v. Cobbett was called for trial on December 13, 1799, in the Pennsylvania Supreme Court.⁷ The court called the case as the first trier of fact under the *nisi prius* system then in effect whereby this appellate court also acted in selected cases as a trial court.⁸ A transcript of sixty-seven pages was taken in shorthand by T. Carpenter, a clerk either acting as court reporter or assigned to the trial by the printer W. W. Woodward, who announced his publication of the transcript within days of the trial.⁹ Cobbett, who had secreted himself in New York and neither attended the trial nor was present in Philadelphia in its aftermath, charged that the transcript—which he called the “report of the trial”¹⁰—had been organized and published by Thomas Bradford, a republican printer with whom he had a contentious relationship and whom he considered Rush's friend. Whereas it is possible Bradford published the transcript while Woodward only printed and advertised it, there is no evidence of Bradford's involvement nor is there a second transcript that could be linked to Bradford. Neither is there a link to the court itself, for example as part of a collection of judges' or lawyers' notes of cases such as those published by Alexander Dallas, Jasper Yeates, or Alexander Addison.¹¹ Woodward, having printed his announcement just six days after the verdict, thereby laid claim to the transcript that does exist.

The fact that Cobbett was not in Philadelphia, and therefore not immediately knowledgeable about what was being published, might account for his

assertion that Bradford published the transcript. In any case, Cobbett raised a number of objections to the objectivity of the report, attacking it as “the most infamous bundle of libelous falsehoods that ever was published in the world”¹² and claiming that “they”—presumably Rush’s republican acolytes, to whom Cobbett referred as “Rushites”—“have published a ‘report’ of the trial, not badly calculated to justify themselves and to deceive the world.”¹³ Nevertheless, in an extensive response that appeared in five issues of a newspaper he called *Rush-Light*, Cobbett treated the transcript as standing—however askew—for what occurred at the trial. The falsehoods he objected to, as a result, were just as likely a reference to the prosecution’s case as they were a statement about the reliability of the transcript as a trial record. Cobbett engaged directly the arguments as the transcript presented them without further comment on the quality or accuracy of the transcript itself other than to say that “*The Narrative of the judicial proceedings in the cause of Rush*, furnishes . . . a series of facts [that] demand an ample exposure.”¹⁴

The transcript does appear to privilege the prosecution case in several ways. For one, it prefaces the legal arguments with presiding justice Edward Shippen’s charge to the jury, in which his commentary proves seriously prejudicial to Cobbett. It is worth noting that the republican press was highly congratulatory of Shippen’s charge, isolating it for attention when the verdict was announced. On the very day of the verdict, for example, the *Constitutional Diary*¹⁵ represented Shippen’s presentation as “elegant, sensible and pointed upon the doctrine of libels and the press . . . a bold and decided opinion.” In the same issue, Cobbett was described in less adulatory terms by a correspondent who remarked, “Porcupine, we are happy to find, will be *bled* and *purged* to some tune.”

The transcript restricted itself almost exclusively to the presentation of the legal arguments by counsel. It did provide for reference the main exhibits of the trial (a selection of attacks on Rush printed in Cobbett’s *Porcupine’s Gazette*), a truncated version of an examination of one witness, a description and excerpt of an examination of a second, and a deposition from a third. The respective amount of time devoted to prosecution and defense arguments were clearly disproportionate: the former was accorded little less than two thirds of the transcript (thirty-six pages) and the latter one third (twenty pages), suggesting either a bias on the clerk or printer’s part toward the prosecution or a clearly inadequate representation by the defense.

Even before the transcript was published, the general consensus was that *Rush v. Cobbett* was an important trial for republicans, in line with which the verdict was enthusiastically embraced by the Rush-friendly crowds that attended the trial, a crowd described in the press as having expressed its satisfaction “in a manner (unprecedented in the Courts of this city) [*sic*] by