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The Development of the Law of Seditious Libel and the Control of the Press

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The Development of the Law of Seditious Libel and the Control of the Press

Philip Hamburger*

CONTENTS

INTRODUCTION	662
I. THE OPTIONS	666
A. <i>Treason</i>	666
B. <i>Scandalum Magnatum</i>	668
C. <i>Heresy</i>	669
D. <i>Libel</i>	669
E. <i>Felony Statutes</i>	670
F. <i>Licensing</i>	671
II. PROSECUTIONS UNDER THE LICENSING LAWS	674
A. <i>Licensing Under Royal Prerogative</i>	675
B. <i>Licensing Under Ordinances and Statutes</i>	679
C. <i>Statutory Licensing After the Restoration</i>	680
D. <i>The Reemergence of Prerogative Licensing</i>	682
E. <i>Statutory Licensing From 1685</i>	690
III. THE EARLY DEVELOPMENT OF THE LAW OF SEDITIOUS LIBEL: LIBEL OF MAGISTRATES	691
IV. THE LAW OF SEDITIOUS LIBEL, 1660-1695	697

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A.	<i>The Trials</i>	697
B.	<i>Elements of the Offense</i>	700
1.	<i>Defamatory Content</i>	700
2.	<i>Publication</i>	702
3.	<i>State of Mind</i>	703
C.	<i>Two Extraordinary Trials</i>	708
V.	THE FAILURE OF THE LAWS OF LICENSING AND TREASON	714
A.	<i>The Demise of Licensing</i>	714
B.	<i>Prosecutions for Treason</i>	717
C.	<i>The Treason Trials Act</i>	722
VI.	THE DEVELOPMENT OF THE EIGHTEENTH CENTURY DOCTRINE OF SEDITIOUS LIBEL	725
A.	<i>William III's Reign From 1696</i>	726
B.	<i>Queen Anne's "Moderate" Tory Ministry</i>	734
C.	<i>Queen Anne's Whig Ministry</i>	743
D.	<i>Queen Anne's Second Tory Ministry</i>	748
E.	<i>George I's Whig Ministry</i>	751
F.	<i>The Acceptance of Holt's and His Colleagues' Interpretation of the Law of Seditious Libel</i>	753
	CONCLUSION	758
	APPENDIX	762

INTRODUCTION

This article presents a new account of the development of the law of seditious libel from the late sixteenth century to the early eighteenth. It also outlines a new version of the relationship between the government and the press during that period. The article argues that it was the gradual erosion, during the late sixteenth and seventeenth centuries, of the legal foundations of the government's policies toward the press that eventually made necessary a new policy based on the law of libel. In the mid-sixteenth century, the Crown possessed a wide variety of means for dealing with the printed press, including the laws of treason, *Scandalum Magnatum*, heresy, and licensing. Legal restraints and public opinion, however, gradually forced the Crown to abandon one method after another until in the late seventeenth century it had great difficulty finding a law with which it could defend itself against printed criticism. The sole remaining law that the Crown could rely upon for prosecuting the printed press was one that during the previous century had not been considered suitable for

that purpose. It was, however, the Crown's only alternative, and, after doctrinal adjustments, it became the chief means of prosecuting the printed press in the eighteenth century. This was the law of seditious libel.

The conclusions arrived at in this article differ significantly from those found in the well-known writings of Sir James Fitzjames Stephen, Sir William Holdsworth, and Frederick S. Siebert.¹ These historians believed that the use and doctrine of the law of seditious libel in the eighteenth century were not significantly different from what they had been in the seventeenth. Stephen, Holdsworth, and Siebert identified many seventeenth century seditious libel trials and assumed that the law of seditious libel was, in the seventeenth century as in the eighteenth, an important instrument used by the Crown to restrain and control the printed press.² This article will show that prior to the eighteenth century the law of seditious libel was a relatively insignificant means of restraining the printed press and was the basis of a relatively small number of prosecutions. It will be argued that the law of seditious libel was heavily relied upon and regularly used against the printed press only after other means of restraining the press, such as licensing and treason, became unusable in the mid-1690s, and that the severe doctrine of seditious libel enunciated in eighteenth century press prosecutions developed only around 1700.

The misinterpretation of these developments, perpetuated by Stephen and others, had its origin in confusion among lawyers and historians about the seventeenth century meaning and use of the word "libel." Although it was a technical, legal term for a written defamation as defined and prohibited at common law, it was also a generic word for *any* pamphlet or small book, regardless of whether its content was defamatory.³ Thus, when a seventeenth century judge condemned a seditious libel, it was not always clear what he meant. He may have meant that he was applying the common law to punish a written defamation that, because it defamed an official, had a seditious effect. Alternatively, he may have meant that he was dealing with an antigovernment

1. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 298-395 (1883); 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 340-41 (1937); F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776 (1952).

2. 2 J. STEPHEN, *supra* note 1, at 309-15; 8 W. HOLDSWORTH, *supra* note 1, at 340; F. SIEBERT, *supra* note 1, at 269.

3. 6 OXFORD ENGLISH DICTIONARY 236 (1961).

pamphlet, without specifying the law being used against it. Thus, in attempting to reconstruct the law that prohibited seditious written defamations, one cannot indiscriminately rely on all trials in which a seditious libel was said to have been punished.

That was the mistake made by Stephen, Holdsworth, Siebert, and other historians who, in examining the multitude of seventeenth century trials that punished "seditious libels," assumed that all such trials involved the predecessor of the common law offense that they referred to with that phrase. This error led them to conclude that the law of seditious libel was a very traditional method of control and that in the seventeenth century, as in more recent periods, prosecutions of the printed press were predominantly for violations of that law.⁴ To illustrate their point of view, they pointed to the numerous seventeenth century trials that punished what were referred to as "seditious libels," even though, in fact, many of these trials were for violations of the licensing laws.⁵

Stephen and the others misunderstood not only the law of seditious libel but also the entire relationship between the government and the press. They assumed that in the seventeenth century, a period in which the licensing laws were in effect and enforced, the law of seditious libel was also used regularly against printed material. They therefore failed to notice that, in response to ever changing legal and political circumstances, the Crown relied at different times on different laws to restrain the press and that the Crown turned from one law to another only when the law that had been its most effective instrument of control became for some reason unusable. By missing the distinctions between government policies, the reasoned choices that lay behind those policies, and the gradual loss by the Crown of its most effective means of control, legal historians exaggerated the reliability of the laws used against the press and the strength and confidence of governments in their legal relations with the press.⁶

4. 2 J. STEPHEN, *supra* note 1, at 309-15; 8 W. HOLDSWORTH, *supra* note 1, at 340; F. SIEBERT, *supra* note 1, at 269; Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 106-07 (1984).

5. 2 J. STEPHEN, *supra* note 1, at 309-15; 8 W. HOLDSWORTH, *supra* note 1, at 340; F. SIEBERT, *supra* note 1, at 269; Mayton, *supra* note 4, at 106-07.

6. For example, the 1586 Star Chamber decree concerning printing is not usually interpreted as a sign that the Crown had encountered difficulties in using felony statutes to prosecute the printed press. See note 46 *infra* and accompanying text. Prynne's 1637

In addition, the interpretations of a number of highly important individual events have been distorted by the conventional account of seditious libel. For example, the belief that the law of seditious libel was an important instrument for prosecuting the printed press in the seventeenth century is largely responsible for the failure of historians to recognize the reasons for the end of censorship and the origins of the idea of a free press.⁷

The following parts of this article present the evidence for my interpretation. Part I describes the means or options available to the Crown in the late sixteenth century for the prosecution of producers of antigovernment printed material. Part II examines the use of one of these options, licensing prosecutions, to identify trials for unlicensed printing and distinguish them from trials for seditious libel. Using as sources only the small number of trials that clearly were for seditious libel, Parts III and IV trace the history and doctrine of the law of seditious libel from the days of Coke, when it first developed, until the late seventeenth century. It will be shown that throughout this period the law of seditious libel was used almost exclusively against manuscripts rather than printed material. Part V shows that after 1696 the Crown was obliged to rely upon the law of seditious libel to restrain the printed press, because it had discarded its traditional option against printed material, licensing law, and was unable to use effectively an alternative option, treason prosecutions. Finally, Part VI explains how the judges, especially Chief Justice Holt, modified the law of seditious libel in an attempt to adapt it to its new role as the Crown's chief means of controlling antigovernment printing. Thus, the emergence of the law of seditious libel as the Crown's chief means of prosecuting the printed press was the culmination of the developments of more than a century, during which period the government repeatedly and with ever greater difficulty searched for effective means of control that were not already rendered unusable as a result of legal restraints and public opinion.

trial (probably for *Scandalum Magnatum*) is not normally understood to have resulted from the Crown's dissatisfaction with the licensing laws. See note 53 *infra* and accompanying text. The prosecution of Lilburne in 1638 for licensing is not ordinarily recognized as a retreat from the policy of relying upon laws other than licensing in Prynne's trial. See note 55 *infra* and accompanying text.

7. See notes 169 and 253 *infra* and accompanying texts.

I. THE OPTIONS

By the late sixteenth century, the English government had at its disposal a wide range of laws with which it could prosecute the authors, producers, and distributors of undesirable printed material. Instead of a comprehensive law that proscribed all the types of written material that troubled the Crown, there existed many different laws, each of which was suitable for dealing with a particular category of offensive writings.

A. *Treason*

One option was the medieval law of treason. The advantages of prosecuting printers and authors for treason rather than for various misdemeanors lay not so much in the degree of punishments imposed as in the procedures that were followed in treason trials. Defendants in felony trials, including trials for treason, had very few rights. They could have neither counsel nor even a copy of the indictment, let alone a list of jurors. There were, moreover, few protections against perjury by government witnesses. The law was weighted against the defendant, and in treason there was no appeal.⁸

Despite these procedural advantages, the government found that it was no easy task to prove that even the most scurrilous publication qualified as treason according to the definition provided by the statute 25 Edward III.⁹ That statute, the basis of most subsequent treason law, declared illegal three acts: to imagine or compass the death of the king, to make war against him, or to aid his enemies. In each case, the government had to prove an overt act.¹⁰ Since many publications, although critical of the authorities, did not so directly incite rebellion as to qualify as overt acts, it was difficult for judges regularly to construe treason so that it could be used to control the press.¹¹

8. For the state of the law in the sixteenth century, see J. BELLAMY, *THE TUDOR LAW OF TREASON* 152-62 (1979).

9. 25 Edward III, St. 5, cap. 2 (1352).

10. Although the statute 25 Edward III may not have been intended to require proof of an overt act with respect to a charge of imagining or compassing the king's death, J. BELLAMY, *THE LAW OF TREASON IN THE LATER MIDDLE AGES* 122 (1970), it came to be so interpreted by at least the late sixteenth century.

11. In Peacham's case in 1615, Attorney General Francis Bacon tried to convince the judges that in addition to the three overt acts mentioned in 25 Edward III, there existed a fourth means "whereby the death of the king is compassed and imagined": "by disabling his regiment, and making him appear to be incapable or indigne to reign."

The treason statute of Edward III was so unwieldy that, after the fifteenth century, in order to make treason an effective means of prosecuting the press, the Crown had to use acts of Parliament rather than judicial interpretations. In 1534, Henry VIII's Parliament made it possible to commit treason "by words or writing."¹² Such a wide definition of treason was also characteristic of Elizabeth's statutes. It was only under these acts that most subversive publications qualified as treason. Without such statutory extensions of the definition of treason, judges were reluctant to convict authors and printers. No sixteenth century printer is known to have been convicted and executed for treason under the original Act of Edward III.¹³ Later, in 1649, when the parliamentary government wished to prosecute printers for treason, it, like Elizabeth's government, had to expand the traditional definition of the offense by passing a new statute.¹⁴ These post-medieval treason statutes together with Tudor felony statutes constituted a distinct option for control that will be discussed later in this part.

Another restraint on the government's use of the medieval law of treason against the printed press was the government's fear that severe punishments for treason would provoke public

Bacon wrote to James I: "[Y]our Majesty's safety and life and authority was thus by law insconced and quartered; and . . . it was in vain to fortify on three of the sides, and to leave you open on the fourth." 2 A COMPLETE COLLECTION OF STATE TRIALS 874 (1816) [hereinafter cited as STATE TRIALS] (Letter of Feb 11, 1614). But Coke and some other judges disagreed, and indeed, most seventeenth century lawyers probably doubted whether written criticism that did not directly incite rebellion constituted treason as defined by 25 Edward III.

Bacon sounded out the judges at Westminster, did not like what they told him, and promptly sent Peacham into the provinces to be tried and convicted. Although it is not known to me precisely how many judges agreed with Coke, "many . . . were of opinion, that it was not treason." 79 Eng. Rep. 711, Croke Car. 126. The judges' belief that Peacham had not committed treason may have been influenced by the fact that Peacham had not preached or published his allegedly treasonable sermon. *Id.* The absence of publication, however, was not the only issue, although Bacon would have liked to have had lawyers and historians believe otherwise. Noting that "there is some bruit abroad, that the judges of the King's Bench do doubt of the case, that it should not be treason," Bacon suggested to James "that it be given out . . . that the doubt was only upon the publication, in that it was never published." Such a ploy, Bacon thought, "taketh away, or [at] least qualifies the danger of the example." 2 STATE TRIALS, *supra*, at 876 (Letter of Feb. 28, 1614).

12. 26 Henry VIII, cap. 13 (1534).

13. See F. SIEBERT, *supra* note 1, at 90.

14. 2 ACTS AND ORDINANCES OF THE INTERREGNUM 120-21, 193 (1911). Even with such statutes, convictions were not guaranteed. Lilburne, for example, was acquitted. 4 STATE TRIALS, *supra* note 11, at 1405 (1649).

reaction. Although strict measures had been necessary during the Wars of the Roses, in the sixteenth and seventeenth centuries the punishments for treason seemed inordinately harsh for mere paper crimes.¹⁵ The government's aim, moreover, was to frighten and control printers rather than to exterminate them. In 1663, Lord Chief Justice Hyde explained to three men found guilty of seditious libel that they could have been tried for treason but were not, and that from this they could "see the king's purposes; he desires to reform, not ruin his subjects."¹⁶ In untroubled times, it was neither politic nor useful to employ so harsh a law against so common a crime.

B. *Scandalum Magnatum*

Instead of treason, the government could use other medieval statutes: the collection of acts concerning *Scandalum Magnatum* (1275 and later).¹⁷ These created a statutory offense of defamation, under which it was illegal to invent or spread either spoken or written "false news" or tales concerning the king or the magnates of the realm. Although its definition was refined and its penalties were elaborated by Parliament under Mary and Elizabeth, the law was not frequently used as a criminal sanction because it led prosecutors into two difficulties.¹⁸ First, it forbade only "news." The offensive material could be neither political nor theological doctrines but had to be news, albeit that word was broadly understood. Second, unlike libel law, *Scandalum Magnatum* may have condemned only material that was untrue. The prospect of the defense exploiting its legal right to explain the truth of the "news," thus simultaneously establishing the defendant's innocence and embarrassing the Crown, could not have recommended *Scandalum Magnatum* prosecutions to attorneys general. It was one matter for a judge to denounce a common law defamation as false, but quite another for a defendant to have

15. The popularity of Foxe's *Book of Martyrs*, the refusal of a grand jury in 1579 to indict Stubbe for felony, and the reaction to Prynne's treatment at the hands of the Star Chamber all illustrate how harsh punishments could inflame public opinion. Severe treatment of gentlemen probably appeared especially repulsive.

16. 6 STATE TRIALS, *supra* note 11, at 564 (1663).

17. See 3 Edward I, cap. 34 (1275); 2 Richard II, cap. 5 (1378); 12 Richard II, cap. 11 (1388); 1 & 2 Philip & Mary, cap. 3 (1554); 1 Elizabeth I, cap. 6 (1559). Prosecutions that were based on the statutes of *Scandalum Magnatum* usually can be recognized by references in the charges or other sources to the words of the statutes. *Scandalum Magnatum* could also be the basis for a private action.

18. See 2 J. STEPHEN, *supra* note 1, at 302.

a statutory right to defend his crime on the ground of its truth.¹⁹

C. *Heresy*

A third option was heresy. Under this broadly defined law, which existed both before and after the Reformation, men and women were punished for their beliefs or states of mind. Anything, from their behavior in church to the books they might print, could be evidence against them. Even the mere purchase of a heretical book may have been evidence of heresy in the buyer.²⁰ Yet the law of heresy applied only to those books that dealt with religion, and even then it was not entirely appropriate, since it punished not a man's printed expression but rather his opinions, of which his book was only evidence.²¹

D. *Libel*

A fourth option for controlling printed criticism was the law of libel or written defamation, which eventually produced the law known as seditious libel.²² Whether in speech or writing, defamation had given rise to actions in medieval local courts and to punishment in the courts of the church.²³ In the late fifteenth century, it became a crime in Star Chamber, which sought to prevent the violent consequences of verbal attacks, and shortly thereafter became a tort as well in King's Bench.²⁴

In the sixteenth century, and even much later, the same law applied to spoken and written defamations. Although written defamations had acquired the name of "libels," they were occasionally still referred to as "slanders."²⁵ Both spoken and written

19. The difficulties of using *Scandalum Magnatum* are discussed in Manning, *The Doctrine of Sedition*, 12 ALBION 99, 112 (1980).

20. CALENDAR OF THE PATENT ROLLS, 1385-1389, at 427, 430 (1900).

21. For discussion of the law relating to heresy and blasphemy, see L. LEVY, *TREASON AGAINST GOD* (1981).

22. This article does not attempt to discuss prosecutions of spoken offenses against the government and their possible relationship to prosecutions for written offenses, since in the seventeenth century, spoken words were treated very differently from their more deliberately produced and more enduring counterparts.

23. J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 364 (1979); 2 SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER, 1509-1544, at 36 n.20 (I.S. Leadham ed. 1911) [hereinafter cited as STAR CHAMBER CASES].

24. For the Star Chamber, see 2 STAR CHAMBER CASES, *supra* note 23, at 37; for King's Bench, see 2 SPELMAN'S REPORTS 238 (J.H. Baker ed. 1978).

25. See, e.g., 2 STAR CHAMBER CASES, *supra* note 23, at 34; J. HAWARDE, *LES REPORTES DEL CASES IN CAMERA STELLATA*, 1593-1609, at 64 (W.P. Baildon ed. 1894); 2 STATE TRIALS, *supra* note 11, at 1073.

defamations had to have been made known or published to a person other than the defamed, on the theory that dishonor or other injury could occur only in the eyes of a third party.²⁶ Accusations made in court as part of the legal process were considered privileged and, in subsequent actions for defamation, could be justified as true. Unprivileged defamations could not be so justified. This rule, judges believed, would encourage people to criticize their neighbors only by way of formal accusations of crimes, thus allowing the defamed an opportunity to defend themselves with lawyers rather than with armed retainers.

Criminal prosecutions for written defamations parted company with other actions and prosecutions for defamation after 1521, when a new rule in King's Bench allowed some unprivileged defamations to be justified as true.²⁷ This new rule apparently applied to all actions on the case for defamation and perhaps, at least in the early seventeenth century, to some criminal prosecutions for spoken defamations.²⁸ In prosecutions for written defamations, however, the defendant could never justify his words as true.

At this early stage in its development, the criminal law of written defamation was not regarded as an effective means of controlling the printed press. In 1642, Parliament briefly considered using libel law but feared that prosecuting attorneys would be unable to prove publication. This doubt appeared in the question put to the judges by the House of Lords: whether the printing of libels could be deemed a publication of them, that is, whether the printing created a presumption of intent to publish. Although the judges assented, their opinion does not appear to have prompted any prosecutions.²⁹

E.. *Felony Statutes*

In addition to these four devices—treason, *Scandalum Magnatum*, heresy, and libel—there were various Tudor felony

26. Broughton's Case, 72 Eng. Rep. 493, Moore 141 (K.B. 1583).

27. SPELMAN'S REPORTS, *supra* note 24, at 247.

28. For actions on the case, see Lake v. Hatton, 80 Eng. Rep. 398, Hobart 252 (Star Chamber 1619), but note the dispute as to whether a defendant could justify a written defamation or libel where the plaintiff brought a bill in Star Chamber. For spoken words, see Hudson, *A Treatise on the Court of Star Chamber*, in 2 COLLECTANEA JURIDICA 104 (F. Hargrave ed. 1792). See Cropp v. Tilney, 88 Eng. Rep. 921, 11 Modern 99; 91 Eng. Rep. 791, 3 Salkeld 225; 90 Eng. Rep. 1132, Holt 422 (K.B. 1706).

29. 5 H.L. JOUR. 37 (May 2, 1642).

statutes that defined certain types of dissent as felony and, in some cases, even treason. For the government, such statutes constituted a fifth option for prosecuting its critics.³⁰

Before the enactment of these special felony statutes, especially in the sixteenth century, the Crown did not possess a law that dealt specifically with seditious opinion, however expressed. Other options did not directly prohibit the expression of seditious views. The treason statute of Edward III and the law of heresy treated the expression of seditious doctrine as evidence (and in the latter case only with respect to content of a theological nature). *Scandalum Magnatum* and libel looked solely to the defamatory and therefore fractious consequences of language. Yet the Tudor felony statutes punished the expression of seditious opinion as a crime in itself.

These statutes failed because they were regarded as too harsh. In 1579, the Queen desired that an author called Stubbe be hanged for what she considered to be felonious writings, but the grand jury refused to indict. In the end, Elizabeth had to be satisfied with having one of the man's hands removed under one of the statutes of *Scandalum Magnatum*.³¹ In 1585, Parliament declined to enact a statute that would have made certain defamations felonies, and when the most important felony statutes against writings expired upon Elizabeth's death in 1602, Parliament did not reenact them for her successor. Parliament's caution and the embarrassment of Stubbe's case reflected a general unwillingness among the public to let the Crown use excessively harsh felony statutes against gentlemen whose only crimes were their expounding of antiestablishment views. By the early seventeenth century, such statutes ceased to be used against the press.³²

F. *Licensing*

The Crown possessed a sixth option for the control of printing. From the early fifteenth century, the English Catholic Church claimed the authority to license books.³³ To prevent her-

30. See, e.g., Trial of John Udall, 1 STATE TRIALS, *supra* note 11, at 1271 (1590); see also 2 J. STEPHEN, *supra* note 1, at 303.

31. F. SIEBERT, *supra* note 1, at 91-92; 3 W. CAMDEN, ANNALES 15-16 (1625).

32. See note 52 *infra* and accompanying text.

33. Details of the licensing system are discussed in F. SIEBERT, *supra* note 1, at chs. 1, 2, 3, 6.

esy, the Church's Provincial Council forbade the translation of the Bible into English and the production of manuscript copies of other books without ecclesiastical permission. In 1414, Parliament confirmed the Church's right to prosecute offenders. More than one-hundred years later, Cardinal Wolsey employed this licensing authority of the Church to control printed books. Thus, already in the fifteenth and sixteenth centuries, there existed ecclesiastical licensing, especially designed to control books.

After the Reformation, this licensing system became a state tool for control of all printed publications. Using his prerogative powers, Henry in 1538 proclaimed that privy councilors and certain others (to be designated) would replace the Church licensors. Although Bibles required only a bishop's approval, all other printed books needed the license of the Council. Convicted men could lose all movable property and suffer imprisonment. Queen Elizabeth's injunctions and proclamations made the licensing system somewhat more practical and, in 1559, provided that various officials—including the Queen or six of her Council, as well as bishops, the chancellors of the universities, and, in London, ecclesiastical commissioners—could license books. Reprints of already approved publications did not require additional permission. After 1586, however, a Star Chamber decree required that all books have the approval of the Archbishop of Canterbury (then the efficient Whitgift) or the Bishop of London; the only exceptions were law books, which needed the judges' license, and publications of her majesty's stationer. In the first half of the seventeenth century, there were further alterations in the law, such as the rule of 1637 that a reprint had to have a new license.

Before the middle of the seventeenth century, the efficacy of the licensing laws was closely tied to the enforcement powers of the prerogative courts. Both the Star Chamber and the Court of High Commission had jurisdiction over offenses against the licensing laws, and their freedom from the restraints of common law procedure and the excessive bias of their judges (even by seventeenth century standards) made acquittals rare.

The technical nature of the crime punished in licensing trials was apt to cause confusion. Charges in indictments and informations frequently did not mention licensing but simply alleged that a seditious and scandalous libel was being dealt with. Whether in this context a libel meant a defamation or merely a writing is not

immediately clear, for the word libel could have referred to either.³⁴ As it turns out, the seditious libels condemned in informations and indictments were seditious writings rather than seditious defamations, the writings being punishable for their having been printed without licenses, not for their defamatory content; what was being punished was not a libel in the sense of a defamation but rather an unlicensed writing. Thomas Berthelette discovered this the hard way in 1526. Although his publication was perfectly orthodox, Bishop Fisher's sermon at a recent book-burning, it was illegal because it was unlicensed.³⁵ In 1680, Carr was similarly told that the content of his publication had nothing to do with his guilt.³⁶ Clearly the crime was the absence of a license, and such an absence was criminal regardless of whether there was evidence of defamatory or seditious content.³⁷

Thus, by 1600, English governments had experimented with a number of laws for restricting the printed press, most of which were unsatisfactory. Treason was too harsh and cumbersome a device for controlling printers, for it brought to death men the Crown usually wished only to restrain. Heresy punished unorthodox theological opinion rather than publications as such and was useless in the face of nonreligious antigovernment books. *Scandalum Magnatum* concerned only news and may have allowed truth as a defense. The law of libel aimed simply to prevent the breach of the peace caused by defamations. The use of harsh Tudor statutes as regular weapons against producers of printed material sometimes met with disapproval in the late sixteenth century and was considered unacceptable in the seventeenth. One option, however, licensing, offered many advantages. Especially created for the task of controlling written material, licensing provided the Crown with censorship prior to publication and easy conviction of offenders.³⁸

34. 6 OXFORD ENGLISH DICTIONARY, *supra* note 3, at 236.

35. A.W. REED, *The Regulation of the Book Trade*, in 15 TRANSACTIONS OF THE BIBLIOGRAPHICAL SOCIETY 166-69 (1920).

36. 7 STATE TRIALS, *supra* note 11, at 1127 (1680).

37. Nor, for that matter, was a license evidence that a defendant was not guilty of seditious libel. Prynne, who got a license for his book, was convicted of seditious libel in 1633. 2 J. RUSHWORTH, HISTORICAL COLLECTIONS 220 (1721).

38. In some trials, defendants probably were punished for acts that did not fit into the usual categories of crimes, whether those categories discussed in this part or other categories. For example, if the charges were obviously improperly framed, it might not

II. PROSECUTIONS UNDER THE LICENSING LAWS

From the late sixteenth century until 1695, English governments relied largely upon licensing laws to control the printed press. This function of the licensing laws was of the utmost importance for the history of the law of seditious libel, since most so-called seditious libel trials before 1696 were not for the common law offense of libel but rather for violations of specific licensing statutes or judicial declarations of the royal prerogative to license printed books.³⁹ It is essential to identify such trials for unlicensed printing in order to avoid using them as historical evidence of seditious libel doctrine. The failure to distinguish licensing from seditious libel trials results in a distorted view of the history of the law of seditious libel.

The possibility of mistaking trials involving licensing violations for those involving seditious libel is considerable, since indictments and other records for these types of cases are usually indistinguishable. In both cases for licensing violations and cases for seditious libel, the charges usually referred to the production or publication of a "seditious libel." Even when verbatim reports survive, licensing trials are deceptively similar to those for libel, for in licensing trials judges tended to mention the legal basis of the prosecutions only casually, if at all, and to denounce the writings as defamatory and seditious, even though such denunciations were legally irrelevant. Thus, in all but a relatively small number of instances, it is not possible to distinguish trials for licensing violations from those for seditious libel by examining the historical records relating to each trial. It is possible, however, to use those trials that can be classified, and other evidence, to reconstruct the government's prosecutorial policies and thereby to establish that from the late sixteenth until the very late seven-

be possible to categorize neatly the offense prosecuted. Such cases, however, did not, and could not, represent a means of regularly prosecuting the press.

Parliamentary proceedings for contempt are not discussed in this article, since they could not during the period discussed herein be used as a means of regularly prosecuting the press. For similar reasons, another means of prosecuting the press, martial law, is not mentioned in the text of this article. For the most part, martial law only could be used either in military camps or during times of insurrection. When, in 1573, Queen Elizabeth commanded that Peter Burchet (accused of a stabbing) be executed under martial law, she was told that it could only be used "in camps" or during "turbulent times." J. BELLAMY, *supra* note 8, at 233.

39. See Appendix, pt. E. Stephen, Holdsworth, and Siebert cite licensing prosecutions as cases in which the law of seditious libel was used. 2 J. STEPHEN, *supra* note 1, at 309, 311, 313; 8 W. HOLDSWORTH, *supra* note 1, at 340; F. SIEBERT, *supra* note 1, at 269.

teenth century it was government policy to employ licensing laws to prosecute the printed press.⁴⁰

A. *Licensing Under Royal Prerogative*

The Crown's almost exclusive reliance in the seventeenth century upon licensing laws to prosecute the press was a relatively recent phenomenon. During the greater part of Elizabeth's reign (1558–1602), the Crown usually used licensing laws to punish only relatively minor offenses. Such prosecutions in the prerogative courts apparently took place as a matter of course and seem to have been so routine that the Privy Council took notice of them only in special circumstances, as when it wished to pardon an already convicted but repentant man.⁴¹ Important cases, however, received different treatment during this period, for the Privy Council was inclined to have serious offenders prosecuted for felony or heresy, if such proceedings seemed practicable. Hence, the following council order:

cause him to be examined and the boke to be perused, and thereupon to conferre with Mr. Sollicitor, and if he [the offender] shall be found culpable in any offence of Treason . . . to procede and order him according to the lawes; if his offence shalbe but a matter of doctrine, then to be punished by the Ecclesiasticall Commissioners according to the qualite of his offence.⁴²

The Crown aimed to hit as hard as legally and politically possible and, therefore, in important cases it often chose to prosecute the press with harsh statutory felonies and treason rather than merely for violations of the licensing regulations.

Unfortunately for the Crown, existing statutory offenses of

40. This article does not purport to identify every recorded prosecution for a licensing violation (or for seditious libel). Those identifications that are made in this article are made on the basis of a variety of factors. Indictments in trials for *Scandalum Magnatum* often recited the language of those statutes. Other trials that referred to "seditious libels" but not the language of *Scandalum Magnatum* and involved manuscripts were very probably for libel of magistrates, an offense that eventually came to be called seditious libel. Still other trials that dealt with seditious "libels" or writings, however, involved printed material, and it is these trials that often cannot be classified on the basis of the surviving records for each trial, since the writings may have been treated either as seditious defamations or as unlicensed printings. Nevertheless, it is highly probable that such trials were based upon the doctrine that the government had adopted for use in such cases, licensing, rather than upon the law of seditious libel, which was considered unsuitable.

41. See, e.g., 7 ACTS OF THE PRIVY COUNCIL (n.s.) 108 (1893) (June 27, 1562).

42. 8 ACTS OF THE PRIVY COUNCIL (n.s.) 331 (1894) (Jan. 3, 1575).

treason and felony were not defined sufficiently broadly to prohibit all of the material that the Crown wished to punish. The Crown therefore sought enactment of catch-all felony statutes that would deal with any undesired language not already subject to severe punishment. The first such statute, passed in 1581, stated, among other things, that any printed or written defamation of the Queen that was not already treason was to be felony.⁴³ At the next Parliament, in 1585, the Crown introduced a bill that would have made slander of the Government in print or manuscript a felony and would have made slander of the established religion a praemunire (and treason upon a second offense); a slanderer of a member of the Council was to be subject to imprisonment and fine at the Queen's pleasure.⁴⁴ At this point, however, Parliament balked, probably because of both the extensive definition of the offenses and the evasion of common law procedures. Having been frustrated by Parliament, the Crown turned to the Star Chamber and thereby came to place greater emphasis on the use of licensing law to prosecute producers of printed material, including the producers of publications against whom the Crown would have preferred to initiate felony indictments.

The Crown's interest in licensing prosecutions in the Star Chamber may have been prompted by the recalcitrance of juries as well as of Parliament. Apparently, grand juries were sometimes reluctant to indict gentlemen for paper crimes if mutilation or hanging were likely to follow. The fiasco of Stubbe's case⁴⁵ was highly embarrassing to the Crown, and illustrates the Crown's need for a means of prosecuting serious offenders that would avoid the overly burdensome penalties of felony statutes and the trouble of grand jury indictments. Informations in the Star Chamber allowed the Crown to avoid such difficulties.

The Crown's increased reliance upon the licensing laws made it necessary that those laws be enforced more efficiently and with slightly greater penalties than they had been, and thus in 1586 the Star Chamber promulgated a decree containing a new set of

43. 23 Eliz. I, cap. 2 (1581).

44. Public Record Office [P.R.O.], London, State Papers, SP 12/176, at 91; *An Extract of the Acts to be made in this Parliament* (1585), calendared in *CALENDAR OF STATE PAPERS, DOMESTIC, 1581-1589*, at 225 (1865) (in the handwriting of Attorney General Popham).

45. See note 32 *supra* and accompanying text. A similar problem may have arisen in the case of Thomas Hale (1594), in which the petty jury gave a special verdict. See note 100 *infra*.

rules for printers.⁴⁶ The content of this decree shows how different the government's new press policy was from the old. The previous printing order of 1566 (issued by the Privy Council) had regulated all printing done "against the force and meaning of any ordinance, prohibition, or commandment," statutory or otherwise, without specifically mentioning the licensing regulations, thereby indicating the Crown's intention to employ against printers the whole gamut of its options, including felony statutes and the law of heresy charges in addition to the licensing law.⁴⁷ This was not true of the 1586 decree; its section concerning printing applied almost exclusively to unlicensed publications.⁴⁸ Licensing law apparently was to play a more important role than it had in the government's struggle against the printed press.⁴⁹

The government's increased reliance upon the licensing laws did not, however, lead to an immediate abandonment of felony prosecutions. Events such as the Martin Marprelate controversy, which began in 1588, and the Essex rebellion of 1601 prompted the Crown to seek harsh penalties and the satisfaction of prosecuting the culprits for the contents of their writings.⁵⁰ Moreover, the Crown had to use felony prosecutions in those unusual situations in which prosecutions under any other law would have been ineffective.⁵¹ On Elizabeth's death in 1602, however, the most important felony statutes expired, and just as grand juries may have been hesitant to apply those statutes, so Parliament was reluctant to reenact them, especially not for the new Scottish King. Thus, in the field of printed offenses, licensing prosecutions eclipsed those for felonies.⁵²

46. The new penalties for unlicensed printing were still negligible compared with the penalties for felonies.

47. Decree in Star Chamber Concerning Books (1566), *reprinted in* SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 388 (C. Stephenson & F.G. Marcham eds. 1937).

48. Decree in Star Chamber Concerning Printers (1586), *reprinted in id.* at 389; F. SIEBERT, *supra* note 1, at 84.

49. Other historians do not argue that the Crown in 1586 began to increase its reliance upon licensing prosecutions. 6 W. HOLDSWORTH, *supra* note 1, at 364, 367; F. SIEBERT, *supra* note 1, at 58-59, 69-70.

50. In 1593, for example, "Barrow and Mr. Goodman, with others [were] condemned upon the Statute for writing and publishing seditious books . . ." CALENDAR OF STATE PAPERS, DOMESTIC, 1591-1594, at 341 (1867) (paper of April 7, 1593).

51. For example, in 1590, Udall had to be prosecuted for a statutory felony. Although he was proven to have been the author of the publication, he was not shown to have been responsible for having it printed. Trial of John Udall, 1 STATE TRIALS, *supra* note 11, at 1277 (1590).

52. Unfortunately, it is not possible to determine the number of trials for licensing

In the 1630s, the government showed some dissatisfaction with licensing law as a means of prosecuting the printed press. When the Crown prosecuted Leighton in 1630 and Prynne and his two co-defendants in 1637, it could have charged them with violations of the licensing law, but because of the danger it saw in their writings, the Crown reverted to the Tudor policy of charging the defendants with the most serious offense possible. In Leighton's case, the charge was seditious libel or *Scandalum Magnatum*; in Prynne's trial, since treason was not acceptable to the judges, another statutory offense had to suffice, probably *Scandalum Magnatum*.⁵³ This temporary abandonment of licensing prosecutions in search of more serious charges led to mutilations and thereby outraged a large segment of the English public.⁵⁴ Consequently, during the period after 1637, the Crown did not again revert to such tactics. Instead, it contented itself with improving the licensing system through a new set of regulations.⁵⁵

The above account of felony and licensing prosecutions shows that both before and after 1586 there existed satisfactory means of prosecuting the printed press and that, as a result, libel law was quite unnecessary for that purpose. Prior to 1586, the government employed felony and licensing prosecutions; after that date, it eventually came to rely upon licensing prosecutions alone. Consequently, the Crown had no reason to turn to libel

violations that occurred in the Star Chamber, since most licensing trials appear to have proceeded without record. My sampling of Star Chamber records has not revealed any proceedings for violations of licensing regulations, and yet it is clear from other sources that such proceedings occurred regularly in that court. It is probable that most licensing trials in Star Chamber were *ore tenus* proceedings, that is, oral and without record.

53. In 1637 in the Star Chamber, Prynne, Bastwicke, and Burton were charged with writing and having had printed various books "contrary to the wholesome lawes, Customes & Statutes of this . . . Realme." Information Against Prynne, Bastwicke, and Burton (1637) (unpublished manuscript available at Beineke Library, Yale University, Osborne Shelves, Tracts 1, 2, No. 33). The mention of statutes suggests that the crime involved *Scandalum Magnatum*. The Crown originally had hoped to charge the defendants with treason. See 2 J. RUSHWORTH, *supra* note 38, at 324. Neither Holdsworth nor Siebert interpret the 1637 prosecution of Prynne as evidence that the government was dissatisfied with licensing law. Siebert, moreover, describes the trial as being for seditious libel. F. SIEBERT, *supra* note 1, at 122. 2 J. RUSHWORTH, *supra* note 38, at 55; CAMDEN MISCELLANY (1875).

54. See J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY 93 (1928).

55. Thus Lilburne's trial in early 1638 was for violation of the recent licensing regulations rather than for a more serious offense. 2 J. RUSHWORTH, *supra* note 31, at 463 (Star Chamber 1638).

law as a means of controlling the printed press. Of course, when a license was issued mistakenly, the Crown was unable to prosecute for unlicensed printing. This bizarre situation arose in 1633 when Prynne deviously obtained a license for his book, *Histriomatrix*. So unusual was the consequent seditious libel prosecution of a printed book in Star Chamber that one lawyer complained, "[H]ere are none brought but such as are Unlicensed."⁵⁶ Between the late sixteenth century and the expiration of prerogative licensing in 1641, the Crown relied almost exclusively on licensing law to prosecute the printed press.

B. *Licensing Under Ordinances and Statutes*

The reliance upon licensing laws continued during the second phase of seventeenth century licensing, from 1643 to 1660. In this period, the governments of the Interregnum employed parliamentary ordinances and statutes instead of the king's prerogative to authorize censorship and to prosecute those who failed to obtain licenses for their publications. The old licensing system of the Crown became ineffective not through any inherent fault but rather because in 1641 Parliament abolished the prerogative courts, which had promulgated and enforced the licensing laws, and then fought the king, upon whose prerogative the laws had rested. The freedom of the press in 1641 and 1642, which had in part resulted from these events, influenced politics greatly. It contributed to the undermining of all authority, and although it facilitated the downfall of the old regime, it also began to trouble Parliament as that body became an increasingly independent governmental power. Fearful of having one of its greatest weapons turned against itself, Parliament searched for a new means of controlling the printed press. After briefly investigating the usefulness of libel law, Parliament in 1643 selected a more traditional method: It reintroduced the licensing system with an ordinance instead of a Star Chamber order.⁵⁷

56. 2 J. RUSHWORTH, *supra* note 38, at 229. On its face, this remark indicates that only unlicensed books were prosecuted in Star Chamber rather than that all unlicensed books were prosecuted under the licensing laws. Nevertheless, the fact that all the printed books punished in Star Chamber were identified as being "unlicensed" suggests very strongly that such books were punished as unlicensed publications printed in violation of the licensing law rather than as seditious libels. The unusual circumstances that required the Crown to use the law of seditious libel, rather than that of licensing, against Prynne in 1633 are not discussed by Stephen, Holdsworth, or Siebert.

57. 5 H.L. JOUR. 37 (May 2, 1642).

Just as violations of the licensing orders previously had incurred penalties in the prerogative courts, breaches of the ordinance now faced discipline in the House of Commons or its Committee on Examinations. Civil war was not conducive to tight control of the press, and committees for enforcement multiplied to keep pace with the unabated flow of subversive literature. In 1647, a new ordinance specified penalties for unlicensed printing, and acts of 1649 and 1653 modified the licensing system further, testifying to its ineffectiveness. In order to frighten printers into submission, Parliament in 1649 made it treasonable to produce subversive books. This threat of prosecution for treason, however, was designed to deal with the extraordinary political situation following the execution of Charles I; it was employed unsuccessfully against Lilburne and does not seem to have produced any convictions.⁵⁸ Certainly the government continued to rely upon licensing laws to control the press; and from 1655 until his death in 1658, Oliver Cromwell even managed to enforce them—quite an achievement, considering the circumstances and the magnitude of the task.⁵⁹ Effective or not, licensing laws existed during most of the Interregnum and provided the legal instrument with which the government prosecuted wayward printers.

C. *Statutory Licensing After the Restoration*

Licensing laws continued to be the chief means of prosecuting the printed press during the period following the Restoration of Charles II in 1660. In 1662, the new government asserted its control over the printed press by obtaining enactment of the first of a series of identical licensing acts, each of which was of limited duration and required reenactment by successive Parliaments.⁶⁰ The 1662 Statute, like those that followed it, set up a system of censorship, requiring that a printer give two copies of any publication to either the Archbishop of Canterbury or the Bishop of London for his approval or, if the books were political, historical, heraldic, or legal, to special licensors. Publications printed for the universities needed the license of the Chancellors or Vice Chancellors. Although the Act also confirmed monopolies

58. Trial of John Lilburne, 4 STATE TRIALS, *supra* note 11, at 1269 (1649).

59. See F. SIEBERT, *supra* note 1, chs. 10, 11.

60. 14 Car. II, cap. 33 (1662).

granted by the Crown, its chief aim was to restrict printing critical of the government.

From 1660 until 1662, when the new Statute was passed, printers were bewildered. As they later recalled, "[T]here was no act or law in being touching printing."⁶¹ It was "an interval when there were no licensers, we knew not where to go."⁶² Lord Chief Justice Hyde saw the situation from a different point of view: "The press is grown . . . common, and men take the boldness to print whatever is brought to them, let it concern whom it will."⁶³ To deal with these offenses that occurred before the introduction of the Licensing Act in 1662, the Crown had to resort to other options: treason and seditious libel.

So unfamiliar were seditious libel trials for printed material that in one such trial, that of Dover, Brewster, and Brooks (which did not take place until 1663), the jurors could scarcely believe that seditious libel existed as a common law offense. They "desired to know upon what statute this indictment is grounded?" Lord Chief Justice Hyde answered, "Upon none; but it is an offense at common law."⁶⁴ He explained:

I must let you and all men know, by the course of the common law, before this new [licensing] act was made, for a printer, or any other, under the pretence of printing [i.e., following his trade] to publish that which is a reproach to the king, to the state, to his government, to the church, nay to a particular person, it is punishable as a misdemeanour.⁶⁵

When licensing was not in force, the government could use treason or seditious libel, but clearly these were not the regular means for dealing with the printed press.

For offenses committed after 1662, the Crown relied on the new Licensing Statute to prosecute the printed press.⁶⁶ As in the years before 1660, the existence of legal authority to license

61. Trial of Dover, Brewster & Brooks, 6 STATE TRIALS, *supra* note 11, at 558 (K.B. 1663).

62. *Id.* at 552.

63. *Id.* at 564.

64. *Id.* at 563.

65. *Id.* at 564.

66. An exception to this statement was the trial of Benjamin Keach in 1665 at the assizes at Aylesbury in Buckinghamshire. For some reason, Keach was tried for violation of the Act of Uniformity. The Trial of Mr. Benjamin Keach, 6 STATE TRIALS, *supra* note 11, at 702 (1665). The use of the Act of Uniformity in this proceeding may be related to the fact that Keach was a baptist preacher suspected of being a Fifth-Monarchy man.

books between 1662 and 1679 made seditious libel quite superfluous as a means of controlling the printed press.

Aside from the 1663 trials for crimes that predated the Licensing Statute, treason and seditious libel prosecutions for printed offenses remained exceptional until the 1690s, when the Crown was again without the power to license.⁶⁷ The trials of authors and others involved in producing printed material between 1662 and 1679 were for violations of the licensing statutes. Consequently, a prosecuting attorney needed only to prove that the defendant had contributed in one way or another to the publication of an unlicensed book. Although such cases went under the label of "seditious libel," they reveal nothing about the common law offense that eventually acquired that name.

D. *The Reemergence of Prerogative Licensing*

A fourth phase of seventeenth century licensing began on May 26, 1679, when the Licensing Statute expired as a result of Parliament's having been dissolved without renewal of the old expiring statute. Even during this period, however, licensing law remained the basis of the Crown's prosecutions of the printed press. The licensing system continued to function but now relied upon royal prerogative rather than parliamentary statute for its authority. Although this phase lasted only six years, it merits detailed comment, since the licensing trials during this period are very easily mistaken for seditious libel prosecutions.

The House of Commons declined to reenact the Licensing Statute because of the controversy over exclusion. In the late 1670s, the exclusionists (or Whigs, as they came to be called) feared the prospect of a Catholic king and attempted to exclude the monarch's Catholic brother, James, Duke of York, from the line of succession. Their fear of Catholicism was widely shared by the English public; it was based partly upon a correct assessment of the dangers of having a Catholic monarch and partly upon ignorance and bigotry. Otherwise moderate men grew rabid at the thought of papists, plotting to overthrow the English establishment, and Protestant radicals in Parliament hoped to exploit this public sentiment in order to force Parliament and Charles II to accept an exclusion bill. To manipulate public

67. No such treason trials are known to me. For one such case of seditious libel, see Appendix, pt. A.

opinion, exclusionists published vast quantities of anti-Catholic literature designed to inflame the populace against the idea of a Catholic ruler. Recognizing this purpose, Charles' government refused to license exclusionist or virulently anti-Catholic pamphlets.

The exclusionists in the House of Commons responded by delaying reenactment of the Licensing Statute. Restoration licensing acts were temporary statutes effective only for brief periods. Normally, the Committee on Temporary Laws recommended reenactment. In 1679, however, the Committee tried to embarrass the Crown by showing that the licensers had refused to authorize Protestant books but had licensed Catholic books.⁶⁸ There is no evidence that any members of Parliament wished to abolish censorship altogether, or to institute a free press in the modern sense. Exclusionists simply thought that the licensing system should be used to promote rather than discourage their cause.

The Committee on Temporary Laws probably delayed the Licensing Act for another reason: to discourage the king from proroguing Parliament. Exclusionists feared nothing so much as a prorogation. It would deprive them of their chief pulpit; it would end their privileges as members of Parliament and make them susceptible to prosecution and harassment by the Crown; it would dash hopes of lawful exclusion. Within St. Stephen's Chapel, the exclusionists could speak loudly; out of doors they would be desperate men. The King's most effective means of preventing his brother's exclusion was to prorogue Parliament; so even though he still lacked a licensing act, in May 1679, he saved the Duke of York.

The day after Parliament broke up and the old Licensing Act expired, the Privy Council began what turned out to be a long and difficult search for a new means of controlling the press. The

68. By April 1679, the Committee's members were "impowered to send as well for licensed as unlicensed Books, in order to be examined and perused by them." 9 H.C. Jour. 600 (Apr. 22, 1679). This entry suggests very strongly that the Commons deliberately employed the Committee to delay indefinitely, and thereby prevent, the reenactment of the Licensing Act. Siebert failed to give proper credit to the intelligence of either the exclusionist managers in the Commons or Charles II when he wrote that the king "discovered much to his surprise that the prorogued Parliament had failed through an oversight to re-enact the Regulation of Printing Act." F. SIEBERT, *supra* note 1, at 298. Siebert admitted, however, that the truth of his statement "has never been ascertained." *Id.* at 298 n.26.

Council asked for the attendance of the Surveyor of the Press, Roger L'Estrange, on the ground that "several Seditious Pamphlets are now in the Press, and are likely to increase by reason [that] the late Act for Regulating the Press . . . expired."⁶⁹ After another two days, the Council requested, for the same reasons, the advice of the Stationers' Company; and in early June 1679, it set up a board for "taking into consideration ye: abuses and liberties of the Press."⁷⁰

In early autumn of 1679, the government still lacked an adequate alternative to the Licensing Act. Anticipating the time when the Crown's lawyers would have a law with which to prosecute, the Privy Council in September 1679 told Roger L'Estrange to gather evidence for future use. He was to seize two copies of all antigovernment pamphlets and cause them "to be attested to in such a manner that they may be brought in Evidence against the offender, if there shall be occasion."⁷¹

Given the precedent set by the cases of 1663, it is curious that the Crown did not turn to seditious libel or treason prosecutions to control the press—even as a temporary measure—during the summer of 1679. Certainly the Crown was not reluctant to use the law of treason against spoken language, for that same year it executed William Staley for uttering treasonable words while intoxicated.⁷² Perhaps the Crown was reluctant to prosecute under laws that would condemn the content of the printed materials. Exclusionist literature was virulently anti-Catholic, and in a period of hysteria about a popish plot, such writing sometimes could not be condemned for its content without embarrassment.

The government turned to the judges for help. The first two requests for judicial opinions on control of the press were not altogether successful. In October 1679, the king in Council asked the judges to consider and report "what expedients may by Law be made use of to remedy the great Mischiefs that dayly arise

69. P.R.O., Privy Council Registers, PC 3/68, at 60 (May 28, 1679).

70. P.R.O., PC 2/68, at 76 (May 30, 1679); *Id.* at 94 (June 6, 1679).

71. *Id.* at 212 (Sept. 24, 1679). The language of this order, which refers to the bringing of evidence against offenders "if there shall be occasion," does not appear in any other Privy Council order concerning the press during the last forty years of the seventeenth century and therefore seems to indicate that the Council doubted whether at the time or in the near future it would be able to bring proceedings. The Crown had managed to get the Stationers' Company to issue an ordinance concerning printing, which was officially approved of in a royal proclamation dated August 22, 1679. See R. STEELE, *TUDOR AND STUART PROCLAMATIONS* 417, no. 3693 (1910).

72. Trial of William Staley, 6 *STATE TRIALS*, *supra* note 11, at 1501 (1678).

from ye Licentiousness of the Presse”⁷³ Ten days later the Privy Council received the judges’ reply:

That all Seditious & Scandalous Books or Pamphlets being Libells ag[ains[t] the Government or against any Publique or Private Person whatsoever may by any person Lawfully authorized bee Seized on, & the Makers, Printers, Sellers, or Publishers of ye same may by the Like Authority be apprehended & Committed to Goale to the end that they may be proceeded against & punished according to law.⁷⁴

Since the licensing statutes had expired, it was little comfort to the Crown to know that it could punish books under existing law. The judges, in effect, had tactfully informed the Crown that it no longer could impose censorship or prosecute for unlicensed printing.

Dissatisfied with an opinion that gave no power of censorship, Charles II in January 1680 again requested that the judges “meet to consider the most effectual means to restrain the present exorbitancy of the Presse.”⁷⁵ Later that year, Henry Sidney, M.P., recalled that “[t]here was a consultation held by the judges . . . and they gave their opinion, that they knew not of any way to prevent printing by law; because that act for that purpose was expired.”⁷⁶ The judges would not authorize licensing or any other means to “prevent” printing. Instead, they suggested that the king use the statutes of *Scandalum Magnatum* against the press.⁷⁷

Two weeks after being given, these opinions were interpreted to authorize the prosecution and conviction of Benjamin Harris, a printer, for a strange combination of seditious libel and *Scandalum Magnatum*.⁷⁸ When one of the judges apparently ques-

73. P.R.O., PC 2/68, at 236 (Oct. 17, 1679).

74. This opinion was signed by W. Scroggs, F. North, W. Montagu, H. Windham, W. Ellis, T. Jones, T. Raymond, E. Atkins, and W. Gregory. P.R.O., PC 2/68, at 256–57 (Oct. 27, 1679). See Royal Proclamation of Oct. 31, 1679, *calendared in STEELE, supra* note 54, at 448.

75. P.R.O., PC 2/68, at 369 (Jan. 20, 1680).

76. Proceedings Against Sir William Scroggs, 8 STATE TRIALS, *supra* note 11, at 163 (1680).

77. The evidence that the judges recommended use of *Scandalum Magnatum* comes from Scroggs’ speech quoted in the next paragraph.

78. Trial of Benjamin Harris, 7 STATE TRIALS, *supra* note 11, at 928–30 (1680). Francis Smith and Jane Curtis faced similar charges two days later on February 7, 1680. Trial of Francis Smith, *Id.* at 931; Trial of Jane Curtis, *Id.* at 959. Both, however, pleaded guilty, and consequently their trials are not very interesting for the purposes of this article.

tioned whether Harris had committed a crime, Scroggs explained:

Because my brother shall be satisfied with the opinion of all the judges of England, what this offense is, which they would insinuate, as if the mere selling of such a book was no offense: it is not long since, that all the judges met, by the king's command; as they did some time before too: and they both times declared unanimously, that all persons that do write, or print, or sell any pamphlet, that is either scandalous to public or private persons; such books may be seized, and the person punished by law And further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or the state; yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account . . . for all the judges have declared this offense, at the common law, to be punishable in the seller⁷⁹

In describing the crime, Scroggs recited the portion of the second opinion that concerned *Scandalum Magnatum*, a statutory offense. He then said, however, that sellers who violated the statutes of *Scandalum Magnatum* offended "at the common law." In short, Scroggs conflated libel with *Scandalum Magnatum*. No wonder one of the other judges was skeptical.

The Crown, however, still wanted censorship—something the judges had explicitly refused to allow—and therefore compelled the bench to bend to its desires. In order to prevent the second negative opinion of the judges from interfering with his attempts to get legal authorization for censorship, Charles II or some Crown officer apparently did not allow the clerk of the Privy Council to record that opinion in the official *Register*. Charles then "put out" two judges, Robert Atkins and Francis Pemberton.⁸⁰ They were two of the three judges who had conspicuously refrained from signing even the first opinion in October 1679.⁸¹ The third judge, William Dolben, now agreed with the Crown, whatever his earlier beliefs had been, for he and the rest of the newly modeled bench gave a third, more favorable opinion unanimously. In April 1680, the King insisted specifically that the judges "consider how far his Majtes. Royall power may by law be made use of for regulating the abuses of the Presse

79. Trial of Benjamin Harris, 7 STATE TRIALS, *supra* note 11, at 928–30 (1680).

80. This occurred on February 6 and 16, 1680. See E. FOSS, BIOGRAPHICA JURIDICA 24–25, 507–08 (1870); E. FOSS, TABULAE CURIALES 66–67 (1865); Proceedings against Sir William Scroggs, 8 STATE TRIALS, *supra* note 11, at 182 (1680).

81. See note 74 *supra*.

by pamphlets and newes Bookes.”⁸² Finally, the judges were more cooperative.

Wee doe most humbly & unanimously certifie that your Matie may by Law prohibit the printing & publishing all News Bookes & Pamphletts of News whatsoever not licenced by your Authority as Manifestly tending to the Breach of the Peace & Disturbance of the Kingdome.⁸³

Although this third opinion did not authorize censorship of all types of printed material, it permitted the Crown to prohibit unlicensed publications of news without a statute. It thereby contradicted the second opinion, which had denied that there was “any way to prevent printing by law” or institute censorship. The judges justified their opinion on the ground that unlicensed news would tend “to the Breach of the Peace.” Their opinion may also have been based as well on the King’s prerogative to grant printing monopolies, including that for printing news. Whatever its legal foundation, the opinion was a successful compromise. Although it allowed the judges to avoid giving way completely, it was sufficient for a government that had floundered without a press law for almost a year.⁸⁴

As a consequence of the judges’ third opinion, most of the “seditious libel” trials between 1680 and 1685 were not for libel but for the publishing of books of news without license, contrary to the declared prerogative of the king. During this period, verbatim reports of trial proceedings became frequent and illustrate how the new prerogative licensing law was enforced.

The trial and conviction of Henry Carr in July 1680, shortly after the judges gave their third opinion, provided Scroggs with an opportunity to expound the new licensing law to the public.⁸⁵

82. P.R.O., PC 2/68, at 477 (Apr. 14, 1680).

83. P.R.O., PC 2/68, at 496 (May 5, 1680). This opinion was signed by W. Scroggs, F. North, W. Montagu, H. Windham, W. Ellis, T. Jones, W. Dolben, T. Raymond, E. Atkins, W. Gregory, R. Weston, and J. Charlton. *Id.* In *Freedom of the Press*, Siebert wrote that “No official report of this opinion of the judges has been found,” and he does not even mention the first and second opinions. F. SIEBERT, *supra* note 1, at 298; see also Royal Proclamation of May 12, 1680, *calendared in* STEELE, *supra* note 71, at 450.

84. A different account of the Crown’s attempt to secure a judicial opinion allowing censorship may be found in F. SIEBERT, *supra* note 1, at 298. The warrants that Scroggs issued on the basis of the first and third opinions of the judges may be found in *Proceedings Against Sir William Scroggs*, 7 STATE TRIALS, *supra* note 11, at 92–93 (1680).

85. The background to this prosecution was extraordinary. Originally, the *Weekly Packet of Advice* had been licensed. Shortly before the prosecution, however, an information was brought in King’s Bench against Carr. Rather than convict him, the judges

Carr had caused to be published the *Weekly Packet of Advice from Rome*. The information stated that the defendant had acted maliciously, intending to scandalize the government.⁸⁶ From the very beginning of the trial, however, it was clear that the crucial issue was neither the defendant's motives nor the seditious or defamatory content of the publication but rather was the absence of a license.

The recorder, the legendary George Jeffreys, opened the proceedings by describing the opinion of the judges, "That no person whatsoever could expose to the public knowledge anything that concerned the affairs of the public, without license from the king"⁸⁷ In his summing up, Scroggs insisted that the offense was the publication of news without a license and that the propriety of the content was immaterial:

[T]o print or publish any newsbooks or pamphlets of news whatsoever, is illegal [S]uppose that this thing is not scandalous, what then? If there had been no reflection in this book at all, yet it is *illicite* and the author ought to be convicted for it. And that is for a public notice to all people, and especially printers and booksellers that they ought to print no book or pamphlet of news without authority. So as he is to be convicted for it as a thing *illicite* done, not having authority⁸⁸

Although the innocence of Carr's intentions could legitimately influence the judge to mitigate the sentence, it could not absolve Carr of guilt:

[T]his book, if it be made by him to be published, it is unlawful, whether it be malicious or not If you find him guilty, and say what he is guilty of, we will judge whether the thing imports malice or no If this thing doth not imply it, then the judges will go according to sentence [I]t concerns not you one farthing, whether malicious or not malicious, that is plain.⁸⁹

If the jury found that Carr had caused to be published an unli-

made a rule that in the future he had no authority to print his newspaper. Carr apparently continued to publish, even though he lacked authority, and shortly thereafter he was prosecuted under the third opinion of the judges. The Report of the Committee of the House of Commons, Appointed to Examine the Proceedings of the Judges, *quoted in* 8 STATE TRIALS, *supra* note 11, at 187 (1680). The rule against future publication of the *Weekly Packet of Advice* was much criticized in the early 1680s. According to Roger North, the rule was an "experiment" that "went no farther." *Id.* at 165.

86. Trial of Henry Carr, 7 STATE TRIALS, *supra* note 11, at 1114 (1680).

87. *Id.* at 1114.

88. *Id.* at 1127.

89. *Id.* at 1128.

censed book, they were to find him guilty. Carr's good intentions were a separate matter, unrelated to the question of guilt, that might nevertheless induce Scroggs to mitigate the sentence. (Scroggs never claimed, despite what some historians have said, that he would judge Carr's guilt.)⁹⁰

Scroggs was carefully setting a precedent as to how to apply the law, since Carr's trial was the first to rely upon the judges' third advisory opinion. Once Scroggs had stated in Carr's trial how the opinion was to be interpreted, other judges could use the law on a regular basis. So-called "seditious libel" trials for unlicensed publishing of news during the remainder of Charles' reign followed the precedent set by Carr's case.

In sum, the "seditious libel" trials for printed material between 1680 and 1685 were probably, indeed almost certainly, for violations, as punished in Carr's case, of the king's prerogative to license news rather than for seditious libel.⁹¹ In periods of Star Chamber or statutory licensing, it was not usually necessary for judges to mention the legal authority for a prosecution; and similarly, once Scroggs had established a precedent in Carr's trial showing how to apply the judges' third opinion, it was no longer necessary for judges to quote that opinion in court. Although in one trial—Cellier's in 1680—the third opinion of the judges was mentioned, almost casually, as the basis of the charges,⁹² in other trials during these years it was not. Yet, despite the lack of much internal evidence in the reports of these prosecutions to indicate whether the offense was a matter of licensing or libel, the fact that the Crown had finally established its prerogative to license news, and that almost all prosecutions of printed material for "seditious libel" in the last five years of Charles II's reign (1680–1685) were for publications that contained news, suggests very strongly that the trials were for unlicensed publishing of

90. F. SIEBERT, *supra* note 1, at 273–74. Among the charges of impeachment against Scroggs that were suggested by Oates and Bedlow was that Scroggs had allowed the prosecution of Carr, even though "the said Lord Chief Justice neither did, nor could alledge or charge the said Carr with any thing contained in the said book, that was any ways criminal or derogatory to his majesty's laws, crown or dignity . . ." Proceedings Against Lord Chief Justice Scroggs, 8 STATE TRIALS, *supra* note 11, at 163, 170 (1680); see also *id.* at 182.

91. See Appendix, Pt. E(4). These trials, including that of Carr, are described by other historians as having been for seditious libel. 2 J. STEPHEN, *supra* note 1, at 308–09, 311, 313; 8 W. HOLDSWORTH, *supra* note 1, at 340; F. SIEBERT, *supra* note 1, at 269–74.

92. Trial of Elizabeth Cellier, 7 STATE TRIALS, *supra* note 11, at 1183, 1203 (1680).

news.⁹³

E. *Statutory Licensing From 1685*

A fifth phase of seventeenth century licensing began in 1685 and ended in 1695, during which period the government was able to return to licensing that was authorized by act of Parliament. Between 1685 and 1688, James II relied upon a licensing act to prosecute the printed press. Of all the prosecutions of printed material during James' reign, only that of Baxter was for seditious libel, and it took place early in 1685 before the new Licensing Act came into effect.⁹⁴ After the Revolution of 1688, William III's government similarly used licensing acts to prosecute the printed press until 1695, when the existing act was allowed to expire.

Thus, it is evident that almost all so-called "seditious libel" prosecutions of printed material that took place in the seventeenth century were actually for violations of licensing laws, whether established by statute or royal prerogative.⁹⁵ In these trials, prosecution was facilitated by the nature of the offense, for the courts had only to determine whether the defendant had contributed to the printing or publishing of the book. All other considerations, such as the book's content or the defendant's intentions, were irrelevant to the determination of guilt. Of course, prosecution was likely only if the content was objectionable to the government, and since trials often were propaganda events, books with objectionable content were usually denounced as such in court, but the defendant's crime was simply his failure to get a license rather than seditious libel or any other form of defamation. Although defendants were charged with writing, printing, and selling "seditious libels," neither the seditious nor the defamatory content of the writing was an element of the offense. Their trials therefore do not elucidate the definition and history of the common law offense known as seditious libel. To find evidence of this, it is necessary to turn to the relatively

93. There is some indication that the word "news" was liberally interpreted, at least by Jeffreys, to encompass "anything that concerned affairs of the public." Trial of Henry Carr, *id.* at 1114. From this point of view, the third opinion of the judges was a powerful weapon indeed.

94. Trial of Richard Baxter, 11 *id.* at 494 (1685).

95. This is true of trials in all courts, including the Star Chamber, King's Bench, and the sessions at the Old Bailey.

small number of seventeenth century prosecutions that really were based on the law of seditious libel.

III. THE EARLY DEVELOPMENT OF THE LAW OF SEDITIONOUS LIBEL: LIBEL OF MAGISTRATES

In 1605, Attorney General Edward Coke prosecuted one Lewis Pickeringe for violation of a law that Coke, in his own report of the case, referred to as libel of magistrates.⁹⁶ Examination of Coke's language and comparison with earlier cases suggest that in Coke's time libel of magistrates was but a subcategory of the law of libel or written defamation.⁹⁷ Rather than a general measure for punishing all antigovernment publications, libel of magistrates was a remedy for written defamations of a particular class of persons: "magistrates" or officials.⁹⁸ Moreover, it was intended to be used, and in the seventeenth century was used, chiefly against manuscripts, not printed material.⁹⁹ Although libel of magistrates could have been employed against printed publications, in the seventeenth century the existence of the licensing laws rendered libel of magistrates largely unnecessary and undesirable as a device for control of the printed press. Libel of magistrates developed in order to protect officials from libel or defamation in manuscript.

What circumstances induced Coke to separate libels against officials or "magistrates" from those against private persons and thereby divide criminal libel into two categories? It appears that the array of options for controlling printed criticism of the government did not include adequate means of punishing antigovernment manuscripts. When in the 1580s the government found that Parliament would not extend the definition of statutory felonies and that it could not depend upon juries regularly

96. Case de Libellis Famosis, 77 Eng. Rep. 250, 5 Coke 125 (1605).

97. Holdsworth argues that the law of seditious libel derived largely from Roman law. 8 W. HOLDSWORTH, *supra* note 1, at 336. Others, including Siebert, trace the origins of the law of seditious libel chiefly from *Scandalum Magnatum*. F. SIEBERT, *supra* note 1, at 117-19; Manning, *The Origins of the Doctrine of Sedition*, 12 ALBION 99, 115 (1980).

98. Other historians do not think that the law originally developed as a protection of individuals in governments.

99. Other historians and textbook writers describe the law of seditious libel as the chief means of prosecuting the printed press in the seventeenth century. 2 J. STEPHEN, *supra* note 1, at 302, 309-15; 8 W. HOLDSWORTH, *supra* note 1, at 340; F. SIEBERT, *supra* note 1, at 269; W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 977 (7th ed. 1982); M. FRANKLIN & R. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 862 (3d ed. 1983).

to indict and convict authors and printers under existing felony statutes, it had to find new laws to supplement those statutes. For printed material, the government placed extra reliance on the licensing laws; for manuscripts, however, it had no such remedy readily available.¹⁰⁰ The licensing regulations did not deal with manuscripts. The statutes of *Scandalum Magnatum* extended only to news publications and failed to protect government officials, such as privy councillors, who were not deemed to be magnates.¹⁰¹ The law of treason, like the various Tudor felony statutes, was far too harsh for ordinary use. None of the traditional options seemed suitable for use against manuscripts.

The law of libel eventually filled a large part of the gap by dealing with manuscript defamations of officials; but as it existed in the late sixteenth century, it was not yet a suitable means of prosecuting manuscripts that defamed officials (let alone those that more generally criticized the government). The law had developed to prevent petty provocation to breach of the peace and was not, in a sense, dignified enough for its new task of punishing those who undermined the state by criticizing officials. Thus, in the late sixteenth century, the attorney general could use libel law to bring a criminal action against someone who defamed an official in manuscript, but he could do so only with a libel law that had been developed to punish defamations of mere private individuals.¹⁰² He needed a law especially designed to deal with at-

100. That difficulties could arise in the prosecution of manuscripts for statutory felonies is illustrated by the trial, in 1594 at the Essex assizes, of Thomas Hale, who had been indicted for feloniously writing and publishing a manuscript "seditious libel." The petty jury gave a special verdict, finding that Hale "did coppey a slanderous and a Seditious Lybill mentioned in the Recorde" but also finding that he "did nether devise the same Libill nor publishe it Maliciously." The court apparently insisted on an additional verdict from the jury, namely: "yf this be felony, then we find him guilte thereof, . . . yf it be not felony then we find him not guilty . . ." (That this subsequent verdict was elicited by the court is evident from the fact that it is written after the initial verdict in another hand.) This record does not necessarily indicate that the jury was reluctant to condemn the defendant for a written felony, but it does reveal that difficulties were encountered by the government when it sought to rely on its felony option and that such difficulties existed with respect to manuscript as well as printed offenses. P.R.O., Assizes, 35/38/2, at 32, 34 (1594).

101. 3 Edward I, ch. 34 (1275); 2 Richard II, ch. 5 (1378); 12 Richard II, ch. 11 (1388); 1 & 2 Philip & Mary, ch. 3 (1554); 1 Elizabeth, ch. 6 (1559); see also 2 STAR CHAMBER CASES, 36 n.20.

102. For example, when in 1602 Atkinson, Cawley, and others criticized a privy councillor, Coke had to charge them with private defamation or ordinary libel rather than with a seditious crime against the state, which would have been more appropriate. J. HAWARDE, *supra* note 25, at 143, 146-47.

tacks on officials.

Coke began to remedy the unsuitability of libel law for punishing defamations of officials by treating all libels with severity. One contemporary noted: "In all ages libels have been severely punished in this court [the Star Chamber]; but most especially they began to be frequent about 42. & 43 Eliz. when *Sir Edward Coke* was her attorney general."¹⁰³ In addition, Coke treated defamations of officials as if they were of much greater consequence than ordinary libels. He reminded judges that libels of officials were increasing. In a trial for defamation of privy councillors in 1602, Coke said the crime "is a growing vice, and there are more infamous libels [now] within a few days than ever there were in the ages last past."¹⁰⁴ When Coke was attorney general, libels of magistrates were distinguished from libels of private persons and given special status, because they were offenses more directly against the state.

Libel of magistrates finally came to be fully distinguished from libel of private persons as a result of the "great cause" of Lewis Pickeringe in 1605 in the Star Chamber. Pickeringe had written and given to a friend a defamatory rhyme about the recently deceased Archbishop Whitgift. It was "against him [Whitgift], & againste the late Queen [Elizabeth] of blessed memorie, and against the now Archbishop [Bancroft], & by implication against o[u]r King that now ys." Pickeringe answered, "that he tooke it to be no lybelle, and that he gave a Copie of it, & beinge of a dead man he tooke it no offence."¹⁰⁵ The court disagreed. As the Lord Chief Justice said with greater perspicacity than some of his ecclesiastical colleagues, "[T]his is a poisen in ye Common wealthe, & no difference of ye deade or lyuinge: & the offence to the state dyes not."¹⁰⁶ Although Archbishop Whitgift could not feel the sting of Pickeringe's libel, the govern-

103. Hudson, *A Treatise of the Court of Star Chamber*, in 2 COLLECTANEA JURIDICA 100 (F. Hargrave ed. 1792).

104. J. HAWARDE, *supra* note 25, at 143.

105. *Id.* at 223.

106. *Id.* at 226. Wraynham's case also held that a dead man could be libelled. Coke told his colleagues on the bench: "You know that the slander of a dead man is punishable in this court, as Lewis Pickering is able to tell you, whom I caused here to be censured for a slander against an Archbishop that is dead; for justice lives, though the party be dead: and such slanders do wrong the living posterity and alliance of the man deceased." Proceedings against Mr. Wraynham, 2 STATE TRIALS, *supra* note 11, at 1059, 1073-74 (Star Chamber 1618).

ment would continue to suffer the effects of the attack upon its late servant.

Pickeringe's libel did not incur punishment merely as a misdeed that might provoke a quarrel. In his report of the case, Coke distinguished between a libel "against a private man" and one "against a magistrate or public person." The latter was "a greater offence; for it concerns not only the breach of the peace, but also the scandal of Government; for what greater scandal of Government can there be than to have corrupt or wicked magistrates" ¹⁰⁷ All libels, by definition, defamed individuals, but libels of magistrates thereby additionally brought scandal upon the government.

Nevertheless, libel of magistrates continued to share many characteristics with libel doctrine as applied to private persons. Thus, the details of law that Coke set out in Pickeringe's case largely followed earlier libel precedents and were equally relevant to libels of private and public persons. Libels of magistrates, like those of private persons, had to have been published to a party other than the person defamed. Five years after the 1605 trial, Lamb's case reaffirmed that if a defendant "writes a copy . . . and does not publish it to others, it is no publication of the libel" (although the defendant's copying of the libel was rebuttable evidence of his intent to publish). ¹⁰⁸ Pickeringe's trial also established that in criminal cases it was "not material whether the libel be true." ¹⁰⁹ Confirmation of Coke's view on this point appeared in the writing of a contemporary, Hudson, who stated explicitly that the contrary rule of oral defamation (slander) and *Scandalum Magnatum* did not govern libel of magistrates. "[U]pon the speaking of words, although they be against a great person, the defendant may justify them as true; as in all actions *de scandalis magnatum* But if he put the scandal in writing, it is then past any justification." ¹¹⁰ The apparently novel

107. Case de Libellis Famosis, 77 Eng. Rep. 250, 5 Coke 125 (1605).

108. John Lamb's Case, 77 Eng. Rep. 822, 9 Coke 59 (Star Chamber 1610). Coke, when Attorney General, is reported to have argued in Pickeringe's case that it was criminal not only to publish a libel but also to see it or to hear it read. J. HAWARDE, *supra* note 25, at 225. This appears to have been an exaggeration; certainly this statement did not appear in Coke's report of Pickeringe's case, *supra* note 96, and it was contradicted in Coke's account of Lamb's case. Perhaps these words reported by Hawarde were simply a loosely stated or inaccurately reported reference to the rule concerning the duties of a person who found a libel. See note 111 *infra* and accompanying text.

109. Case de Libellis Famosis, 77 Eng. Rep. 250, 5 Coke 125 (1605).

110. Hudson, *supra* note 103, at 104.

doctrine that dead men could be libeled applied to libels of private as well as public persons, since, in the case of a private person, the dead man's family might be provoked to violence. Clearly, in Coke's view, libel of magistrates was subject to the same doctrines as libel of private persons and was simply a subcategory of the law of written defamation or libel.

The status of the law of libel of magistrates as a mere subcategory of the law of libel was reflected in the categories used by authors of law books to organize their material. No seventeenth century or even early eighteenth century law book, to the author's knowledge, contained a separate heading for libel of magistrates or seditious libel. Instead, libel of magistrates was discussed together with other types of written defamation, under the general rubric of "libels."

It should be noted, parenthetically, that one rule concerning libels of magistrates did not also apply to libels of private persons: Those who found or received libels of magistrates had to turn them over to the authorities. This rule, the only one to differentiate between libels of private persons and libels of magistrates, derived not from the law of defamation but from traditional practices concerning seditious writings, and had already been applied to libels in dicta of 1600; it was a distinction that Coke inherited rather than invented and should not be thought to reflect a belief on his part that libels of private and public persons were to be analyzed in terms of different legal doctrines.¹¹¹

Because libel of magistrates was merely a subcategory of the offense of written defamation, it could not include criticisms of institutions, such as the government, but rather could only consist of defamations of individual officials. Coke referred to the new branch of libel law in terms that reflected its purpose of punishing defamations of officials rather than defamations of the government in general. In his report of Pickeringe's case, he

111. See EXTRACTS FROM THE MUNICIPAL RECORDS OF THE CITY OF YORK 209-10 (R. Davies ed. 1976) (letter from Richard III to mayor and corporation of York); see also 2 TUDOR ROYAL PROCLAMATIONS no. 672, at 507 (P. Hughes & J. Larkin eds. 1969). This rule was applied to libels in dicta in *Want's Case*, 72 Eng. Rep. 802, Moore 628 (Star Chamber 1600). The rule also applied to *Scandalum Magnatum*. In an anonymous prosecution of a libel of a private person in 1669, King's Bench declared: "[T]he having of a libel and not delivering of it to a magistrate, was only punishable in the Star-Chamber, unless the party maliciously published it." Anonymous, 86 Eng. Rep. 22, 1 Ventris 31 (K.B. 1669).

used the names "*Libellis Famosis*," "scandalous libel," and "infamous libel," as well as the subcategories libel "against a private man" and libel "against a magistrate," all of which implied a defamatory sense of the word libel. He did not mention "seditious libel," which could have been understood to mean seditious writing in general, regardless of whether the writing defamed an individual. The law reported by Coke in Pickeringe's case did not condemn all writings containing antigovernment sentiment ("hereditary monarchy is a poor system of government") but rather prohibited those antigovernment writings that were seditious by virtue of the fact that they defamed officials ("the Chancellor is corrupt").

Although Coke managed to make such a distinction, he did so only by fighting an uphill struggle against conventional linguistic usage and political perceptions. The essence of the offense punished by Coke was defamation of an individual or, in legal terminology, "libel." In common parlance, however, a libel, especially a seditious libel, was an antigovernment writing, regardless of whether it defamed an individual. The fact that prosecutions for libel of magistrates were designed to protect the government by shielding the governors encouraged the broader view of the word libel. The broad understanding of libel made itself evident in the Star Chamber where, Coke's report of Pickeringe's case notwithstanding, an information charging a defendant with libelling various magistrates could add that the libel was "also against yo[u]r ma[jes]ties . . . temp[or]all gover[n]m[en]t."¹¹²

An expert practitioner in the Star Chamber, William Hudson, was aware of the double meaning of the word libel and, in an attempt to prevent confusion, wrote of Coke's prosecutions in the prerogative court: "But it must not be understood [that these prosecutions were] of libels which touch the alteration of government; . . . but libels against the king's person and nobles have been here examined."¹¹³ In the early seventeenth century,

112. Information in Star Chamber against Lamb, P.R.O., STAC, 8/205/20; see also 2 J. RUSHWORTH, *supra* note 38, at 422 (the information against Prynne and others in 1633).

113. Hudson, *supra* note 103, at 100. Taken out of context, Hudson's comment appears to have uncertain meaning, since "libels against [kings] and nobles" could refer to the crime of libel of magistrates, *Scandalum Magnatum*, or both. Nevertheless, when Hudson said that such libels "have been here examined," he almost certainly was referring to libels of magistrates rather than *Scandalum Magnatum*, since his comment appeared in the portion of his treatise devoted to "such crimes as are examined in this court, although no constitution or law [has] been made for them." He discussed

the law was one of defamation, but already at least one lawyer feared that the law's name might lead people to believe that it had a far broader reach than it in fact had.¹¹⁴ That lawyer was very prescient.

IV. THE LAW OF SEDITIONOUS LIBEL, 1660-1695

The main features of the law of seditious libel during the thirty-five years following 1660 must be gleaned from reports of the relatively small number of trials that occurred.¹¹⁵ Nonetheless, these few reports reveal that the law of seditious libel was well-defined and settled and that it was consistently applied.¹¹⁶

A. *The Trials*

Before examining the details of the law of seditious libel in the last half of the seventeenth century, it is necessary to identify the cases that can serve as evidence. A few such cases involved printed publications. As explained in part III, almost all of the seventeenth century prosecutions that dealt with what were called "seditious libels" and involved printed material were for the offense of unlicensed printing. Nevertheless, there were a few trials of printed material that because of special circumstances had to be based on the law of seditious libel. In addition, there were occasional prosecutions involving manuscript defamations under the law of seditious libel. These trials for manuscript seditious libels were not, of course, as frequent as those for licensing violations, since manuscripts were relatively less common and less visible to authorities than printed material. Unfortunately, of those trials that can be identified as having been based on the law of seditious libel, a number are known only from formal records that are notably unrevealing. Thus, in order to investigate that doctrine, it is necessary to rely on those

Scandalum Magnatum in the section concerning the Star Chamber's jurisdiction over statutory offenses. *Id.* at 113.

114. Historians, as well as lawyers, have fallen into this trap and have argued that the definition of the language prohibited by the law of seditious libel was as broad in the seventeenth century as it was in the eighteenth. 2 J. STEPHEN, *supra* note 1, at 310; 8 W. HOLDSWORTH, *supra* note 1, at 340-41; F. SIEBERT, *supra* note 1, 270-71, 382 n.50.

115. According to other historians, prosecutions for seditious libel were of "great frequency" in the late seventeenth century. 2 J. STEPHEN, *supra* note 1, at 313; 8 W. HOLDSWORTH, *supra* note 1, at 341 n.2; F. SIEBERT, *supra* note 1, at 269. Most of the trials referred to by these historians were, in fact, for violations of the licensing laws.

116. *Contra* F. SIEBERT, *supra* note 1, at 117.

few cases that were more amply reported.¹¹⁷

The first was the 1663 trial of Simon Dover, Thomas Brewster, and Nathan Brooks, who were found guilty of causing to be printed and of publishing the *Phoenix* and the last speeches of some of the regicides. As was explained in part II, the Crown was obliged to use libel law against these printed offenses because they had been published before the new Licensing Statute came into effect. The chief argument for the defense was that the printers and booksellers had merely followed their trade when they had published the libels. The accused were found guilty, and the judge ruled that "though printing be a trade . . . yet they must use their trade according to law"¹¹⁸

The second usefully recorded seditious libel trial during this period was Pym's in 1664. He had delivered a handwritten message to a parson requesting him to "bewaile . . . those wickednesses which go unpunished by the magistrate."¹¹⁹ Since the message was in manuscript, it could not be punished under the Licensing Act. After being found guilty in Exeter, Pym brought a writ of error in King's Bench, only to meet the same result. Unfortunately, just a brief report rather than a verbatim account of this case survives.

In the third trial, in 1684, the Crown successfully accused Sir Samuel Barnardiston of writing libelous private letters. In the letters, Barnardiston had questioned the existence of the "sham" popish plot and had criticized members of the government and the bench, including the judge, William Scroggs, who subsequently sat at Barnardiston's trial.¹²⁰

In the fourth trial, in 1685, the Crown found itself obliged to use the law of seditious libel rather than the licensing law against a printed book. The author, the well-known dissenter Richard Baxter, had published a theological work that could not possibly be considered news and thus was immune from prosecution for printing unlicensed news in violation of the king's prerogative. He was, moreover, not subject to statutory control, since James

117. See Appendix, Pt. A.

118. Trial of Dover, Brewster & Brooks, 6 STATE TRIALS, *supra* note 11, at 540 (1663).

119. 82 Eng. Rep. 1068, 1 Sid. 220 (K.B. 1664).

120. Trial of Sir Samuel Barnardiston, 9 STATE TRIALS, *supra* note 11, at 1334-35 (1684).

II's new licensing statute had not yet been enacted.¹²¹ The government therefore brought an information against Baxter for seditious libel, claiming that when he had written about "bishops" he had meant, by innuendo, "the English bishops." A supposedly verbatim record of the trial survives, but it is probably not complete or entirely accurate.¹²²

In the fifth case, in 1686, the government sought to punish Dr. Eades "for commending a book" containing "several seditious sentences." Such spoken approval of a libel was, according to dictum in the 1605 case of Pickeringe, a criminal publication. Unfortunately, the defendant pleaded guilty, thereby depriving historians of what might have been an interesting decision.¹²³

The last usefully recorded seditious libel trial before 1696 was that of the Seven Bishops in 1688.¹²⁴ Having refused to read James II's Declaration of Indulgence, the Bishops presented to the king a petition objecting that he did not have the dispensing power upon which his Declaration was based. The Crown prosecuted the Bishops, claiming that the petition was a seditious libel. The trial sparked greater excitement than any other of the period, and the events associated with it soon became legendary. Perhaps the most remarkable aspect of the trial was that the jury acquitted the Bishops, an exceedingly rare conclusion to any seventeenth century state trial and attributable largely to the equally extraordinary political atmosphere in 1688.

Since there are only six usefully recorded trials, conclusions drawn from them must be tentative. One trial—Eades'—becomes less useful upon examination, as the defendant eventually pleaded guilty. Of the other five, only three were reported in detail, and one of these, the Seven Bishops' trial, was a political event of such magnitude that the decisions of the judges in it are not certainly reliable sources about the law. Consequently only two of these trials—that of Dover, Brewster, and Brooks, and that of Barnardiston—provide much evidence.

121. Baxter's trial took place on May 15, 1685, four days before James II's Parliament met.

122. Proceedings against Richard Baxter, 11 *STATE TRIALS*, *supra* note 11, at 494 (1685). See notes 147–148 *infra* and accompanying text.

123. *King v. Eades*, 89 Eng. Rep. 1046, 2 Shower 468 (K.B. 1686).

124. Trial of the Seven Bishops, 12 *STATE TRIALS*, *supra* note 11, at 183 (1688). See notes 150–160 *supra* and accompanying text.

B. *Elements of the Offense*

Having surveyed the available historical evidence, it now is possible to examine the elements of the offense of seditious libel and the requirements for establishing those elements. Indictments and informations for seditious libel appear to have contained three essential allegations: first, that the content of the writing was defamatory; second, that the defendant had published the writing or had made it with the intention of publishing it; and third, that he had acted with a knowing and malicious state of mind. By the Restoration period, precedents (or authoritative dicta) concerning libels of both private and public persons had established the meaning of the first two allegations, and there were fairly clear notions about how to discuss the defendant's mental state.

1. *Defamatory Content.*

Allegations concerning the content of the writings were not interpreted to make all criticism of the government illegal. Traditionally, seditious libels had been punishable only if they defamed individuals. Thus, in all known seventeenth century seditious libel trials, the offensive language was such that it at least could be interpreted to have criticized particular magistrates rather than the government as a whole. Seditious libel was still a form of defamation, and therefore prohibited criticism of governors rather than the government. For example, criticism that touched the judges at Westminster would be defamatory, but an attack on the judicial system in general would not. A contemporary commentator on the law of defamation, William Sheppard, made this distinction explicit. There was "public" slander and there was "private or personal" slander. The former:

is a Slander of the State, as to report any thing about the Affairs thereof that is false, and may be to the prejudice of it . . . But we shall not have to do with this at all. But with private and personal Defamations, which are either of eminent, or common persons.¹²⁵

"Public" defamations, touching the institution of government, were punishable as false reports—*Scandalum Magnatum*. Libel law, however, concerned "private" or personal defamations, that is, defamations of individuals. Only after distinguishing libel from *Scandalum Magnatum* as an offense against individuals could

125. See W. SHEPPARD, ACTION UPON THE CASE FOR SLANDER 2 (1662).

Sheppard divide libel into the crime against a common man and the greater crime against "a Magistrate, . . . or eminent man."¹²⁶

Nevertheless, although this idea that only a criticism of an individual in government could be a defamation survived into the late seventeenth century, it increasingly was succumbing to the confusion created by the double meaning of the word libel and the natural inclination to treat the law of seditious libel as a means of dealing with criticism of the institutions of government. Just as in the first half of the seventeenth century some informations in the Star Chamber added charges of defaming the government, so in the last half of the century judges in dicta stated that language critical of the government as well as of the governors was prohibited.¹²⁷

An additional requirement was that the writing clearly identify its victim. According to King's Bench in Baxter's case, allusions to persons by innuendo or suggestion had to be such that "no other persons could be reasonably intended." Baxter's innuendoes, it will be recalled, were found by the jury to have referred to "the English bishops."¹²⁸

A libel, moreover, had to encourage a breach of the peace. This interpretation seems to have been accepted in the law of libel of private persons in the last half of the seventeenth century, and there is no reason to think that it did not also apply to the law of seditious libel. For example, in the trial of Saunders for libel of a private person, the judge held that the letter was "provocative, and tends to incense Mr. Rich to break the peace, and therefore an information lies"¹²⁹ Following the example of Coke, the judges described other writings as seditious libels on the ground that they diminished the affection of the people for the king or his ministers and thereby encouraged rebellion. This

126. *Id.* at 117. Sheppard's use of the words "public" and "private" to distinguish between criticism of government and of individuals is somewhat confusing, since seventeenth century lawyers, including Sheppard, normally employed those words to make the further distinction between individuals who were government officials and individuals who were not. *Id.* at 115, 117.

127. See Trial of Dover, Brewster & Brooks, 6 STATE TRIALS, *supra* note 11, at 558, 564 (1663); Seven Bishops' Trial, 12 *id.* at 183 (1688); see also Licensing Act, 14 Car. II, cap. 33, § 1 (1662). I wish to thank Professor Thomas A. Green of the University of Michigan Law School for persuading me to modify my views on this point. *The Jury, Seditious Libel and the Criminal Law*, in JURIES, LIBEL, & JUSTICE 75 n.10 (1984).

128. Proceedings against Mr. Baxter, 11 STATE TRIALS, *supra* note 11, at 502 (1685).

129. *Rex v. Saunders*, 83 Eng. Rep. 106, Sir T. Raymond 201 (K.B. 1670).

suggests that in the last half of the seventeenth century, as in the first, a seditious libel had to encourage a breach of the peace but, unlike libels of private persons, could do so by encouraging violence in the third party to whom it was published, rather than in the party whom it defamed.

Whether the judge or the jury decided the truth of allegations concerning the content of the writing has been a troublesome historical issue. The theoretical question was not discussed in detail until the early eighteenth century. In the seventeenth century, the bench determined in practice whether a writing's content was defamatory or libelous. Admittedly, judges went through the motions of proving to juries that publications were libels and painted the crimes in lurid colors. In so doing, however, they effectively decided the question of libelousness themselves, for in the circumstances nobody could or would disagree with them. When a judge declared that no honest man could dispute his opinion and that he hoped the jury was well affected to the government, few members of the panel would be so courageous as to dissent.

2. *Publication.*

The second of the three major allegations concerned the fact that the writing was published. The prosecution had to prove not only that the defendant had "invented" or "made" the libel or had "caused it to be made" but also that he had "uttered" it or at least had intended to do so. Printing, stitching, and binding were understood to be the making of a libel. In general, to utter a libel was to publish, sell, or in any way distribute it to a third party. The proof of publication or the defendant's intent to publish was as important in prosecutions for libels of public persons as it was in prosecutions or actions for libels of private persons. As Chief Justice Hyde told a jury in 1663 in a prosecution for a libel of a public person, "[P]rinting alone is not enough; for if a man print a book to make a fire on, that's no offence, it is the publishing of it which is the crime."¹³⁰ Publishing the libel to a third party or at least intending to do so was essential for the establishment of guilt, and the Crown's attempt to prove publication to the jury occupied a considerable part of most trials.¹³¹

130. Trial of Dover, Brewster & Brooks, 6 STATE TRIALS, *supra* note 11, at 563 (1663).

131. Although letters sent only to the person defamed had been punishable in the

3. *State of Mind.*

The allegations concerning the defendant's state of mind had not been the subject of precedents as clear as those relating to the allegations about the defamatory content of the writing and its publication.¹³² Star Chamber dicta had indicated that a defendant's lack of knowledge with respect to the content of a libel was irrelevant and thereby had effectively made knowledge and malice pertinent only with respect to the element of publication or intent to publish.¹³³ Other dicta, however, suggested a contrary rule.¹³⁴ Further information about Star Chamber attitudes to intentions is minimal, since proceedings in Star Chamber had given defendants only limited opportunities to challenge assumptions about their intentions.¹³⁵ Nevertheless, by the Restoration period, the third kind of allegation, that described the defendant's mental state, had acquired a fairly clear set of rules for its interpretation. These rules were borrowed largely from the law of murder, which came to be distinguished from manslaughter only by malice and the degree of provocation prior to the killing. However simple this distinction may appear in the-

Star Chamber as tending to a breach of the peace, after 1641 they were not criminal. Of *Barrow v. Lewellin*, a case involving an insulting letter sent only to the person insulted, it was written: "[A] man in the case aforesaid cannot be Indicted at the Common Law, because there is no publishing of the defamation and scandal of the party, and that which may be the occasion of quarrels is not sufficient ground for an Indictment without an actual breach of the Peace, nor more than a man could be indicted for sending a challenge to another, which yet was frequently punished in the Star Chamber at the Suit of the King." 2 J. MARCH, *ACTIONS FOR SLANDERS* 26-27 (1656). After the Restoration, however, opinion changed. See Appendix, Pt. C. Nevertheless, sending a challenge or defamation to the person defamed was not the same as publishing a defamation to a third party. A paper was only punishable as a libel if published to a third party.

132. Some historians, using reports of trials for licensing violations as their evidence, have contended that in the late seventeenth century juries could decide only the issue of publication. See, e.g., F. SIEBERT, *supra* note 1, at 274. As will be shown, the few trials for common law seditious libel indicate otherwise. See notes 145-146 *infra* and accompanying text. Perhaps the question that should be addressed is not so much whether juries determined defendants' intentions as whether intentions could be made an issue at all. If so, there is no reason to doubt that juries decided the matter as a question of fact.

133. *Want's Case*, 72 Eng. Rep. 802, Moore 628 (Star Chamber 1600); see also *Trial of Dover, Brewster & Brooks*, 6 STATE TRIALS, *supra* note 11, at 564 (1663). But see note 140 *infra*.

134. *Lamb's Case*, 77 Eng. Rep. 822, 9 Coke 59 (Star Chamber 1610).

135. Intentions could be considered in actions for libel. Helmholz, *Civil Trials and Limits of Responsible Speech*, in JURIES, LIBELS, & JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH- AND EIGHTEENTH-CENTURY TRIALS FOR LIBEL AND SLANDER (1984).

ory, in practice it was difficult to apply, for malice is a thing of the mind and is difficult to prove.

The efforts to find a practical definition of malice and a means of proving it extended over many decades, but by the early seventeenth century, it was established that the act of killing created a rebuttable presumption of malice.¹³⁶ This rule of implied intention was described by Coke and Hale as applicable to a wide variety of crimes, all of them, however, felonies.¹³⁷ It was not used in trials for larceny, "wherein the best rule is, *in dubiis*, rather to incline to acquittal than conviction."¹³⁸

Whether the Star Chamber had implied the knowledge and malice alleged in seditious libel prosecutions cannot be determined with certainty. During the last half of the seventeenth century, however, common law courts (which were far more fastidious about legal technicalities than prerogative courts had been) consciously borrowed the rules of evidence used in murder trials for use in seditious libel cases.¹³⁹ They did so even though seditious libel was only a misdemeanor, presumably because it was considered almost as serious an offense as treason.

In the last forty years of the seventeenth century, the content of a seditious libel created a rebuttable presumption of the defendant's knowledge and malice.¹⁴⁰ Challenges to this rule in the

136. 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 52 (1641); 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 13, ¶ 32 (1716).

137. 3 E. COKE, *supra* note 136, at 62; 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 229, 455, 508 (1736).

138. M. HALE, *supra* note 137, at 509.

139. In a seditious libel trial of 1663, for example, Chief Justice Hyde explained, "Malice is conceived in the heart, no man knows it unless he declares it: [A]s in murder, I have malice to a man, no man knows it; I meet this man and kill him; the law calls this malice." Trial of Dover, Brewster & Brooks, 6 STATE TRIALS, *supra* note 11, at 547 (1663). Twenty years later in Barnardiston's trial, Jeffreys affirmed the parallel between murder and seditious libel: "As it is in murder, . . . [s]o, in informations for offences of this nature [seditious libel]." Trial of Sir Samuel Barnardiston, 9 *id.* at 1349 (1684). Although the Seven Bishops' trial will be considered separately, it should be noted that in that trial the implication of malice "by construction of law" was compared to the implication in murder cases. Trial of the Seven Bishops, 12 *id.* at 401 (1688); *see* note 150 *infra* and accompanying text.

140. Proof that the defendant had made or published a book maliciously usually came from the publication. Malice was implied by the defamatory words. Although in their summations judges explained the malice of the accused, they did not believe normal evidence of malice was either necessary or possible. In the trial of Dover, Brewster, and Brooks, Lord Chief Justice Hyde said, "There are some things that you of the jury are not to expect evidence for, which it is impossible to know but by the act itself. Malice is conceived in the heart." A libelous book "is, in construction of the law, malice." 6 *id.* at 537, 547 (1663). In Barnardiston's trial, Lord Chief Justice Jeffreys ruled that "cer-

1680s only provoked exasperation. The Attorney General explained in 1688: "I think these matters are so common, and that is a point that has been so often settled, . . . that I need not insist upon it; if the act be unlawful, the law supplies the malice and evil intentions."¹⁴¹

Since a defendant's knowledge and malice were implied by the defamatory content of the writing, the question of whether the defendant had had such intentions arose only if the implication was called into doubt. The judge would do this if he thought the publication insufficiently defamatory to imply malice.¹⁴²

tainly the law supplies proof, if the thing itself speaks malice and sedition." The defendant's counsel stubbornly insisted that there was "no evidence given about this malice." In return Jeffreys asked, "How shall any man prove another man's malice, which is a thing that lies only in a man's mind?" He concluded, "No proof can be expected, but what the nature of every thing will bear." 9 *id.* at 1334, 1349-50 (1684). Earlier, in Prynne's Star Chamber trial (in which there was no jury), Attorney General Noy said, "This Book . . . is the witness, it doth testifie what was his intention." J. RUSHWORTH, *supra* note 38, at 224. After Prynne's lawyers had suggested that there had been no proof of bad intentions, one of the justices, in giving judgment, exploded:

Good Mr. Prynne, you are a lawyer. Intention! . . . [W]here the words are plain and positive, as in your Books, here there is no help of Intention in the world: your words are plain and clear, therefore you can never make any defence at all out of that.

Id. at 236. In short, the publication itself could be evidence of the defendant's malice.

Informations declared that defendants had acted knowingly, yet intention or knowledge, like malice, was one of the allegations for which the jury could not expect evidence other than the act of publication itself. 6 *STATE TRIALS*, *supra* note 11, at 547 (1663).

141. *Id.* at 401.

142. Following the logic that a defamatory writing itself supplied evidence of seditious or malicious intentions, the judges acknowledged that if a publication was not clearly defamatory, then malicious intentions required additional proof. Since the bench could control the judgment about whether a publication was defamatory, Jeffreys could freely explain (in Barnardiston's trial), "If the fact [of the publication being defamatory] is indifferent in itself, then to make a crime of it, the accidental circumstances must be proved, but it needs not [be proved] where the thing implies malice in its own nature." 9 *STATE TRIALS*, *supra* note 11, at 1349 (1684). If the publication was not clearly defamatory, then the jury could expect evidence other than the publication itself of the defendant's malicious intentions. In arrest of judgment, Barnardiston's counsel, Williams, again insisted that there had been no proof of his client's malice. He claimed that the letters did not imply it. But Jeffreys ruled,

You say, that there was no evidence given by proof of the defendant's evil disposition, or of these things being done falsely, seditiously, factiously and tumultuously, and the like. There was not any, but what the fact proves. It is true, these are words put into the information of course; and there must be some accusations, or words of the person accused, that in their own nature will bear the interpretation of such crimes; or else the charge is not maintained. For if a man should put into an information that I did falsely, maliciously, and seditiously, speak certain words to Mr. Williams; and when I came to set forth the words, it should only be, that I did ask him this question, how his wife and children did, or some such like; that would not bear any information, because

More typically, the defendant tried to prove that he had acted without knowledge or with good intentions.¹⁴³ The jury could

there was no evil in the very matter of the accusation or words. But now that is not the case here

Id. at 1350. Jeffreys stated that if the words of the libel had not implied malice, then the information would have remained unproved. In such a case, additional evidence of malice would have been necessary. It was very unlikely, however, that such a situation would ever arise.

The trial of Prynne indicated that somewhat similar notions about evidence had existed in the Star Chamber as early as 1633. In giving judgment, the Lord Chief Justice said that "[w]here the word standeth equal, as that you may take the *Intention* this way, or that way, with right hand or left-hand, there in that Case you [the defendant] may speak about the *Intention*" J. RUSHWORTH, *supra* note 31, at 236. Judges recognized that some supposed libels might not clearly imply bad intentions or malice, and they even conceded this in the Star Chamber, where there was no need to pay strict attention to standards of procedure. In such cases, where the publication was not clearly defamatory, judges apparently believed independent evidence about the defendant's intentions to be relevant. Unfortunately, it cannot be determined from the Chief Justice's words whether he believed that additional evidence was necessary for the Crown's case or was allowable for the defense. It is quite possible that notions about evidence and procedure in seditious libel trials remained similar but by no means exactly the same during the century. In any case, by the time of Barnardiston's trial in 1684, Jeffreys believed that if malice was not clearly implied by a libel, then additional evidence of it was necessary before the jury could find a verdict of guilty.

143. In Barnardiston's trial, Jeffreys repeatedly taunted the defense to offer evidence of lack of malice:

You would have the jury find, I warrant, that he did it piously, and with a good intent You would have the jury find he had no ill design in it Do you think he did it to serve the crown? If the jury will take it upon their oaths, that sir Samuel Barnardiston wrote these Letters to serve the crown, you say something. Pray ask them that question. Try if you can make them believe that, Mr. Williams.

9 STATE TRIALS, *supra* note 11, at 1349 (1684). George Jeffreys freely acknowledged, albeit in a rhetorical manner, that juries could consider proof of good intentions. Even if the words of the publication were defamatory and therefore supplied evidence of malice, the defendant could, as in murder trials, bring the question of malice before the jury by offering proof to the effect that he had acted with good intentions. Good intentions, however, like evil ones, were difficult to prove.

The issue of knowledge was treated in the same way as malice. Discussions before the jury of malice usually assumed that the accused had published the paper "knowingly" or intentionally. In one trial, however, that of Dover, Brewster, and Brooks, there was no prolonged discussion about malice, because the more essential question arose of whether or not there had been any knowledge or intention to publish at all. The assumption of knowledge was challenged, since Dover and Brewster tried to prove that they did not read what they printed or sold. *Id.* at 546. Even though Hyde had stated that a defendant's ignorance of the content of a libel was irrelevant, he in fact treated a defendant's knowledge of the content as a rebuttable presumption. Thus in his summations, Hyde had to claim that evidence of knowledge, other than that provided by the act of publishing, existed. He said that Brewster only "[p]retended he did it not knowingly; I will not repeat the evidence; he sent for them, had them stitched, caused them to be kept privately, not upon the stall." *Id.* at 548-49. Of, Dover, he told the jury:

Though a man doth not come and tell you he declared to him he knew what was

consider these questions only if the judge or defense raised them. Barnardiston's counsel, for example, quarreled with Chief Justice Jeffreys over the proper requirements for proof of malice but presented no evidence that his client had acted with good intentions. Jeffreys therefore summed up to the jury:

Gentlemen, the question before you is, Whether the Defendant be guilty of writing these malicious, seditious Letters; for that they are malicious and factious, no honest man can doubt in the least; and I do not find that the defendant do offer to say any thing in defence of the Letters.¹⁴⁴

Barnardiston had failed to offer the jury proof of his good intentions, and therefore the question of whether he had acted with malice did not even arise.

In the 1680s, judges and Crown lawyers disparagingly referred to questions of knowledge and malice as mere formalities in order to remove such issues from the control of juries. To bolster their point of view, Crown lawyers insisted that allegations concerning knowledge and malice were comparable to, and should be treated with as much seriousness as, allegations of demonic influence upon defendants' actions, which were a regular, albeit obsolete, feature of many seventeenth century indictments and informations for a variety of crimes. These attempts to label questions of knowledge and malice as mere formalities, however, did not alter the burden of proof. Every formal charge was part of the indictment or information and therefore required, at least theoretically, some sort of proof—whether by testimony of witnesses or presumption of law. Even if the information referred to well-known facts, such as the convictions of Russell and Sidney, which were mentioned in the information in Barnardiston's trial, the defense could nevertheless demand proof of those facts. Barnardiston's counsel delayed his trial for one-and-one-half hours by demanding such proof, and Chief Justice Jeffreys told the Crown's attorneys, "[I]f they [the defense] insist upon it, you must prove them [the charges]."¹⁴⁵ Knowledge and malice, like the instigation of the devil, may have been formal charges, but

contained in this book, yet if there be sufficient evidence to satisfy you in your consciences, that he knew what was in it, and was privy to the printing and publishing of it[,] there is enough for you to find the indictment.

Id. at 559. The judge drew attention to additional evidence of the knowledge of Brewster and Dover, because the defendants had offered proof to rebut the presumption that they had published the libels with knowledge of the libels' contents.

144. Trial of Samuel Barnardiston, *id.* at 1356.

145. *Id.* at 1350.

they were, nevertheless, issuable and came within the province of the jury.

Although the Crown prevailed in most seventeenth century trials for seditious libel, and claims of absence of knowledge or malice usually were unlikely to succeed, it should not be concluded that the defense's right to rebut the presumption of knowledge and malice was meaningless. Not only did defense lawyers attempt to take advantage of the rules concerning intentions, but on occasion they succeeded. In Paine's trial in 1696—a time beyond the scope of this part, when the law was already beginning to change dramatically—the arguments of the defense that Paine had lacked both knowledge and malice were allowed by the court and were so convincing that the jury in a special verdict refused to find Paine guilty of publishing the libel.¹⁴⁶

C. *Two Extraordinary Trials*

Before closing this discussion of the law of seditious libel in the last half of the seventeenth century, it is necessary to discuss in detail two extraordinary trials: those of Baxter and of the Seven Bishops.

Baxter's trial was an example of how judges in the 1680s could ignore not only the law normally applied in seditious libel trials but also all legal conventions. Although the only detailed report of Baxter's trial that has survived may well be unreliable, it shows clearly that the judge, Jeffreys, engaged in arbitrary and intimidating behavior.¹⁴⁷ The defense at first attempted to prove that the innuendos in the publication could not bear the interpretation put upon them in the indictment. The defense probably intended to make other arguments, but, because of Jeffreys' rude and threatening demeanor, simply gave up.¹⁴⁸ Thus, in the 1680s, it was possible for a judge to disregard almost all requirements of a fair trial. Although Baxter's trial is an ugly reminder of what could happen, it was, among libel trials, an exception. It does not reflect the state of libel law so much as the general condition of the judiciary in the 1680s.

The other and far more important seditious libel trial that must be described separately is that of the Seven Bishops in

146. See notes 196–204 *infra* and accompanying text.

147. The most detailed account of Baxter's trial is somewhat suspect because it was "Taken by the Prisoner's Friends." 11 *STATE TRIALS*, *supra* note 11, at 494 (1685).

148. *Id.* at 501.

1688. The Bishops petitioned King James II that they should not be required to read James' *Declaration of Indulgence* (tolerance) in their churches, on the ground that James lacked the power to dispense with statutory religious restrictions. The acquittal of the Bishops was seen as a Protestant victory against James' Catholicizing plans and was one of the events that led to his fall. The case was of the utmost political importance and occurred in an atmosphere of such excitement that it may not be an accurate guide to the law of seditious libel of the time. It should therefore be treated with caution.

Although the trial of the Seven Bishops confirms what has been said here about the law of seditious libel, it reflects influences of ideology and public sentiment that conflicted with the law. During the trial, the defense and one of the judges disregarded all known precedents and argued that truth justified a libel. Their political sentiments and desire for rationality prevailed over their knowledge of the law. Nevertheless, three of the four judges and the Attorney General insisted that the trial follow the traditional pattern. Although the trial led to a discussion of novel ideas about seditious libel, on the whole it deviated very little from earlier practices.¹⁴⁹

The question of malice never arose as a separate issue. To the defense's contention that the information "is laid malicious and seditious, and there is no malice or sedition found," the Attorney General replied that, as with the procedure in murder trials, the libel itself supplied evidence of seditious and malicious intentions: "[W]e know very well, that that follows the fact, those things arise by construction of law out of the fact. If the thing be illegal, the law says it is seditious . . . if the act be unlawful, the law supplies the malice and evil intentions."¹⁵⁰ In other words, the fact of the defamatory words in the petition supplied evidence of seditious and malicious intentions. As in earlier trials, the Attorney General did not rule out the right of the defense to offer evidence of absence of malice. The defense, however, offered no such evidence—perhaps because it could not.

The only question in the trial left by Lord Chief Justice

149. The defense made a number of arguments that were not directly related to the law of seditious libel. Among their minor but time consuming contentions was the argument that the writ authorizing the Bishop's imprisonment had been improperly signed. Moreover, the lawyers questioned whether there was proof that the libel, the Bishop's petition, had been made in Middlesex, as stated in the information.

150. Trial of the Seven Bishops, 12 STATE TRIALS, *supra* note 11, at 401 (1685).

Wright for the jury to determine was whether the Bishops had published the petition. The defense claimed that there was no certain proof that the Bishops had published the petition, since it was unclear whether anyone had ever read it to the Privy Council. In his summation, therefore, the Lord Chief Justice told the jury:

[T]he only question before me is, and so it is before you, gentlemen, it being a question of fact, whether here be a certain proof of a publication? . . . [I]f you do not believe it was this petition [that was presented to the privy council], then my lords the bishops are not guilty of what is laid to their charge in this information.¹⁵¹

The only question of fact was whether the petition had been published.

The most intriguing question in the trial, however, was a question of law that belonged to the judges; it was, in their words, whether the petition was a libel. Within this question were two distinct issues: whether the petition was privileged, and whether its content was defamatory. The defense insisted that the libel was privileged, since the Bishops had the right to petition the king both as subjects and as peers. The Attorney General and Solicitor General doubted whether anyone had the right to petition the king directly outside of Parliament and said that, in any case, a petition made outside Parliament must not be reflective or scandalous. Although, according to precedents concerning libels of private persons, a lawsuit, an indictment, or a petition to Parliament was normally privileged, it was not clear that a petition presented directly to the king was so protected, for it was not made in the course of a judicial proceeding. Strictly speaking, neither subject nor peer possessed the right to petition outside parliamentary channels, and thus two of the four judges declined to excuse the libel on the ground that it was a petition.

The other issue that the judges had to resolve when they asked themselves if the petition constituted a libel was whether its content was defamatory. The defense argued that the content was not, since the petition did not diminish the king's prerogative, as claimed in the information. According to Sir Robert Sawyer, if the king did not actually possess a dispensing power, the Bishops' rejection of that power was harmless. One could not diminish an already nonexistent prerogative. This argument by the defense, however, soon degenerated into the very different

151. *Id.* at 425-26.

claim that truth justified the defamation. Although some of the more radical lawyers and Justice Powell encouraged this subtle shift in meaning, they clearly were running against long standing legal practice and theory in libel cases. In the view of the law, criminal libels could not be justified as true, and accordingly the Lord Chief Justice declared that the king's dispensing power was irrelevant.

The Attorney General had argued that any reflection upon the king that would stir up the people to sedition was a libel. The Bishops' petition said that the king had acted illegally and therefore, according to the Attorney General, clearly came within the definition of a seditious libel. The Lord Chief Justice and Justice Allynbone agreed. Incidentally, these two judges and the Crown lawyers also believed that "any thing that shall disturb the government, or make mischief and a stir among the people, is certainly within the case of *Libellis Famosis*."¹⁵² In other words, although the case of the Seven Bishops concerned only the defamation of an individual, the king, the judges adhered to the view, which had occasionally found its way into earlier dicta, that criticism of the government as a whole could amount to seditious libel. In any event, Wright and Allynbone declared the Bishops' petition a libel.

Justice Holloway, however, appears to have believed that the petition was not defamatory because it was privileged, and, since a nondefamatory writing could not imply malice, Holloway's opinion raised the previously undebated issue of malicious intentions. In this connection it should be noted that in both Prynne's and Barnardiston's trials (1633 and 1684) it was explained that if a judge were uncertain whether a writing was so defamatory as to imply malice, he would have to instruct the jury to consider evidence other than the words of the publication for proof of malicious intentions (or, in the Star Chamber, he himself would have to consider the additional evidence).¹⁵³ Holloway appears to have found himself in such a situation. He thought that "to deliver a petition cannot be a fault," and that the petition could not in itself be a libel. It may be supposed, therefore, that Holloway believed that the petition could not provide evidence of the Bishops' malicious intentions. Certainly, he concluded that the jury could only find the Bishops guilty if "satisfied [presumably by ev-

152. *Id.* at 426.

153. See note 142 *supra*.

idence other than the petition itself] there was an ill intention of sedition.”¹⁵⁴ In Holloway’s view, apparently, since the petition did not supply a presumption of malice, he was obliged to raise the issue and to instruct the jury to consider intentions, even though the defense had not raised that issue by offering evidence of absence of malice. Holloway’s actions in the Seven Bishops’ trial were exactly what Jeffreys had prescribed earlier in the similar but hypothetical situation in Barnardiston’s trial.¹⁵⁵ Because Holloway’s discussion strayed into a summary of the evidence relating to the question of malice, it drew a sharp reprimand from the Lord Chief Justice. Chief Justice Wright objected only to Holloway’s attempt to sum up the case—a task that the Chief Justice did not think belonged to Holloway—and not to Holloway’s giving an opinion on whether the petition amounted to a libel.

Unlike Justices Wright and Allybone, who thought that the petition amounted to a libel, and Holloway, who was doubtful at best, Justice Powell believed that the petition was not a libel. But whereas the other judges had provided conventional and legally acceptable arguments for their opinions, Powell contended that the truth of the petition justified it.

The traditional law of libel did not recognize this argument based on the truth of the writing, for the law aimed to settle disputes; it condemned any statement that would dishonor a man and provoke him to violence or, in the case of libels of officials, would encourage violence against the government. Hence, in his report of Pickeringe’s case, Coke had said correctly that truth was no defense in prosecutions for either private or seditious libels; it was immaterial. Another Star Chamber lawyer, Hudson, agreed, describing the argument that truth justified a libel as a “gross error.”¹⁵⁶

Sentiment against the rule that truth was no defense was easily aroused, since to many the rule seemed irrational, and to some, disadvantageous. Throughout the seventeenth century, moreover, a minority of Englishmen had been influenced by both religious and secular intellectual developments to challenge laws that punished what they considered to be true statements; such

154. Trial of the Seven Bishops, 12 STATE TRIALS, *supra* note 11, at 426 (1688).

155. See note 142 *supra*.

156. Hudson, *supra* note 103, at 102.

laws seemed to them to be contrary to both common sense and conscience.

Powell's belief about truth was not without some apparent, albeit misconceived, basis in law. Powell may have looked at precedents for crimes of language that did allow truth to be a defense. For example, truth could justify libel in civil actions. The statutes of *Scandalum Magnatum*, moreover, had forbidden "false news" pertaining to affairs of state, and truth may have been a valid defense under those acts. "False news," however, was a specific statutory offense very different from seditious libel. Another legal source of Powell's belief may have been the confusing words of indictments and informations for seditious libel. Seventeenth century informations and indictments sometimes referred to false libels, even though the falsity of the publication was legally immaterial.¹⁵⁷ Such was the form of the charges against the Seven Bishops. Consequently, it is not surprising that one judge with a rigorous sense of logic and strong political sentiments, convinced himself that truth justified a libel.¹⁵⁸

As in earlier trials, the jury was supposed to accept the opinion of the judges about the libelousness of the publication. The Lord Chief Justice declared that the question of whether the writing was libelous belonged to himself and his colleagues on the bench: "[T]he . . . question is a question of law indeed, whether if there be a publication proved, it be a libel."¹⁵⁹ The question of whether the writing was libelous was undoubtedly a matter of law for the judges to decide, and the Bishops' lawyers did not question that judicial power. As it happened, however, the justices could not agree among themselves, thereby leaving the decision *de facto* to the jury.

Although some of the discussions in the Seven Bishops' trial varied from earlier seditious libel trials, the proceedings were not very different. The only feature of the trial that distinguished it from others on grounds of libel doctrine was the disagreement among some lawyers and judges about what sort of writing constituted a libel and the subsequent *de facto* decision of that question by the jury. There was no confusion about other aspects of the law. Thus the Bishops' trial does not contradict what has been said about Restoration seditious libel trials.

157. See text accompanying note 109 *supra*.

158. Trial of the Seven Bishops, 12 STATE TRIALS, *supra* note 11, at 426-27 (1688).

159. *Id.* at 425.

In sum, throughout the seventeenth century, the law of seditious libel was far less amorphous than has been supposed. It was subject to unambiguous rules of application; it punished only defamations of individuals in government, although, because of the word libel, opinion about this was changing; and it was used almost exclusively against manuscript offenses, printed publications being subject to prosecution under the licensing laws.¹⁶⁰

V. THE FAILURE OF THE LAWS OF LICENSING AND TREASON

During the last decade of the seventeenth century, the law of seditious libel gained greatly in significance. It was given a new role as a consequence of two events: the abolition of the Licensing Act in 1695 and the enactment of the Treason Trials Statute in 1696. The former event was carefully planned by the Crown; the latter came as a surprise. Together, the two events made it impossible for the government to prosecute the printed press for violations of the licensing law and impracticable to prosecute the press for treason. Consequently, it became necessary for the government, if it were to prosecute the printed press, to rely upon the law of seditious libel.

A. *The Demise of Licensing*

In 1693, the government seems to have decided to use the law of treason instead of the Licensing Act as its means of prosecuting printers. There is no reason to doubt that licensing laws supplied an excellent tool for convicting press offenders. In the early 1690s, trials for unlicensed printing were both frequent and highly successful. Surviving sessions papers at the British Library indicate that such cases occurred almost every other month at the Old Bailey.¹⁶¹ Why then did the government wish to jettison the Licensing Act?

Although the Licensing Statute provided a practical means of convicting printers after they had published antigovernment books, the licensing system that the statute authorized was not

160. See notes 99, 114 *supra*.

161. The Proceedings on the King and Queen's Commissions of the Peace, Oct. 9 & 10, 1689; Jan. 15 & 16, 1690; Jan. 15, 16, 17, & 19, 1690; Feb. 26 & 27, 1690; Jan. 15, 16, & 19, 1691; Apr. 22, 23, 24, & 25, 1691; Sept. 9, 10, 11, & 12, 1691; June 29 & 30 & July 1, 1692; Aug. 31 & Sept. 1 & 2, 1692; Dec. 7, 8, 9, 10, & 12, 1692; Apr. 26, 27, 28 & 29, 1693; May 31 & June 1, 3, & 8, 1693; July 13, 14, 15, & 17, 1693; Feb. 21, 22, & 23, 1694, Apr. 18, 19, & 20, 1694 (proceedings available in the British Library).

entirely successful. In theory, censorship before publication was the chief advantage of licensing laws, in practice, censorship had always been difficult to impose, and such difficulties had increased during the seventeenth century. Many printers simply ignored the prohibitions of the censor:

[I]t appears the [Licensing] Law is far insufficient to the end which it intends. Do we not see, not once or oftner, but weekly, nay daily, that continued *Jacobite Libels* against our present happy Establishment, are printed and dispersed amongst us; for all that *Licensing* can do?¹⁶²

By the early 1690s, advances in technology had reduced the cost of printing and permitted the number of presses to increase to the point that the government could no longer keep an eye on all of them. Meanwhile, the demand for antigovernment tracts remained considerable, for after the Revolution of 1688 many Jacobites and others were violently disaffected. In the face of such pressure, censorship was not very effective.

Economic forces also tended to bring the Licensing Statute into disrepute. The Act confirmed lucrative printing monopolies and thereby earned the resentment of printers who lacked privileges. Monopolies, moreover, were enforced through the licensing system. Thus, when angry printers complained to the government about monopolies, they often asked that the licensing laws be abandoned. Other printers, who thrived on cheap, scurrilous pamphlets that would not have been licensed, opposed censorship because it was irksome and potentially dangerous for them. Finally, almost everyone in the trade was annoyed by the delays involved in obtaining licenses, even for short and innocuous publications.¹⁶³

The complaints of the printers who opposed monopolies were supported by those who had political and religious objections to licensing. Although almost no one questioned the necessity of punishing antiestablishment pamphlets after their publication, many doubted the propriety of prior censorship. The proliferation of religious sects in the 1640s and the consequent diversity of opinion reconciled most people to the idea of some religious toleration. The growing cynicism and factionalism of court politics after mid-century and the development of a

162. REASONS HUMBLY OFFERED FOR THE LIBERTY OF UNLICENSED PRINTING 5 (1693).

163. For details of some of the economic complaints, see 11 H.C. JOUR. 305 (Apr. 17, 1695).

respectable, Protestant country opposition led many to believe that antiadministration sentiments were useful and even morally commendable. Yet such sentiments usually were not those of the censor. The enforcement of prior censorship seemed arbitrary and was associated with arbitrary government and Catholicism. How could a few men, let alone venal or prejudiced appointees, judge what a nation should read? These arguments became especially forceful in the late 1680s when James II's government licensed Catholic books. James' licensing policy not only was repugnant to most Protestants, it also taught them that licensing was a double-edged weapon that might one day again be turned against the establishment it was meant to protect.¹⁶⁴ After the Revolution of 1688, the reputation of licensing did not improve. In the early 1690s, a Whig licenser was succeeded by a high church Tory licenser; their contradictory policies revealed just how arbitrary the licensing system of even the post-Revolutionary government could be.¹⁶⁵

Although the government probably had little desire to protect printing monopolies and perhaps did not even particularly wish to censor books (since few authors or printers ever bothered to try to get licenses for antigovernment publications), Parliament in 1693 nevertheless delayed the expiration of the Licensing Act.¹⁶⁶ The Crown required some efficient means of prosecution and therefore, at least for the moment, had to retain its traditional weapon.

The government appears to have decided to permit the licensing system to lapse as soon as Crown lawyers could find another means with which to prosecute the printed press. The Crown apparently did not want to hold on to a licensing act that only aroused opposition to a system of censorship that, in any case, was ineffective. That the government had by 1695 become indifferent to the Licensing Act appeared in the actions of the House of Commons, which, apparently without a division, declined to renew the Act and then resisted the Lords' attempt to

164. 11 H.C. JOUR. 306 (Apr. 17, 1695); D. DEFOE, *THE TRUE BORN ENGLISHMAN* (rev. ed. 1703), *reprinted in* LATER STUART TRACTS 110 (G.A. Aiken ed. 1903); M. TINDAL, *REASONS AGAINST RESTRAINING THE PRESS* 12 (1704).

165. This point was made in a particularly forceful way by Charles Blount, a republican Whig, who in 1693 craftily arranged to have licensed a book that greatly embarrassed the new government. 5 T.B. MACAULAY, *HISTORY OF ENGLAND* 2301-08 (1914).

166. 10 H.C. JOUR. 820 (Feb. 20, 1693).

revive it.¹⁶⁷ Neither court M.P.s nor other government supporters attempted to defend the statute. As Defoe mentioned several years later, licensing expired only after "the Government . . . thought fit . . . not to suffer it."¹⁶⁸

B. *Prosecutions for Treason*

In 1695, unlike in 1693, the Crown could allow the Licensing Act to lapse, because in the interim it had found a new means of controlling the press: the law of treason.¹⁶⁹ When the Crown permitted the Commons to reject the Licensing Act, it was acting with great confidence and with reason, for in 1693, after it had reinstated the Licensing Act, the Crown initiated a test case to determine whether treason could be used as a substitute for the troublesome Licensing Act to prosecute the printed press on a regular basis.

The unfortunate defendant in that test case was William Anderton, a Jacobite who had written, printed, and published, according to the indictment, "Two Malicious, Scandalous and Traitorous Libels," *Remarks on the Present Confederacy, and Late Revolution in England and A French Conquest neither Desirable nor Practicable*. One report explained that Anderton was first imprisoned

167. 11 H.C. JOUR. 305-06 (Apr. 17, 1695).

168. D. DEFOE, *supra* note 164. The Crown's role in the abandonment of the Licensing Act has been overshadowed by the famous *Reasons* given by the Commons for their refusal to renew the Act—a document that does not reveal the reasons why the government could afford to jettison the Act. When the Lords returned the bill for renewing temporary statutes to the Commons, they suggested that the Licensing Act be renewed. As mentioned above, the Commons vetoed this proposal. At a conference with members of the House of Lords some members of the Commons explained the position of their House and provided a list of reasons for their position. The *Reasons* consist of economic, political, and equitable objections to the Licensing Statute. Although the *Reasons* are very informative about what some members thought about licensing, they do not explain why the Crown was willing to do without the Licensing Act.

It should be noted that the first reason states that there is "no Penalty appointed" by the Licensing Act "for Offenders therein; they being left to be punished at Common Law." 11 H.C. JOUR. 305 (Apr. 17, 1695). This refers to a section of the Licensing Act that condemned seditious libel. The first reason also states that there are "great and grievous Penalties imposed by that Act for matters wherein neither Church or State is in any way concerned." *Id.* This refers to the Statute's provision for prosecution and punishment of those who violated the Statute's licensing or printing provisions.

169. This account contradicts traditional explanations, which state that the Commons rather than the Crown took the initiative to end licensing, and which fail to explain why the Crown was so willing to abandon the law that for more than a century had been the mainstay of its press policy. F. SIEBERT, *supra* note 1, at 260-63; Mayton, *supra* note 4, at 106.

simply for violating the licensing laws and only later for committing treason.¹⁷⁰ Anderton was the first person since 1663 to face such a charge for writing or producing printed material.¹⁷¹

The difficulty for the king's counsel was to prove that Anderton had compassed and designed the death of the king and queen. According to the law of treason, "[T]here must be an overt act to discover the intention of the man." The Crown, therefore, had to claim that "[t]hat which made the overt act in this case, was in composing, printing, publishing and dispersing of two treasonable libels. . . . [T]he design of it was merely to incite all the king's subjects to stir up, and raise war and rebellion against him, and to restore the late king James."¹⁷² Anderton replied that "bare printing" could not "be deemed in law an overt act of compassing, or imagining the kings death." Justice Treby, however, quoted precedents from the fifteenth century—the last time the government had used treason on a regular basis to control publications—and declared that "[I]n primitive times, before printing was invented, writing was found to be an overt act; and made high-treason; therefore printing was more manifestly an overt act."¹⁷³ Anderton responded the best he could, but, like all defendants in treason trials, he pleaded under the severe disadvantage of having few rights and thus, for example, had no counsel in court.¹⁷⁴ Not surprisingly, he was found guilty. Afterwards, he was executed.

Following its success in Anderton's trial, the Crown felt that it could employ treason instead of the Licensing Act to control the

170. Trial of William Anderton, 12 STATE TRIALS, *supra* note 11, at 1246, 1251 (1693).

171. The trial of Algernon Sydney in 1683 is not an exception to this statement, since it did not involve printed material. Moreover, Sydney's trial should not even be considered an example of the use of treason to control manuscript material. Sydney was prosecuted not because he wrote his *Discourses* but because he appears to have flirted with the Rye House plotters in a conspiracy to assassinate the king. Trial of Algernon Sydney, 9 *id.* at 317 (1683). The same is true of Stephen College's trial and conviction in 1681 for treason. College had written *A Raree Show*, a printed poem that was used as evidence against him. College faced an accusation of treason because he travelled to Oxford carrying arms and talked and wrote of deposing the king, all at a time when England "was upon the edge of civil war." J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603–1689, at 248 (1966). Although much of the testimony against College probably was perjured, and College was as harmless as he was foolish, he was not charged with treason simply for writing an antigovernment poem.

172. *Id.* at 1246.

173. *Id.* at 1248.

174. Note that Anderton did have legal advice while in prison.

press. As explained in part I, the statute of 25 Edward III had always been an unwieldy tool to use against printers; yet Anderton's conviction seems to have persuaded the Crown that it had overcome the difficulties of interpreting constructive treason. Five days after the trial, Narcissus Luttrell recorded that "[A] warrant is signed for executing Anderson [sic] the printer . . . and orders are given for taking up 36 several persons concerned in the trade of libells."¹⁷⁵ Apparently the Crown had been waiting for the results of the test case before it made wholesale arrests. On the day of Anderton's execution, a broadside ominously informed the public that subversive pamphlets were and always had been treasonable:

Such has been Their Majesties Incomparable Clemency . . . that among the many Lives Forfeited by the Law, on the account of Treasonable Books and Pamphlets, their boundless Mercy has taken but One: (as a great Lawyer has excellently observed) It was only Their Majesties Goodness towards many others, to call that a Misdemeanour, which the Law calls Treason.¹⁷⁶

An expired statute of 1661 (which had gone largely unused during its life) had made it treasonable to criticize the king or his government, and judges had often claimed that the publishing of a seditious libel was nearly an act of treason, but now the Crown actually intended to put those threats into practice. Although, until the very demise of the Licensing Act in the spring of 1695, the Attorney General continued to prosecute for violations of that statute, from the time of Anderton's trial onward the government was confident enough of its ability to use treason prosecutions against the press to allow the Licensing Act to expire.

After the expiration of licensing in spring 1695, the Crown began to put its new policy into effect. In the September 1695 sessions at the Old Bailey, two printers, Newbolt and Butler, were found guilty of treason for printing *King James' Declaration*. The prosecution argued that "whatsoever does go about to depose the king and queen . . . was a compassing, imagining, and contriving the death and destruction of the king and queen."¹⁷⁷

175. 3 N. LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS 115 (1857) (entry from June 13, 1693).

176. ACCOUNT OF THE CONVERSATION BEHAVIOUR AND EXECUTION OF WILLIAM ANDERTON PRINTER (1693).

177. Trial of William Newholt & Edward Bulter, 15 STATE TRIALS, *supra* note 11, at 1404, 1405 (1695).

The Crown must have thought that even these isolated treason convictions (after which the defendants apparently were pardoned) would deter antiadministration pamphlets.¹⁷⁸

The government's hopes of controlling the press with treason prosecutions were, however, misfounded. The first unforeseen difficulty was that, although the government had convinced the judges that the most virulently antigovernment publications were treasonable, it could not have even attempted to make that claim about more moderately critical pamphlets. The vast majority of antigovernment literature was not so extreme as to be treasonable and therefore was now immune from any form of restraint.

Second, printers had greater reverence for parliamentary than for judicial measures, and they took the end of licensing to be a sign that anything was permissible. Acts of Parliament, which were passed by the representatives of the nation and were widely circulated in print, enjoyed indisputable and immediate authority. This was not true of judicial declarations. They were infrequently printed and even then only narrowly circulated, and they were often politically suspect. The bench had yet to acquire a reputation for impartiality. Since the 1680s, the bench had been known for its willingness to conform to the desires of the Crown, and its political decisions carried weight only with those who agreed with it. Thus in 1695, despite the convictions of Newbolt and Butler for treason, the press began to flourish, just as it had in 1660 and 1679, when licensing acts did not exist.

A third problem with the new policy arose because the identification of the publications to be prosecuted became much more complicated and administratively more difficult than it previously had been. Although prepublication censorship had not been entirely successful (since most publishers of antigovernment material would proceed illegally rather than apply for a license), the licensing law had at least made it easy for the government to identify the publications eligible for prosecution. Before 1695, it was a simple matter for the messenger of the press, a government employee, to determine whether any given volume he might find in a book stall or shop could be prosecuted; he had only to rummage through the tables and shelves and grab any generally an-

178. Other historians do not mention the fact that the post-revolutionary government intended to rely on treason prosecutions as a regular means of controlling the press. This was a much harsher policy than any normally associated with the English government of the 1690s.

tingovernment book that lacked an imprimatur. After 1695, he had to send the book to a secretary of state or a secretary's agent for perusal and a decision about whether it was criminal, a decision that usually required extensive consultation with the Attorney General.

Yet another unforeseen difficulty was that the broadest sort of general warrants were now of doubtful authority. Before 1695, the licensing laws had authorized either of the principal secretaries of state to issue warrants for searches of all houses and shops of commoners (in other words, anyone) in the book trade. A single warrant could be entirely general, allowing the messenger of the press to search all printers' houses at will. Shortly after the lapse of the Licensing Act, on May 9, 1695, the Duke of Shrewsbury asked the Solicitor General whether a general warrant for search and seizure of all scandalous and seditious publications offered for his signature was still legal.¹⁷⁹ At the time, King William III was fighting Louis XIV's armies on the Continent, and a regency of justices and bishops was handling domestic affairs. One of the regents, the Archbishop of Canterbury, ordered the Attorney General and Solicitor General "to consider how they [pamphlets] may be Supress'd, & the Authors & Publishers may be detected and punished."¹⁸⁰ The Crown lawyers declared "[t]hat a Genl. Warrant could not now be granted to Search houses for Printing Presses, but that it must be done upon Particular Informations upon Oath."¹⁸¹ This opinion prevented Secretaries of State from continuing to issue general warrants; it required that henceforth warrants somehow identify the particular person to be arrested or house to be searched; and it thereby made it all the more difficult to track down offending printers. The Crown lawyers saw that if general warrants could not be used to search houses and shops at will, then the only means of tracing the printers of antigovernment pamphlets was through subterfuge. "They were still punishable when detected. That the properest way for discovering the Authors & Publishers would be to employ some fit Persons to be Conversant among them and to give them suitable rewards."¹⁸² The messenger of the press, armed with a general warrant, would give way to a secret agent

179. *CALENDAR OF STATE PAPERS, DOMESTIC, 1695* (1906) (May 9, 1695).

180. *P.R.O., Regency Papers, SP 44-274*, at 10 (May 28, 1695).

181. *Id.* at 14 (May 30, 1695).

182. *Id.*

working for his "suitable reward." Even the most efficient spy system, however, could not compensate for the loss of general warrants.¹⁸³

C. *The Treason Trials Act*

By far the most serious unforeseen check to the government's use of treason prosecutions against the press occurred in February 1696, when Parliament passed a statute to regulate procedures in prosecutions for treason.¹⁸⁴ Having recently adopted treason as its chief weapon against the press, the Crown suddenly found itself hampered by an act that reformed the excesses of treason trials.

The Treason Trials Act put an end to the government's new press policy. Since the abandonment of the Licensing Act in spring 1695, the Crown's ability to control the press with treason had depended largely upon the harsh trial procedure that characterized treason trials prior to 1696. Treason had always been a difficult means with which to control the press, and it was in part because of the restrictions on defendants' procedural rights that judges were able to impose doctrines of constructive treason such as the notion that printing is an overt act against the life of the king (in Anderton's trial) and that advocating the deposing of the king was tantamount to attempting to kill him (in the trials of Newbolt and Butler).¹⁸⁵ The new statute sharply reduced the likelihood of convictions in treason trials by granting the accused rights such as the right to counsel at trial and the right to be indicted and tried only on the testimony of two or more witnesses. Although members of the parliamentary opposition passed the Treason Trials Act with their own safety in mind, they restrained the government in a way that they did not directly intend. As a result of the Act, not only did politically motivated prosecutions of politicians for constructive treason become less frequent, but it became almost impossible for the government to

183. The power to seize printing presses had also been called into question. CAL-
ENDAR OF STATE PAPERS, DOMESTIC, 1697, at 257 (1927) (July 20, 1697).

184. 7 & 8 William III, cap. 3 (1696).

185. Although the proponents of the Treason Trials Act knew of Anderton's conviction and denounced it as being "against the plain Sense of so many Statutes," they viewed that trial as just another unfair proceeding and not as the harbinger of a new press policy. H.N., A LETTER CONCERNING SIR WILLIAM WHITLOCK'S BILL FOR TRIALS IN CASES OF TREASON I. They did not advance the Act in order to frustrate the Crown's press policy and may not even have been aware that it would have that effect.

obtain treason convictions for printed criticism.¹⁸⁶ The government, which had just switched from licensing to treason law as a means of controlling the press, now found itself unable to use the law of treason effectively.

When the government realized that the restrictive Treason Trials Act would soon become law, its first reaction was to arrest for treason a great many printers so that they could be tried before the statute took effect. In early February 1696, one warrant alone authorized the arrest of fourteen men "for publishing and dispersing seditious and treasonable papers and libels, exciting to treason and rebellion."¹⁸⁷ None appears to have been prosecuted.

Following the winter of 1696, however, the government required a new means of restraining the press. The Crown had switched from the law of licensing to the law of treason in the mistaken belief that the latter would be effective. Unable now to employ even the law of treason against printers, the Crown had to turn to a third and even less desirable option: the law of seditious libel.

The law of seditious libel, however, did not immediately come into use against the printed press. The Privy Council appears to have believed that it was still able to bring treason prosecutions, and continued until 1697 to order the arrest and prosecution of authors and printers. Its directions to Crown lawyers seem to have prompted no trials. Even so, the government still did not turn to the law of seditious libel. Instead, it sought to use the statutes of *Scandalum Magnatum*, and in May of 1697 it ordered the Lord Mayor and aldermen of London and the justices of the peace for Westminster to proceed against authors and publishers of false and seditious news.¹⁸⁸

Nevertheless, Crown lawyers apparently were reluctant to rely

186. The critical role played by the Treason Trials Act in preventing the Crown from using treason prosecutions against the printed press is revealed by the incidence of prosecutions. Although the Treason Trials Act was only one of many obstacles to prosecutions for treasonable printing, all of the other obstacles did not prevent the Crown from obtaining convictions in the cases that occurred prior to the passage of the 1696 Act. After the passage of the Act, the Crown did not even bother to bring treason prosecutions for printing (the only exception being Mathews' trial, which took place more than two decades later in special circumstances under a special act).

187. CALENDAR OF STATE PAPERS, DOMESTIC, 1696, at 34 (1913) (Feb. 4, 1696). Whether the Crown ever managed to arrest them, let alone prosecute and convict them, I do not know. It certainly is unlikely that they were convicted.

188. CALENDAR OF STATE PAPERS, DOMESTIC, 1697, at 175 (1927) (May 28, 1697).

exclusively upon *Scandalum Magnatum* and may have placed greater than usual reliance upon pretrial imprisonment and fees to harass and threaten producers of printed material.¹⁸⁹ By late 1698, the Privy Council was actively participating in such measures, and as a result some details appear in their *Registers*. In December 1698, four producers of antigovernment printed material who apologized for their misdeeds were, by order of the Privy Council, released "without paying of fees."¹⁹⁰ In May 1699, the King ordered "a noli prosequi to be entered to all proceedings" involving a Mr. Hicks, on the ground that he had "behaved himself."¹⁹¹

Prosecution for *Scandalum Magnatum* and imprisonment without trial were only temporary means of restraining the press while a satisfactory substitute for licensing and treason prosecutions was developed. As will be shown below in Part VI, the judges and possibly the Crown lawyers had in 1696 already begun an attempt to improve the effectiveness of the law of seditious libel as an instrument of prosecution. Eventually, under Queen Anne, in the early years of the eighteenth century, the law of seditious libel became the government's chief means of restraining the printed press.

Thus, the end of the licensing system and the Treason Trials Act of 1696 led the government to rely on seditious libel prosecutions to restrain the printed press. Whereas before 1696 the Crown had used the law of seditious libel chiefly against manuscripts, and against printed offenses only when it had no other choice, it now would become quite dependent upon that law to punish producers and distributors of printed material. Prosecutions for seditious libel, which had been infrequent, soon became very common.¹⁹² Between 1702 and 1760, at least 115 informations and indictments for seditious libel were filed in the Court of

189. In the last half of the seventeenth century, the law of seditious libel apparently was not even considered sufficient to deal with manuscripts. In 1675, L'Estrange argued that the Licensing Act should be extended to apply to manuscripts. Historical Manuscripts Commission, 9th Report, App. at 66 (Nov. 11, 1675).

190. P.R.O., Privy Council Registers, PC 2/77, at 275 (Dec. 3, 1698).

191. P.R.O., Privy Council Registers, PC 2/77, at 334 (May 18, 1699). Hicks was said to have behaved himself since 1691, but the years in which the proceedings against him were initiated are not mentioned.

192. Before 1696, seditious libel prosecutions were relatively infrequent, since they were necessary only when the licensing laws were inapplicable, as when there was a manuscript rather than a printed offense.

King's Bench.¹⁹³ Additional trials took place at the Old Bailey. Following 1696, the law of seditious libel shed its seventeenth century obscurity. It had become the sole surviving instrument of prosecution in the government's arsenal of antipress weapons.

VI. THE DEVELOPMENT OF THE EIGHTEENTH CENTURY DOCTRINE OF SEDITIONOUS LIBEL

The new role of the law of seditious libel as the government's chief means of prosecuting the printed press led to doctrinal modification of that law.¹⁹⁴ The bench appears to have understood that the seventeenth century law, as inherited from Coke, would have to be modified if it were to suit its eighteenth century function.¹⁹⁵ Whereas it had been merely a subcategory of the law of libel or written defamation, it now became a separate law, with its own precedents. Under the new version of the law, the scope

193. AN ACCOUNT OF PERSONS HELD IN BAIL TO ANSWER IN THE COURT OF KING'S BENCH FOR LIBEL, FROM 1 ANNE TO 57 GEO. 3 (E.H. Lushington ed. 1818) [hereinafter cited as ACCOUNT OF PERSONS HELD]. This is a list of persons so held in bail. I have assumed that informations and indictments were for seditious libel rather than for libels of private persons, except where the list indicates otherwise. Note that not all of the accused were actually tried. During the first 31 years of George III's reign, there were, it has been estimated, about 70 *ex officio* prosecutions. A. ASPINALL, POLITICS AND THE PRESS, 1780-1850, at 41 (1949).

194. For another point of view, see 2 J. STEPHEN, *supra* note 1, at 316; 8 W. HOLDSWORTH, *supra* note 1, at 341; F. SIEBERT, *supra* note 1, at 380-81. I wish to thank Professor John Langbein of the University of Chicago Law School for helpful suggestions with respect to my characterization of Holt's interpretation of the law.

195. The courts had to formulate a means of prosecuting the printed press because Parliament failed to do so. Although a variety of ingenious methods for facilitating prosecutions were proposed in the two decades following the end of licensing, the most efficient were watered-down versions of licensing that required publication or registration of an author's name. Probably because licensing had become associated with Catholicism, no administration managed to force such measures through the legislature. Consequently, the burden of developing a method of dealing with the printed press fell upon the judges.

It should be noted that the 1698 Blasphemy Act does not provide any reason to believe that Parliament dealt effectively with the need for a means of prosecuting the printed press. Although the Act condemned printed as well as other forms of blasphemy, it was not intended to be the basis of regular prosecutions of antigovernment material. It did not deal with all troublesome religious writings, let alone nonreligious publications. 9 William III, cap. 35 (1698). Similar observations can be made about the 1706 Regency Act and the 1712 Stamp Act. The treason clause of the 1706 Regency Act was not contemplated as a means of regular prosecutions but rather was designed to be used on rare occasions during regencies. See note 266 *infra*. The Stamp Act was enforced by prosecutions but worked as a monetary hinderance to publication. Both statutes, moreover, were enacted long after the need for an efficient means of prosecution had already prompted the judges to seek a common law remedy.

of prohibited conduct was enlarged, and the issues decided by the jury were narrowed. Nevertheless, the judges were not entirely successful; although capable of modification, the law was not sufficiently malleable to allow the innovations necessary for it to be made appropriate for its new role.

A. *William III's Reign From 1696*

The attempt to adapt the law of seditious libel to its new function took place over several decades and will be examined chronologically in periods defined by shifts in policy toward the press, which usually reflected changes in the governing administration. In the first such period (1696–1702), after the collapse of the policy of using constructive treason against the printed press, the government of the last half of William III's reign employed the law of libel as it had been used for almost a century, chiefly to prosecute manuscript offenses.

The Crown's failure in this period to use the law of seditious libel regularly against printed material was not, however, a consequence of a misunderstanding of the law of seditious libel's new function. At least the judges—especially Holt—were astute and appear to have realized that the law would soon have to play a greater role than it had previously. When eighteenth century governments applied the law of seditious libel to printed offenses, they benefited from the fact that William's judges had already modified libel law in cases of manuscript crimes.

The first such trial was that of one Paine in 1696 in King's Bench.¹⁹⁶ Three sets of facts were alleged. First, Paine wrote the libel, an *Epitaph* on Queen Mary, from dictation to him by another, unidentified person. Although Paine confessed that he wrote the *Epitaph*, he insisted that he kept it hidden in his study with no intention of publishing it. Second, his servant recalled that one day Paine fetched the *Epitaph* from his study and that either Paine or another man, a Dr. Hoyle, read it aloud in a room out of the servant's sight but within his hearing. Third, Paine "by mistake, delivered it to one Brereton instead of another paper, who transmitted a copy thereof to the Mayor of Bristol."¹⁹⁷ Although Brereton died prior to the trial and his deposition was ruled inadmissible, Paine confessed to this third incident.

196. *King v. Paine*, 87 Eng. Rep. 584, 5 Modern 163 (K.B. 1696). The defendant may have been Henry Neville Payne. 5 POEMS ON AFFAIRS OF STATE 440 (1968).

197. 87 Eng. Rep. 584.

The defense appears to have argued that Paine did not publish or intend to publish the libel, and in its summation the court may have repeated those arguments. The publication of the *Epitaph* when it had been read out loud and overheard by the servant had not necessarily been by Paine, since the servant was uncertain which of the two men had been speaking. The other publication, when the *Epitaph* had been sent to Brereton, had been unintentional: "There will be no proof of a malicious and seditious publication of this paper; for he [Paine] confessed that it was delivered by mistake."¹⁹⁸ In short, it was unclear whether, in one incident of publication, Paine had read the *Epitaph* aloud; and it was fairly certain, in the other incident, that although Paine had published the *Epitaph* to Brereton, he had done so without knowledge, that is, intention.

Defense counsel apparently tried to prove Paine's lack of knowledge, and therefore, as was the acknowledged practice in such a case, the jury had to decide whether the defendant had published the libel intentionally. The evidence showed that the only act of publication unquestionably committed by Paine, his sending of the libel to Brereton, had been done mistakenly, and the jury accordingly found Paine not guilty of publication. (It should be noted that the jury decided the questions of knowledge and malice only after these issues had been raised by evidence of lack of knowledge and that no one doubted the propriety of a jury decision on these questions.) The jury, however, was uncertain whether the making of a copy of a libel without intention to publish was an offense, and therefore it gave an additional, special verdict. The jurors found that an unknown person had dictated the words of the libel, "which the defendant did write; and if that will make him guilty of composing and making the libel, then they find him guilty."¹⁹⁹ After pronouncing an opinion, the court adjourned without giving judgment.²⁰⁰ Nevertheless, the judges' opinion made clear that they thought Paine guilty.

In justification of its opinion, the court had to point to an act of publication. The mere making or composing of a libel had never been regarded as criminal without additional proof that the

198. *Id.* at 585.

199. *Id.*

200. Following its account of the court's opinion of Paine's guilt, the report tersely announces "Sed adjournatur." 87 Eng. Rep. at 587. I have not, unfortunately, had an opportunity to search the records for further proceedings in this case.

defendant either had knowingly published the libel or had at least intended to do so.²⁰¹ In this case, neither of the two acts of publication was clearly legally sufficient to support a conviction.

One justification given by the court for its opinion of Paine's guilt was that Paine had contributed to a publication by the mere act of fetching the *Epitaph* for the purpose of having it read. The court explained that "[I]t is not material whether it was read by Dr. Hoyle or not; for if that was the libel and was read by either [man], it is a publication."²⁰² Paine had brought the libel into the room in order to have it read, and thus, regardless of who actually read it, Paine had intended that it be published and had assisted in its publication. Consequently, the court thought Paine guilty.

Another interpretation (probably that of Holt) was that Paine had committed an offense without having intended publication. Using the language of the information, which accused Paine of composing and making the paper, the court argued: "It does not appear upon the evidence that this libel was ever written before; so that the defendant must be guilty of the making it, by first reducing it into writing, though probably he might not compose it."²⁰³ Thus, Paine's writing of the *Epitaph* for the first time was said to constitute a criminal "making" of the libel (implying, however, that a second or third copying of it would not be such a "making").

In sum, the dicta in Paine's case established two alternative theories of guilt. According to one theory, to assist or even encourage the publication of a libel was criminal. According to the other, more novel interpretation, to write down a libel for the first time was to "make" it, and such "making a libel is an offense, though never published."²⁰⁴

Holt gave that second rule more permanent authority in 1699 in the case of *King v. Bear*.²⁰⁵ The indictment—found three years earlier before Holt on circuit in Devon—was removed into King's

201. See text accompanying notes 108 and 130 *supra*.

202. 87 Eng. Rep. at 587.

203. *Id.* at 586–87.

204. *Id.* at 586.

205. The standard accounts of this case are *King v. Bear*, 90 Eng. Rep. 1132, Holt 442; 91 Eng. Rep. 363, 2 Salkeld 417; 91 Eng. Rep. 1175, Lord Raymond 414 (K.B. 1698). Fortunately, Justice Holt's opinion in this case also survives verbatim in his manuscript reports. *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981 (1699).

Bench by certiorari and then sent back to Devon to be tried at *nisi prius*.²⁰⁶ It accused Bear merely of writing and collecting libelous poems, saying nothing of his publishing them or intending to do so. In a special verdict, the jury found that Bear had written and collected the poems but "as to all . . . other things . . . he is not Guilty."²⁰⁷

In King's Bench, after the return of the case from trial at *nisi prius*, Holt and his colleagues held Bear guilty on the special verdict, in spite of arguments to the contrary from both Bear and king's counsel. The prosecuting attorney moved that the verdict be quashed and that a new trial be granted on the ground that the verdict was ambiguous and repugnant. Seeing that the king's counsel "Designed the Quashing the Verdict in Order to have a New Tryal," the defense was "willing to take Advantage [of the Crown's position] rather than undergoe the Judgement of the Court." Yet the defense "did not so much Insist upon [the verdict's repugnancy], because that would be to Close with the Kings Council."²⁰⁸ Instead, it demanded judgment and, in the alternative, moved for arrest of judgment.

The defense's argument in arrest of judgment concerned a technical flaw in the form of the indictment. In the course of showing that the indictment was satisfactory, Holt explained that an indictment or information had to set forth either the defendant's actual words or the sense and substance thereof in Latin. The importance of this seemingly innocuous rule was that it placed in the hands of the judges the question whether the content of the libel was defamatory. How it achieved this will be examined later in this article in connection with another case.²⁰⁹

206. King v. Bear, 90 Eng. Rep. at 1133. In the summer of 1696, Holt went on the western circuit. J.S. COCKBURN, A HISTORY OF ENGLISH ASSIZES FROM 1558-1714, at 279 (1972). An indictment from one county could be removed by certiorari in order to send it for trial at *nisi prius* in another county. In Bear's case, however, it is unclear why certiorari was granted, since the trial took place at *nisi prius* in Devon, the very county in which the indictment had been found. The effect and perhaps the purpose of this arrangement was to facilitate a ruling on the substantive issues decided in the case, namely, whether publication or intent to publish was an element of the offense of seditious libel.

207. Rex v. Bear, British Library, Hardwicke Papers, Add. M.S. 35981, at 2 (reckoned from the beginning of the case). Of the charge that Bear "collected" libels, Holt said that it "is a foolish Word in the Indictment." *Id.* at 15.

208. *Id.* at 2. Holt observed: "The Kings Council at first moved upon the verdict to have it Quashed for Uncertainty and Repugnancy which was a design to have him [Paine] Tried again." *Id.* Thus it was Justice Holt who took the initiative to eliminate the publication requirement, not the King's counsel.

209. Regina V. Drake, see notes 232-236 *infra* and accompanying text.

The defense argued for an acquittal on the ground that Bear had not been found guilty of publication. Holt responded with the novel opinion that neither the publication of the libel nor even the intent to publish it was essential to the crime. What had been one of the possible holdings in Paine's trial now became a necessary and therefore authoritative holding. Traditionally, the defendant's publication of the libel (or his intent to publish it) and his knowledge in regard to that act were considered essential to a conviction. As Lord Chief Justice Hyde had summed up many years earlier: "Printing alone is not enough, for if a man prints a book to make a fire on, that's no offense, it is the publishing of it which is the crime."²¹⁰ Until Holt's decision in Bear's case, writing or "printing alone" had not been criminal.

How did Holt justify his opinion? First, as had been stated in Paine's case, Holt maintained that to reduce a libel to writing was to "make" it, according to the form of the indictment. He said that the person who first put a libel into writing was guilty, because he "makes the Scandalous and reproachful Words become a Libel."²¹¹ Thus, Holt began by confirming what had already been suggested in Paine's trial, that to be the first to write down a libel, even without intent to publish, was to "make" it and was within the charges.

Even if "writing" were considered to be "making" a libel, Holt still had to show that the mere making of a libel, without either knowingly and maliciously publishing it or even intending to do so, was criminal. This requirement he simply evaded. Although Holt quoted some Star Chamber cases as precedents,²¹² he failed to find any that were relevant. It was true that bare writing had been punishable in the Star Chamber, but not under any form of libel law, as the judges of that court made clear in a dictum in *Dr. Edwards v. Dr. Wooton*, which involved a letter sent solely to the person defamed. In that case, the judges distinguished between such a letter, which was punishable only as

210. Trial of Dover, Brewster & Brooks, 6 STATE TRIALS, *supra* note 11, at 539, 563 (1663).

211. Rex v. Bear, British Library Hardwicke Papers, Add. M.S. 35981, at 7. If the words of a book were:

not Written . . . they will not Amount to a libel. Now he that first Writes these reproachful Words is the Writer of the Libel, and as such a Principal in the making of the Libel as he that was the Composer or Inventor, for he doth that very Act that Consumates the Offense of Libelling, and makes the Scandalous and reproachful Words become a Libel.

212. *Id.* at 8-16.

a provocation to revenge, and "the dispersing of copies of it," which constituted libel or defamation.²¹³ Similarly, in Sir Baptist Hickes' case, which was cited by Holt, an information lay against the culprit for provocation to breach of the peace rather than for libel, since the defendant sent a derogatory letter to the defamed man, Hickes, rather than to a third party.²¹⁴ In *Barrow v. Lewellin*, also cited by Holt, the court stated expressly that the conviction was for a provocative letter rather than a libel.²¹⁵ A mid-seventeenth century law book even singled out this case as an example of defamation not published to a third party.²¹⁶ Another trial cited by Holt, Goodricke's case, was for *Scandalum Magnatum*.²¹⁷ There were, in fact, no plausible precedents for Holt's ruling in Bear's case.²¹⁸

Rather than argue directly that publication was not a necessary element of the crime, Holt insisted that a crime was committed when the libel was first reduced to writing. As with all other

213. *Dr. Edwards v. Dr. Wooton*, 77 Eng. Rep. 1316, 12 Coke 35 (Star Chamber 1607). A seventeenth century member of Grey's Inn, Cornelius Burton, summarized the case of *Edwards v. Wooton*: "Libel punish[ed] in Star Cham[ber] . . . as revenge and breach of peace." 12 Coke 35 (1656); see also J. HAWARDE, *supra* note 25, at 344.

214. *Sir Baptist Hicke's Case*, 79 Eng. Rep. 1240 (Star Chamber 1677). Sir Robert Sawyer made this point in the Seven Bishops' trial. *Trial of the Seven Bishops*, 12 STATE TRIALS, *supra* note 11, at 183, 337 (1688). Francis Bacon added a convoluted argument that the offense was a libel in that Hickes was forced to publish the scandalous letter to his friends "for fear that the other party would publish it." *Id.* at 1241. This analysis, however, had been rejected only a few years before in the case of *Barrow v. Lewellin*, and most of the court seems to have thought Hickes' case a prosecution for a provocation to breach of the peace. *Barrow v. Lewellin*, 80 Eng. Rep. 211, Hobart 63 (Star Chamber 1615).

215. *Barrow v. Lewellin*, 80 Eng. Rep. at 211.

216. 2 J. MARSH, *ACTIONS FOR SLANDER* 26-27 (1656).

217. *Goodricke's Case*, 72 Eng. Rep. 927, Moore 821 (Star Chamber 1612).

218. Other cases that were cited by Holt but did not support his position are discussed below. The only language in *Lamb's case* that could conceivably be relied upon by Holt concerned the evidence required to prove publication rather than whether publication was an element of the crime. *Lamb's Case*, 77 Eng. Rep. 822, 9 Coke 59 (Star Chamber 1610). In *Rex v. Saunders*, 83 Eng. Rep. 106, Sir T. Raymond 201 (K.B. 1670), a prosecution for libel of a private person, the defendant was found guilty of publishing the libel, even though publication had not, in fact, been proved. This was not a precedent for the unimportance of publication, however; rather it was a case in which neither the judge nor the defendant insisted upon proper proof of publication. The case, therefore, was criticized by the reporter. The case of *John de Northampton*, also cited by Holt, involved a published letter. E. COKE, *supra* note 136, at 174. Moreover, although the Star Chamber had punished the mere failure to deliver a libel to a magistrate, King's Bench after the Restoration refused to treat such a failure as a crime. Anonymous, 86 Eng. Rep. 22, 1 Ventris 31 (K.B. 1669). Note, however, that Hudson, in his *Treatise of the Court of Star Chamber*, dealt with provocative letters as if they were a type of libel. Hudson, *supra* note 103, at 101, 103.

laws, "He that does that without which the thing could not be what it is, viz. a libel, cannot be construed to be innocent."²¹⁹ In the name of a superficial consistency, that all those who perform an essential part of a crime are subject to prosecution, Holt altered the law of seditious libel so that writing a libel without publishing it was an offense. He was correct in observing that no prosecution for libel could have been brought if the offensive words had never been written down, but he failed to mention that, according to all relevant precedents, the crime of libel had not been committed unless the writer had also published or intended to publish the writing.

Whatever his technical explanations for the opinion, Holt seems to have realized that he was taking great liberties with the law, and he justified himself on the basis of general political considerations. Holt concluded his opinion with a declaration that the crime of writing libels was an offense in all societies, citing Justinian and the civil law for proof:

So this Opinion that We now give is no Novelty in the World, It is founded upon the principle of the preservation of All Government, and Safety of all Civil Society: And if it Should be no Crime to Write Libels, the Government & the Magistrates, must be Exposed to the Malice & Discontents of Disaffected persons.²²⁰

Holt declared that the offense of writing libels (without intent to publish them) "is no Novelty in the World," probably because he knew that it was very much a novelty in England. He cited Justinian since he could not find precedents in Coke. Holt relied upon the preservation of government and the example of Roman law to justify a fundamental change in the common law.²²¹

219. *Rex v. Bear*, 91 Eng. Rep. 363.

[I]t would be very Strange that this Crime of Libelling that in the Eye of the Law should be so great, And yet a person who is the Writer of the Libel . . . should be Innocent . . . that the reason of it is not . . . Consistent with itself nor can stand upon firm principles.

Rex v. Bear, British Library, Hardwicke Paper, Add. M.S. 35981, at 8.

220. *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981, at 16.

221. After Holt had given his opinion, Turton and Rokeby "cited some cases, to prove, that the writing of a libel, without publishing, was punishable in the Star Chamber, and by consequence now punishable by indictment." 91 Eng. Rep. 1175, 1177 (1699). It is ironic that these judges distorted Star Chamber law in the name of the Star Chamber powers inherited by King's Bench. Holt also believed that all of the Star Chamber's powers resided in King's Bench. *Prynne's Case*, 90 Eng. Rep. 1100, Holt 362, 87 Eng. Rep. 764, 5 Modern 459. (K.B. 1690). A Chief Justice of the previous reign had used such an explanation of the court's power to justify a licensing prosecution under a statute. *Rex v. Johnson*, 90 Eng. Rep. 328, Comberbach 36 (K.B. 1686).

But Holt was not satisfied in Bear's case merely to make the "first writer" of a libel guilty regardless of an absence of intent to publish; he also tried to show that all those who copied seditious libels without intent to publish were guilty. Holt made a digression to let the public know that the writing or printing of copies of the first libel, even without intention to publish them, was just as criminal as the making of the original, since the effect of the copies, if published, would be equally pernicious.²²²

This dictum, however, created two problems. First, in justifying the holding in Bear's case that it was illegal to reduce a libel into writing for the first time, Holt relied upon only one argument: that the initial act of writing was an essential element of the crime. Now Holt added in dicta that to make additional copies of the libel without intending to publish them was equally criminal, since they would have an equally undesirable effect if published. This was a poor argument, for unpublished libels have a merely potential rather than an actual effect, and, in any case, the original libel was punishable solely because an initial reduction into writing was essential to the crime, not because of its effect. Holt's second difficulty was to show that English transcripts of libels within indictments and informations were not also libels. If it was criminal to make any copy of a libel, regardless of the innocence of one's intentions, why were the law officers and clerks who transcribed libels within indictments not vulnerable? Holt could only reply that the words of a libel in a indictment were written "[i]n order to Punish the party for Libelling, Therefore he that Writes it upon that Account Writes not Libellum but Tenorum, or Transcripsit Libelli."²²³ Law officers who prepared indictments and informations were privileged.

By eliminating the government's need to prove publication or intent to publish, Holt effectively precluded some defendants from rebutting the presumption that they had acted with knowledge or intention. Although an act of publishing can be unintentional (as in Paine's case), an act of writing or printing usually cannot. Thus, the presumption of knowledge could only be denied with respect to allegations of publishing or intending to publish. If, as a result of Bear's case, publication was no longer a necessary part of the charges, it would be of no use for a defendant charged merely with the making of a libel to deny knowledge

222. *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981, at 11-16.

223. *Id.* at 9-10.

or intention. (A man accused of publishing rather than merely making a libel, however, could still defend himself by proving that he had published it unknowingly.)

Bear's case, like that of Paine, concerned a manuscript rather than a printed libel. Only when a defendant, such as Bear, wrote down libels in manuscript with no intention of publishing them could a court hold that it was criminal merely to make a libel without publishing it or intending to do so. Thus, the use of the law of seditious libel against manuscripts permitted the bench to develop doctrines that, if accepted, could later be used in prosecutions for printed material.

The role of trials for manuscripts as test cases appears to have been understood at the time. Most manuscripts were written for eventual publication, and this was regularly alleged in indictments and informations for libel before 1696. The indictment in Bear's case, however, conspicuously left out any suggestion that Bear either published or intended to publish; it said, to the contrary, that he collected the writings "for himself."²²⁴ This unusual formulation of the charges appears to have been framed in order to test whether the mere making of a libel was a crime. Thus, whoever was responsible for the language of the indictment seems to have understood the importance of trials for manuscripts for purposes of eliminating the publication requirement.

In sum, by 1699 Holt had used trials for manuscripts to make some important modifications to the law of seditious libel. He had established requirements for indictments and informations that, as will be seen below, precluded juries from deciding whether the content of a libel was defamatory. He had, moreover, declared it criminal merely to write a libel without any intention of publishing it and had thereby also allowed charges to be framed in such a way that defendants could not rebut the presumption that they had acted with knowledge. Had his elimination of the publication requirement been accepted, it would have transformed the law of seditious libel.

B. *Queen Anne's "Moderate" Tory Ministry*²²⁵

A momentous change in the government's use of the law of

224. *Id.* at 1.

225. It should be noted that references in this article to political parties are intended to convey information about general affiliations and should not be understood to imply the existence of formal party organizations. Nor should such references be

seditious libel occurred in about 1700, probably in 1703 under the recently crowned Queen Anne. From at least 1703 until its final disintegration in 1707, Queen Anne's first, "moderate" Tory ministry regularly used the law of seditious libel to prosecute the printed press—a policy that had never before been attempted and that offered Chief Justice Holt an opportunity to modify the law further. This change in policy may have resulted in part from the ministry's realization that Holt's decision in *Bear's* case had improved the ability of the Crown to obtain convictions.²²⁶

In Tutchin's trial in 1704, Holt held that it was criminal to bring scandal upon the government by defaming the government in general as well as by defaming particular persons within it. Following the traditional law of defamation, Tutchin's counsel insisted that libels must reflect on specific individuals.²²⁷ The defense argued that Tutchin's newspapers, *The Observators*, were innocent papers, and not libels; and . . . that nothing is a libel but what reflects upon some particular person."²²⁸ In response, Holt ignored defamation precedents and said that criticism of the government as a whole was criminal.

But this is a very strange doctrine, to say, it is not a libel, reflecting on the Government If men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; for it is very necessary for every Government, that the people should have a good opinion of it. And nothing can be worse to any Government, than to endeavour to procure animosities as to the management of it. This has been always look'd upon as a crime, and no Government can be safe unless it be punished.²²⁹

Justifying his position with general political considerations, Holt declared that a seditious libel could bring scandal on the government by reflecting on it as a whole as well as by reflecting on the individuals in it. He was able to do this without violating his legal principles because, unlike Coke, he did not consider seditious libel so much a form of defamation as a separate offense of sedi-

understood to imply that party affiliations consistently dominated political controversies or individuals' responses thereto.

226. For details of the administration's policy, see J. DOWNIE, ROBERT HARLEY AND THE PRESS (1979).

227. The traditional rule was stated in *King v. Alme & Nott*, 91 Eng. Rep. 790, 1 Lord Raymond 486, 91 Eng. Rep. 1224, 3 Salkeld 224 (K.B. 1699).

228. *Queen v. Tutchin*, 90 Eng. Rep. 1133, Holt 424 (Q.B. 1704).

229. 90 Eng. Rep. at 1133-34.

tious writing. Although a number of seventeenth century judges and lawyers believed that a scandalous reflection upon the government as a whole was a libel, Holt was the first to rely upon this doctrine in a decision.²³⁰

In 1706, in the trial of James Drake, Holt discussed the power of the bench to decide the question of whether a writing was defamatory. Judges had always exercised this power largely without explanation, and now Holt confirmed the rule of Bear's case concerning the form of indictments and informations that preserved the court's power.

Holt's rule rested on earlier law relating to those indictments, informations, and other Latin records that had to recite language (such as a defamation) originally written in English. In order for an indictment or information for an English-language libel to be entirely in Latin, it had to recite in Latin the sense or substance of the defamatory words. Alternatively, an exception to the use of Latin was allowed in the interest of precision: The charge could set forth the actual defamatory words, even though they were not in Latin. Both of these methods of describing the libel left in the hands of the court the decision as to whether or not the words were defamatory, for they put a description of such words within the record and thereby brought them within the cognizance of the court.

Holt's opinion in Bear's case forbade indictments that set forth only the effects of the defamatory language rather than the actual words or the sense and substance thereof in Latin, since such indictments were insufficiently precise and denied the bench the opportunity to decide whether the writing was defamatory. The defendant's actual words or the sense and substance thereof "ought to appear upon Record, for of that the Court is to Determine whether they be Scandalous or not."²³¹ Charges that failed to meet this strict requirement and gave only the effect of the libel would have undesired consequences:

We all held [in Bear's case] that if the Informacon had been only ["ad effectum Sequentem,["] that would not have Confined the Words in the Information to the Words of the Libell. Such an Informacon ["to the effect following["] is to leave the Construction of it to the Jurors So that if a Jury that are to Try whether it be of that effect or no shall make a Construc-

230. See note 127 *supra*. Note that Tutchin escaped judgment because of an error in a writ. Trial of John Tutchin, 14 STATE TRIALS, *supra* note 11, at 1195 (1704).

231. Rex v. Bear, British Library, Hardwicke Papers, Add. M.S. 35981, at 3.

tion of it to be so, that is to leave the Interpretacon to them in Point of Law, And to Conclude the Court where the Indictment is Tried.²³²

In other words, the court "tried" an information or determined whether it stated an offense, but it thereby could determine issues of law only to the extent that the relevant facts appeared upon the record. If the record contained merely the effect of the libel rather than a factual description of it, the court would be unable to determine whether the defendant's words were defamatory, and the jury would assume that task. Thus, Holt's decision in Bear's case protected the power of the court by requiring indictments and informations to describe a defendant's actual words or the sense and substance thereof in Latin.

In the prosecution of Drake, the Crown paid the price for the exacting technicality of the rule in Bear's case. In accordance with that rule, the information against Drake attempted to give a transcript of Drake's actual words in English, but it failed, for, as the jury pointed out in a special verdict, the word "nor" had been substituted for the word "not." Thus, the facts of the case did not come within the offense stated in the information; "the proof doth not Amount to the Charge."²³³ The technical requirement that in Bear's case had been the basis of a rule protective of the court's power and therefore of the Crown could be costly to the Crown if it failed to meet that requirement. If the Crown was to have the benefit of the law, it would have to comply with the law.

Drake's case was decided in the face of opposition from Crown lawyers, who probably not only desired the immediate satisfaction of a conviction but also feared the long-term consequences of the case, which was so unforgiving of a clerical slip.²³⁴

232. *Rex v. Drake*, British Library, Hardwicke Papers, Add. M.S. 35980, at 13-14. In language similar to Holt's in Drake's case, Mansfield in 1783 looked back to the dictum in Bear's trial "that the writing complained of must be set out *according to the tenour*: Why? That the court may judge of the very words themselves; whereas, if it was to be *according to the effect* that judgment must be left to the jury." 21 STATE TRIALS, *supra* note 11, at 847, 1036 (1783).

233. *Rex v. Drake*, British Library, Hardwicke Papers, Add. M.S. 35980, at 3.

234. Holt may have been the first to perceive the advantages of a rule that prohibited the recitation of merely the effect of a libel. The rule was not attractive to supporters of the Crown so long as other, less demanding means of withdrawing power from juries remained available. Jeffreys, for example, had paid no attention to discrepancies in the English transcript in Baxter's trial. He did so not only because he was zealous for the King and greatly desired a conviction in that particular case but also because he had no reason to resort to technical devices to undermine the jury's power. He possessed more direct methods. *Rex v. Baxter*, 11 STATE TRIALS, *supra* note 11, at 494 (1685). For

Crown lawyers were so concerned that they brought a writ of error in the House of Lords, where the case fortuitously came to an abrupt end as a result of Drake's untimely death.²³⁵ Holt's decision thus was left in place.

Holt's rule concerning indictments and informations ensured that in each case for seditious libel judges rather than juries would be able to decide whether the writing was defamatory. The resulting controversy over the power of juries in trials for seditious libel was settled only in 1792, when Fox's Libel Act required that juries be permitted to give general verdicts on the whole matter put in issue by the charges.²³⁶

Among the further developments in the law of seditious libel were clarifications designed to counter attempts by authors to evade prosecution. Since 1696, the law of libel had become increasingly effective as a means of prosecuting authors, printers, and publishers. In response to this development, authors refined the art of irony and satire. It is one of the minor curiosities of English literary and polemical history that the Crown's dependence upon seditious libel law after 1696 to prosecute the press directly encouraged the use of irony and satire as a common form of literary expression.

Lord Chief Justice Holt did not intend to let writers and printers create loopholes in the law of seditious libel and therefore declared ironical libels to be punishable. There was earlier authority for this,²³⁷ and in 1706 in Joseph Browne's trial Holt established a clear precedent.²³⁸ In that case, the defense moved for arrest of judgment on the ground that Browne had "said no ill thing of any person, and all he said was good of them." Holt answered that "An information will lie for speaking *ironically*."²³⁹ Apparently Holt allowed the jury to decide whether the writing

a discussion of contemporary opinion about the role of the jury, see Green, *The Jury, Seditious Libel, and the Criminal Law*, in Juries, Libels, & Justice, *supra* note 135.

235. 6 N. LUTTRELL, *supra* note 175, at 105, 121 (entries of Nov. 7 and Dec. 26, 1706).

236. 32 Geo. 3, ch. 60 (1792). The origin of the legal doctrine that allowed judges to prohibit juries from deciding whether writings were defamatory is not discussed by Stephen, Holdsworth, or Siebert.

237. Although not very explicit, the earlier authority ran back as far as the time of Coke. *Libellis Famosis*, 77 Eng. Rep. 250 (Star Chamber 1605). The danger that Browne's writings might be protected by his irony was not illusory, for Browne's skills were considerable. See 7 POEMS ON AFFAIRS OF STATE, *supra* note 196, at 151.

238. *Queen v. Dr. Brown*, 88 Eng. Rep. 911, 11 Modern 86 (Q.B. 1706).

239. *Id.*

was intended to be ironic. In so doing, Holt was not granting the jury any new authority; on the contrary, he was simply following the late seventeenth century practice of allowing the jury to decide the intent of a writing that was not clearly malicious.²⁴⁰ In the information, the writing was said "to be wrote *ironice*, . . . and the jury are judges *quo animo* this was done, and they have found the ill intent."²⁴¹ The jury had to decide the question of irony and therefore of ill intent in Browne's case, because allegedly ironic writings were, by their nature, of uncertain intent. The standard to be used by the jury was the understanding given to the writing by all the world. In 1729 it was repeated that the jury should understand the libel "such as the generality of readers must take it in, according to the obvious and natural sense of it."²⁴² Moreover, by 1727 it had been held that "The def[endant] shal[I] show in what other sense his paper can be taken."²⁴³ In other words, the defendant had the burden of proof.

In interpreting the law of seditious libel, Holt may have been partially motivated by a general desire to systematize the law. Certainly the increase in the frequency of trials after 1696 meant that previously unraised issues demanded attention.

A more satisfactory explanation of Holt's behavior is necessary, however. Holt could have interpreted the law of seditious libel in several ways, yet he chose to understand it in a manner that would have astonished Coke a hundred years earlier. When discussing libel prosecutions by Coke and others in the Star Chamber, an early seventeenth century lawyer had explained: "But it must not be understood [that these prosecutions were] of libels which touch the alteration of government; . . . but libels against the king's person and nobles have been here examined."²⁴⁴ A hundred years later, Holt had a radically different conception of the crime: "If men should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist."²⁴⁵ The law that had once protected

240. See notes 141-146 *supra* and accompanying text.

241. 88 Eng. Rep. at 912.

242. King v. Clark, 94 Eng. Rep. 207, 1 Barnardiston 304 (K.B. 1728).

243. This rule apparently comes from a trial of a member of the Knell family, although it is not clear which one. P.R.O., Treasury Solicitor's Papers, TS 11/1076, no. 5338 (1727). (In his notes of Franklyn's first trial, the Treasury Solicitor quoted the ruling in the trial of Knell for printing Mist's Journal.)

244. Hudson, *supra* note 103, at 100.

245. Trial of John Tutchin, 14 STATE TRIALS, *supra* note 11, at 1095, 1128 (1704).

individuals, whether public or private, now also shielded an institution: the government.

This shift in opinion between Coke and Holt was largely the result of the fact that the word "libel" and especially the phrase "seditious libel" were associated with the offense that Coke had so carefully referred to in his report of Pickering's case as "libel of magistrates." Written defamations of officials were, in the language of the law, "libels," and they had a seditious effect; so it is not surprising that they were thought of as "seditious libels." The use of the phrase "seditious libel" in connection with libel of magistrates was encouraged by the language of indictments and informations for libel of magistrates, which (like those for other types of illegal antigovernment writing) referred to the offensive materials as "seditious libels." The identification of the name "seditious libel" with the offense punished by Coke became especially well-established at the very end of the seventeenth century when the other laws for controlling the press had become obsolete. The publications prohibited by those other laws had been known as "seditious libels," in the sense of seditious writings; but by about 1700 libel of magistrates was the only offense concerning seditious writings that could still be prosecuted regularly, and consequently it became specifically associated with the name "seditious libel."

The danger of the association of Coke's offense with the phrase "seditious libel" was that most people did not understand that phrase to mean a written defamation of an official. Instead, they thought of a "seditious libel" as a seditious writing, regardless of whether it defamed an individual, and they therefore assumed that Coke's law broadly prohibited seditious writings, not just writings that seditiously defamed officials. The law delineated by Coke came to be understood as a law for protecting the institution of government rather than individual officials. Already in the early seventeenth century, and increasingly thereafter, the law of libel of magistrates was described in dicta and elsewhere as extending to libels of the state. The defamatory nature of the law was disappearing.²⁴⁶

246. Nineteenth century commentators understood and articulated this distinction without knowing its origin. After discussing defamatory libels, the authors of one book on the law of the press came to other types of libels, including seditious libels, which they termed "disorderly," and of which they wrote: "The libels which have been classed under this head differ altogether from those hitherto dealt with. They are not, indeed, in the popular sense libels at all—that is, they are not defamatory. They are simply

With this new understanding of the law, it seemed justifiable on strictly technical legal grounds to ignore precedents concerning libels of private persons. If a seditious libel was not a personal defamation, then the law of seditious libel could deviate from the law touching libels of private persons; indeed, it had to do this.

The ambiguity of the phrase seditious libel had another, related effect: It allowed Holt to adopt precedents other than those concerning libel of magistrates. As libel of magistrates became associated with the term seditious libel, not only did the law concerning libels of magistrates come to be considered the law for punishing seditious writings, but it also came to be confused with all the other laws that had been used to punish seditious writings or libels; their precedents became its precedents; and judges, if confused or willing to be confused, could look to rules of licensing, *Scandalum Magnatum*, and provocative letters to govern practice in cases of seditious libel. This is precisely what Holt did in Bear's case in 1699.²⁴⁷

It should not be imagined, however, that Holt was easily confused. His final statement in Bear's case indicates that he was aware that at least one of his opinions—the one concerning the irrelevance of publishing—was open to the charge of novelty. Indeed, he spent more than a page refuting this hypothetical charge.²⁴⁸

Holt deliberately allowed himself to depart from precedent in Bear's case because the law of libel of magistrates had always been designed to protect the government (albeit solely by protecting individual officials from defamation); and now that it was the only effective law against seditious libels or pamphlets, the reason for that law seemed all the more clear. It was the law for protecting the government from seditious writings, and that purpose, rather than the more precise requirements of precedent, shaped Holt's decisions.

Holt's interpretation of the law was based on broadly political as well as technical legal grounds. Between the Revolution of

writings which the State for public purposes . . . has resolved to interdict." J. FISHER & J. STRAHAN, *THE LAW OF THE PRESS* 240-41 (2d ed. 1898). Such a view of seditious libels differed considerably from that of Coke and reflected the broad, political name and understanding of the law that developed in the seventeenth century.

247. *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981, at 13, 16.

248. *Id.* at 15-16.

1688 and the gradual settlement of the Hanoverian line in the years following 1714, the English monarchy appeared to be in an exceedingly precarious position. Abroad, the Jacobite threat still seemed very real; at home, the press viciously attacked the government. In the first year of her reign, Queen Anne was worried enough about the publishing of libels to tell both Houses of Parliament that "as far as the present Law will extend, I hope you will all do your Duty, in your respective Stations, to prevent and punish such pernicious Practices."²⁴⁹ Although this statement probably did not influence Holt directly, its sentiments appealed to many Englishmen. Believing that legal niceties would be of no use if the government were undermined, judges probably were reluctant to frustrate the Crown's wish to restrict the licentiousness of the press.

That Holt acted on these broad political grounds—which complemented his legal understanding of seditious libel—is evident from his decisions. Rather than resting consistently on precedent, Holt's decisions were consistent above all in their enlargement of the scope of prohibited conduct and their reduction of juries' opportunities to avoid convictions. He ignored seditious and private libel precedents that were not conducive to easy prosecution. His legal arguments almost invariably rested on his belief that it would be "strange," "absurd," or "ridiculous" if the law were in any way different from what he declared it to be. His willingness to rely upon political justification even in the face of contrary precedent was evident in his decision in *Bear's case*, of which he said that "It is founded upon the principle of the preservation of All Government."²⁵⁰

In 1770, an anonymous lawyer, who was aware of the "very respectable authority" of Holt, momentarily put aside his distaste for Holt's decision in *Bear's case* to weigh the Chief Justice's handiwork.²⁵¹ On the one hand, thought the lawyer, Holt "assumes the legislator, and makes law instead of expounding it." On the other,

He might conceive it was dexterity used for an honest end, and eventually for support of civil liberty since this Monarch [William III] was the great prop of both that and the Protestant religion. Such motives are at least the best palliatives which I can

249. 17 H.L. JOUR. 322 (Feb. 27, 1703).

250. *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981, at 16.

251. *Another Letter on Libels*, in *THE ENGLISH BOOK TRADE* (S. Parks ed. 1974).

suggest for so unprincipled a determination [in Bear's case].²⁵² Holt aimed to preserve the post-Revolutionary establishment.

C. *Queen Anne's Whig Ministry*

The Crown's use of the law of seditious libel temporarily came to a halt in 1708 when a new administration came into power. The Whig administration of 1708–1710 probably had both ideological and practical reasons for not bringing seditious libel prosecutions, and consequently, during the last years of Holt's life (he died in 1710), the law of seditious libel remained largely unused.

A small number of Whigs may have been ideologically opposed to seditious libel prosecutions. From 1703 until 1707, some Whig opposition publicists had faced prosecution under the law of seditious libel and had complained bitterly about their trials. In response to these prosecutions, some publicists and politicians may have developed a theory of freedom of speech that went far beyond the liberty of unlicensed printing espoused by Milton and others in the seventeenth century.

The first claim of free speech appears to have come, not surprisingly, immediately after the law of seditious libel began to be used as the government's regular weapon against the printed press. In 1703, Daniel Defoe, who, although not a Whig, had offended the government, became one of the first persons to feel the effect of the government's new policy of using the law of seditious libel as a regular means of prosecuting the printed press.²⁵³ In a subsequent publication of 1704, Defoe declared, "[W]e pretend to freedom of speech."²⁵⁴ Coming just a year after his prosecution for seditious libel and in the introductory issue of a surreptitious periodical that he may have established in order to express himself without fear of another libel prosecution, Defoe's statement indicates that he claimed more than freedom from li-

252. *Id.* at 15.

253. Trial of John Tutchin, 14 STATE TRIALS, *supra* note 11, at 1098. According to Levy, the idea of a free press had not yet developed at this time. L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 108 (1963). The fact that the first statement of the modern idea of free speech was made in response to the first use, after the demise of licensing, of the law of seditious libel against the printed press suggests that practical circumstances played a crucial role in the development of that idea of free speech. This is not to say that general intellectual trends, such as increasing toleration, were not a necessary precondition.

254. Defoe, *The Master Mercury*, in 6 AUGUSTAN REPRINT SOCIETY no. 124, at 4 (F. Ellis & H. Snyder eds. 1977).

censing.²⁵⁵ In a more considered discussion of the subject, also in 1704, Defoe said explicitly that the law of seditious libel should not be used, but qualified this opinion by arguing that "the Liberty of the Press ought to be restrained" by postpublication prosecution under a more precisely defined and thus less arbitrary law than that of libel.²⁵⁶ Nevertheless, Defoe had at least once used the phrase "freedom of speech" as an expression of defiance against seditious libel prosecutions.²⁵⁷

Evidence of the opinions held by Whigs (and Tories) about a constitutional or natural right to free speech comes in part from an unfriendly source. In 1712, a self-styled "Tory Author" (perhaps Addison) observed that "to plead for the Press is *Whiggish*," and that "[t]he Whigs have argu'd for allowing the Press its full swing."²⁵⁸ The context of these statements shows that they referred to freedom from seditious libel prosecutions as well as from licensing. The same Tory Author quoted a Whig as saying: "There never was a good government that stood in fear of Freedom of Speech, which is the natural Liberty of Mankind: Nor was ever any Administration afraid of Satyr but such as deserved it."²⁵⁹ The Tory Author replied that *Scandalum Magnatum* and libel law should limit "freedom of speech," indicating that Whigs thought otherwise. Of the Tories, on the other hand, it was observed by Defoe that they had "long regretted that old branch of

255. For Defoe's motives in writing *The Master Mercury*, see *id.* at iv.

256. D. DEFOE, AN ESSAY ON THE REGULATION OF THE PRESS 13 (1704). There is evidence that Defoe's advocacy in 1704 of a statutory offense reflected his obeisance to Harley, a leading minister, rather than his own views. Defoe apparently wrote the *Essay on the Regulation of the Press* as an act of gratitude for the leniency shown to him after he was convicted of seditious libel. 6 POEMS ON AFFAIRS OF STATE, *supra* note 11, at 632, 645 n.211. That Defoe's support for statutory regulation should not be mistaken for his own opinion is confirmed by the fact that only three months later, in a poem in which Defoe apparently felt free to express some of his own views, Defoe compared Parliamentary votes on press regulation to offensive libels:

Now you fall foul upon the Press,
And talk of Regulation;
When you our libelling suppress,
Pray Drop your Votes among the rest,
For they Lampoon the Nation.

The Address, in *id.* at 645.

257. It should be noted that the term "freedom of speech" often was used to describe what we would call freedom of the press.

258. *The Thoughts of a Tory Author Concerning the Press* (1712), in THE ENGLISH BOOK TRADE, *supra* note 251, at 7, 12. The views expressed in this pamphlet have been discussed by Levy. L. LEVY, *supra* note 253, at 114-15.

259. *The Thoughts of a Tory Author Concerning the Press* (1712), in THE ENGLISH BOOK TRADE, *supra* note 251, at 13.

English liberty, *Freedom of Speech*.”²⁶⁰ Thus, the idea that there was a natural or constitutional right to freedom from post publication prosecution was certainly not unknown and, although there is very little evidence, may have been espoused by some Whigs.²⁶¹

260. D. DEFOE, *THE REVIEW* (1711), reprinted in *LATER STUART TRACTS*, *supra* note 164, at 253.

261. One of the reasons that the idea of freedom of the press was not publicly espoused even by radical Whigs may have been that it was not entirely a respectable idea, being precisely the type of opinion that many Tories feared was undermining established religion. Public advocacy of a free press would have presented a superb propaganda opportunity to the Tories, who would have been able to prove what was already suspected, that the Whigs were endangering the Church. *The Thoughts of a Tory Author Concerning the Press*, although very moderate in tone, shows that even in the absence of public pronouncements by Whigs about a free press, and even after their fall from power, Whigs remained vulnerable in this area.

In the absence of Whig advocacy of freedom of the press, Tories did not complain about the Whigs' failure to prosecute, since the chief beneficiaries of that policy were Tories. Only after the Whigs lost office could Tories afford to criticize the Whigs for not prosecuting. Thus, Tory discussion of Whig press policy appeared only after 1710. See *The Thoughts of a Tory Author Concerning the Press* (1712), in *THE ENGLISH BOOK TRADE*, *supra* note 251. After 1710, however, this issue was, from the Tories' point of view, largely moot.

A version of the early eighteenth century Whig idea of a free press was espoused with eloquence, albeit not always with precision, in the 1720s by Trenchard and Gordon in their *Cato's Letters*. Although these writers stopped short of asserting freedom from seditious libel prosecutions, they were indebted to the Whigs of two decades earlier, as is evident from their complaint that the Whigs had abandoned the idea of a free press. 3 J. TRENCHARD & T. GORDON, *CATO'S LETTERS* 304 (1733). As Levy has pointed out, *Cato's Letters* did much to popularize the idea of a free press in the American colonies. L. LEVY, *supra* note 253, at 115-21. Thus, the origin of the idea of a free press in America can probably be traced to some early eighteenth century radical Whigs. However, their definition of a free press to mean freedom from seditious libel prosecutions apparently died out in the second decade of the eighteenth century and thus did not cross the Atlantic.

It should be noted that this account of the early eighteenth century development of the idea of a free press does not alter Levy's interpretation of the history of the first amendment. Levy's argument that the Framers did not intend the first amendment to prevent seditious libel prosecutions was based on, among other things, his examination of the legislative history of the Bill of Rights and on his contention that freedom from seditious libel prosecutions was not espoused prior to the 1790s or, at the earliest, the 1780s. It turns out that such a concept of the idea of a free press was in circulation already in the early eighteenth century. This fact does not, however, provide any reason to think that the idea found support or was considered a natural or constitutional right in the decades prior to the 1790s. Thus, although this article suggests a revision of the history of the idea of a free press, it should not change Levy's historical interpretation of the first amendment.

One aspect of the history of the first amendment should, however, be reconsidered in light of the arguments in this article. It has been assumed that the framers and ratifiers of the first amendment were simply adopting the most expansive theory of a free press available to them when they did not protect the press from seditious libel prosecu-

Although it is unclear whether any Whig ministers came under the influence of the idea of a free press, it is apparent that some of them opposed the use of prosecutions for seditious libel. In the face of virulent, high-church Tory criticism, several Whigs, including Somers, suggested that the government be "strengthened" with new laws, which were probably intended to deal with the press as well as the pulpit.²⁶² Somers argued for the new laws on the ground that the use of prosecutions was inexpedient.²⁶³ Prosecutions, he later explained, could be as harmful to the government as to defendants.²⁶⁴ Although he feared the attacks of Tory publicists, Somers told his colleagues in early 1708 that he regarded "this evil . . . of such a nature that unless ye provide against it would be in vain to have recourse to prosecutions."²⁶⁵ Thus, one of the arguments made in favor of legislation against anti-Whig propaganda was the impracticality of prosecutions.²⁶⁶

Whatever the practical or ideological reasons for their policy, the Whigs apparently brought no seditious libel prosecutions between early 1708 and 1710.²⁶⁷ This fact was of importance for

tions. In fact, the idea that the press should be free from seditious libel prosecutions had been broached almost a century earlier and may have been known, in one form or another, to the framers of the Bill of Rights. Certainly, as Levy recognized, the idea was raised at the Pennsylvania ratifying convention of 1787, where it was rejected with dispatch by none other than James Wilson. L. LEVY, *supra* note 253, at 201. If those who framed and ratified the Bill of Rights were aware of the argument that the press should be free of seditious libel prosecutions, and if, as appears to be the case, Levy is correct in believing that that argument was not adopted by the framers and ratifiers of the Bill of Rights, then the first amendment represents a rejection of that radical point of view.

262. 2 A. CUNNINGHAM, *THE HISTORY OF GREAT BRITAIN FROM THE REVOLUTION IN 1688 TO THE ACCESSION OF GEORGE I*, at 144 (1787), *cited in* G. HOLMES, *THE TRIAL OF DOCTOR SACHEVERELL* 87-89 (1973).

263. 2 A. CUNNINGHAM, *supra* note 262, at 144.

264. *Id.* at 277.

265. *Id.*

266. The impracticality of prosecutions was especially great for Whigs, because, in the atmosphere of 1708-1710, prosecution of Tories would, in some instances, be viewed as prosecution of the establishment itself. Note should be taken of the Regency Act of 1706. It included a clause making it a treason to question in writing during the existence of a regency the authority of Queen Anne. Only one person, Mathews, was ever convicted under the Statute. His prosecution took place in 1719 and was ordered by the Regency Council. P.R.O., Delasaye Papers, SP 44/78, at 12 (letter from C. Delasaye to Attorney General). Thus, Mathews' trial was the result of an exceptional exercise of authority by the Regency Council and was not an example of the regular press policy in the late 'teens, let alone an indication of the policy of any party toward the press in 1706.

267. The only trial for seditious libel during this period that is known to me was that of Sare (in November 1708 in Queen's Bench). Sare was tried and acquitted on a presentment by the Middlesex grand jury. 6 N. LUTTRELL, *supra* note 175, at 305 (entry

the law of seditious libel, for while the law remained unused, it also remained unchanged.

Only in the last weeks of 1709, did the Whigs initiate a prosecution, an impeachment of the notorious high-church Tory preacher, Dr. Sacheverell; and this trial did not alter the law.²⁶⁸ Failing to heed Somers' warnings, the Whigs had allowed Tory publicists to attack them virulently for three years; and, for this and other mistakes they paid the price at the polls in 1710, in one of the greatest electoral defeats in English history. Moments before the deluge, and again contrary to Somers' cautions, the Whigs in desperation reversed their original press policy. The impeachment of Sacheverell, which only hastened their demise, was the result.²⁶⁹

The political nature of the Sacheverell case and the fact that it took the form of an impeachment reduced the amount of legal argument to a minimum. For most of the trial, the only major legal question was whether Sacheverell's words amounted to a libel—an issue that invited political discussion.²⁷⁰ As a result,

of May 30, 1708). Although the government could have halted this prosecution, such interference would have been difficult politically. Thus, the prosecution of Sare cannot be said to have been initiated by the Whig government or to have reflected government press policy. It should be noted, however, that from October 1709 Sunderland acted independently of his colleagues to harass printers and publishers by threatening to prosecute, and that following Sacheverell's trial he ordered prosecutions. Moreover, Parliamentary charges of breach of privilege continued during the period 1708–1710. *Id.* at 505 (entry of Oct. 29, 1709), 506 (entry of Nov. 1, 1709), 508 (entry of Nov. 5, 1709), 572 (entry of Apr. 22, 1710); 12 *DICTIONARY OF NATIONAL BIOGRAPHY* 921 (1941–1951); Snyder, *The Reports of a Press Spy for Robert Harley: New Bibliography Data for the Reign of Queen Anne*, in 22 *THE LIBRARY* 326, 327–28 (5th ser. 1963); 18 *DICTIONARY OF NATIONAL BIOGRAPHY*, *supra*, at 752–53. The fact that Sacheverell's case was the sole prosecution initiated by the Whigs from 1708 until 1710 is not mentioned by other historians.

268. It should be noted that some other trials may have occurred in early 1710 as a result of Sunderland's activity. See note 267 *supra*.

269. Even in 1710, when his party's ministry was about to succumb to an electorate inflamed by Tory propaganda, and his colleagues were finally having doubts about the wisdom of their policy, Somers continued to believe that "the dangerous situation of affairs admonishes us rather to take care that . . . offenders do not hurt us, than to consult how to proceed against them." A. CUNNINGHAM, *supra* note 262, at 277.

270. One part of the trial requires some explanation. Toward the end of the proceedings, the Peers asked the judges about the validity of the charges, which failed to reproduce Sacheverell's allegedly seditious words in English transcript or their general sense in Latin. The judges were questioned: "Whether by the law of England, and constant practice in all prosecutions, by indictment or information for crimes and misdemeanors, by writing or speaking, the particular words, supposed to be criminal, must not be expressly specified in such indictment or information." Trial of Dr. Henry Sacheverell, 15 *STATE TRIALS*, *supra* note 11, at 466–67 (1710). Each of the ten judges present—Holt had recently died—declared that the express words had to appear within the

even Sacheverell's trial did not alter the law as Holt had left it. Between 1708 and 1710, the law remained dormant.

D. *Queen Anne's Second Tory Ministry*

In 1710, seditious libel prosecutions of the printed press resumed. The Tories, who were swept into power in the elections of autumn 1710, had neither Whig sympathy for a relatively free discussion of politics nor any expectation of support from the Whig newspapers. Therefore they quickly revived prosecutions for seditious libel. Although in the ensuing trials the judges contributed to the interpretation of the law, they nevertheless failed to satisfy the ministry.

In 1710, the idea of vigorous criticism of authority was as disturbing to most Tories as it may have been congenial to a small number of radical Whigs. Among Tories, Grub Street's pamphlet and newspaper onslaught elicited deep ideological as well as practical concern. Committed to a vision of hierarchical society established by divine authority and therefore unimprovable, unchanging, and uniform, Tory ideologues in the excited atmosphere of 1710 perceived no alternative to the received religious and political Establishment except complete moral and social disintegration. In church and state, according to extreme Tories, the slightest dissent posed a danger, and printed criticism of the government was no exception. In their second administration under Anne, as in their first, the Tories prosecuted printers and publishers for seditious libel, relying, where need arose, upon the judges to interpret the law in a way that would not be prejudicial to the requirements of the government.

The trial of William Hurt in 1711 produced mixed results for the new ministry. On the one hand, the bench settled the irrele-

charges. Taken literally, their opinion rejected not only the form of the articles of impeachment against Sacheverell but also Holt's opinion in Bear's trial that an indictment or information could give the sense and substance of a libel in Latin instead of the specific words. The question put to the judges and their answer indicate that the Lords (and perhaps the judges) mistakenly assumed that there was only one method of identifying a libel within an indictment, that is, with the exact words in English. One may speculate that the judges intended only to turn down the accusations against Sacheverell—which made no attempt in either Latin or English to describe in detail the contents of the libel—rather than to condemn Holt's ruling on Latin descriptions of libels. Certainly the judges had no reason to rule upon the validity of indictments that described libels by their sense and substance in Latin, and it would be surprising if they opposed an uncontroversial practice that most other lawyers accepted.

vance of knowledge of the content of libel.²⁷¹ In Bear's case, Holt had made the defendant's publication of a libel immaterial to his guilt, and as a result, in trials for merely making libels, it became useless for a defendant to prove his lack of intent to publish. In Hurt's trial, a prosecution for publication, the court held that lack of knowledge with respect to the defamatory context of the writing was irrelevant and would not rebut the presumption of malice. It was

not to be material whether he who disperses a Libel knew any Thing of the Contents or Effect of it or not; for nothing could be more easy than to publish the most virulent Papers with the greatest Security, if the concealing [of] the Purport of them from an illiterate Publisher would make him safe in dispersing them.²⁷²

This rule reached beyond the printer to the often illiterate hawker of seditious materials.

In a ruling perhaps less to the government's liking, the bench in Hurt's case confirmed earlier precedent that the jury should be able to interpret innuendos in libels. Like irony, innuendo had become a popular device of polemical literature in response to the threat of libel prosecutions. Hurt defended himself by claiming that the libel reflected on no one, since only a few letters of a name appeared in print, the rest being left to the reader's imagination. The court, however, dismissed this argument:

It brings the utmost Contempt upon the Law, to suffer its justice to be eluded by such trifling Evasions: And it is a ridiculous Absurdity to say, That a writing which is understood by . . . the meanest Capacity, cannot possibly be understood by a Judge and Jury.²⁷³

Innuendos were not to be obstacles to convictions; yet the decision also confirmed the rule that interpretation of innuendos belonged to the jury. Just as the court was permitted by precedent to eliminate the "trifling evasions" of innuendos, it was also bound by unusually strong precedent to leave enforcement in the hands of jurors. Even in Baxter's trial of 1685, Judge Jeffreys had allowed the jury to interpret the innuendos, albeit subject to judicial intimidation.²⁷⁴

271. See note 133 *supra*.

272. 1 W. HAWKINS, *supra* note 136, ch. 73, ¶ 10.

273. *Id.* at ch. 73, ¶ 5.

274. Proceedings Against Richard Baxter, 11 STATE TRIALS, *supra* note 11, at 501 (1685). In the Star Chamber, the questions of innuendos had belonged to the court. See Trial of Osbaldston, in 2 J. RUSHWORTH, *supra* note 31, at 810, 812.

This decision about innuendos was probably a severe blow to the Tory ministry's plans to control the press with libel law. As most eighteenth century attorneys general learned sooner or later, innuendos were a tricky matter. Already, in 1700, the Attorney General declined to bring a prosecution (whether for *Scandalum Magnatum* or for seditious libel is unclear) on the ground that the defendant had used "covert names."²⁷⁵ Because of the uncertainty attached to innuendos, a later Crown lawyer equivocated about a proposed prosecution:

There is more doubt whether the paper is such a libel for which it is advisable to prosecute him, and tho' I am in my own judgment very clear, that, the meaning . . . is seditious and libellous and therefore highly criminal, yet it is conveyed in so obscure a manner, that, it will be difficult to explain the many allusions and innuendoes as to expect a jury will find libellous, tho' there is I think, sufficient ground for them to do it in point of justice.²⁷⁶

The government was reluctant to prosecute if there was a good chance that jurors would not find a criminal meaning in the innuendos. Although Hurt's case ended with a conviction, it confirmed a rule about innuendos that inhibited the Crown from prosecuting many publications it would otherwise have tried to attack.²⁷⁷

If the government were to control the press, it needed to remedy the decision about innuendos in Hurt's case or find an alternative to the law of seditious libel. As Queen Anne told Parliament early in 1712, "This Evil [of antigovernment publications] seems too strong for the Laws now in force: [I]t is therefore recommended to you to find a Remedy equal to the Mischief."²⁷⁸ To supplement the deficiencies of libel law it was ingeniously suggested in 1711 "that no Impressions shall be made with short Words, or initial Letters, with Dashes, or without, . . . but all to be . . . taken, *ipso facto*, for a Libel."²⁷⁹ Yet

275. 6 POEMS ON AFFAIRS OF STATE, *supra* note 196, at 226.

276. L. HANSON, GOVERNMENT AND THE PRESS 1695-1753, at 56 (1936).

277. The famous acquittal of the Craftsman's publisher, Franklin, in 1728 was due to an innuendo.

278. 19 H.L. JOUR. 358 (Jan. 17, 1712). Since the late 1690s, various schemes for the registration of pamphlets had regularly been proposed to facilitate enforcement of the criminal law and had just as regularly been rejected by Parliament because they were reminiscent of licensing.

279. W. Mascal, *A Proposal for Restraining the Great Licentiousness of the Press*, quoted in MacFarlane, *Pamphlets and the Pamphlet Duty of 1712*, in 1 LIBRARY, 2d Ser., no. 3, at 298, 303 (1900).

even this proposal was received with little enthusiasm. Most likely, the ministry did not wish to outlaw nonseditious innuendos, since so broad a prohibition would have inflamed public sentiment and hampered pro-government writers.

Probably because the problem of innuendos seemed insoluble, the government supplemented the law of libel with the Stamp Act. The idea of taxing paper or of placing stamp duties upon copies of publications had been discussed for a number of years,²⁸⁰ and in 1710 Parliament had raised money by taxing calendars and almanacs.²⁸¹ In 1712, Parliament levied similar duties on pamphlets and newspapers to raise the price of newspapers beyond what most people could afford and thereby discourage the purchases of publications that irritated the administration.²⁸² The success of the Stamp Act was immediate but short lived. It did reduce the need for libel prosecutions, which became somewhat less frequent for a very brief time.²⁸³ Yet by 1713, printers discovered a loophole in the statute and thereby evaded its requirements with impunity.²⁸⁴ Consequently, the Stamp Act failed through a mere oversight.

Even at the time of the Stamp Act's passage, the Crown recognized that the stamp tax was at best a supplement rather than a replacement for the law of seditious libel. In 1713, Anne was still looking for "some new law" and probably had some form of registration system in mind. This proposal, however, never matured.²⁸⁵ Thus, in spite of the Stamp Act and a desire for other measures to supplement or replace the inadequate law of seditious libel, that law remained the government's chief method of restraining the printed press.

E. *George I's Whig Ministries*

The Whig administrations that assumed office during the reign of George I (1714-1727), continued to prosecute the

280. The idea of taxing paper had been discussed for decades, and that of taxing copies of publications since at least 1704. D. DEFOE, *supra* note 256, at 5.

281. 9 Anne, cap. 23 (cap. 16 in some compilations) (1710).

282. 10 Anne, cap. 18 (1712).

283. ACCOUNT OF PERSONS HELD, *supra* note 193.

284. F. SIEBERT, *supra* note 1, at 315. The flaw involved a technicality in the wording of the Statute. Much later, in 1724, Walpole closed the loopholes, and, in 1743, Parliament attempted to improve enforcement, but neither of these measures seems to have had much effect on the press. *Id.* at 319-20.

285. 19 H.L. JOUR. 512 (Apr. 9, 1713).

printed press under the law of seditious libel.²⁸⁶ They had, however, less ideological and political need to suppress printed criticism than the Tories, whom they replaced. Although the Whigs were as eager as the Tories to suppress criticism and were more than willing to dispense with the idea of a free press, they had no strong ideological commitment, such as the Tories possessed, to erasing dissent. Moreover, the political atmosphere was gradually becoming more moderate.²⁸⁷ For one thing, the electorate was shrinking, and as a result of the rebellion of 1715 the Tories lost much of their credibility as a political party.²⁸⁸ More important, by 1720 many men began to realize that ministers and factions, with all their petty squabbles and scurrilous printed attacks on one another, would come and go, but the English Establishment, a Protestant, parliamentary monarchy, would be secure in spite of all the liberties taken by the press. Accordingly, although the Whig government continued to prosecute printers for seditious libel after 1714, it did so without expecting to bring the press to complete submission.²⁸⁹

Following 1714, the changes in the law consisted largely of refinements. In a prosecution of Strahan in 1717, the court held that printers were to be presumed guilty of printing libels found in their shops unless they could show their innocence.²⁹⁰ According to the opinion in the trial of Dodd in 1724, a printer was responsible for libels printed by his servants without his knowledge. Nutt's case in 1729 confirmed this ruling.²⁹¹ Thereafter, until 1792, when Fox's Libel Act expanded the authority of juries, the law remained largely unchanged.

Thus, the law of seditious libel applied in the eighteenth century was not, as has often been claimed, "Star Chamber doctrine"; rather, it was a product of the modifications made by the judges of King's Bench during the years 1696 through about 1730. The most rapid modifications took place between 1696 and 1706, when Holt was Chief Justice. Almost all of his decisions either made the law more severe or limited the ability of juries to avoid convictions. Under the Holt's interpretation, i

286. In spite of changes in administration, the government remained Whig.

287. J.H. PLUMB, *THE ORIGINS OF POLITICAL STABILITY IN ENGLAND, 1675-172* (1967).

288. *Id.* at 170-73.

289. See also notes 304-307 *infra* and accompanying text.

290. L. HANSON, *supra* note 276, at 18.

291. *Id.* at 18. For Nutt's case, see 94 Eng. Rep. 208, 1 Barnardiston 306 (1721).

was criminal to assist in any way in the making, writing, or printing of a libel, even without intention to publish it; it was illegal to publish a libel, whether with or without knowledge of its contents; and it was punishable to libel the government as a whole, as well as one of its officers. Although juries interpreted irony and innuendo, judges decided whether the content of a writing was defamatory.²⁹²

F. *The Acceptance of Holt's and His Colleagues' Interpretation of the Law of Seditious Libel*

Having traced the development of the eighteenth century doctrine of seditious libel, it is necessary to examine its reception, which was mixed. Holt's innovations, particularly his elimination of the publication requirement, met with resistance, but the rest of his and his colleagues' decisions soon came to be accepted as having very great authority.

Holt's dictum that it was illegal to make copies of a libel without intent to publish them, was too great an innovation to be accepted. For example, the legal writer Hawkins (whose *Pleas of the Crown* (1716) enjoyed great authority during the eighteenth century) accepted much of what Holt had expounded yet insisted upon the importance of publication as an element of libel. He agreed with the first part of Holt's opinion in *Bear's case*, that "[h]e who first writes a Libel dictated by another, is thereby guilty of making it, and consequently punishable for the bare Writing; for it was no Libel till it was reduced to Writing."²⁹³ The first writing of a libel was a crime in itself. Hawkins doubted, however, "if the bare making of a Libel aside from the first copy be an Offense, as it seemeth to be holden in some Books."²⁹⁴ Beyond the first writing of a libel, Hawkins believed that some proof of publication was necessary. Although by 1770 *Bear's case* was "growing into repute," at least one lawyer regarded it as "metaphysical, scholastic sophisticated nonsense" and rejected those parts of it that he knew were novel.²⁹⁵ Most late eighteenth

292. In addition, it should be noted that in the case of *Derby* in 1711, the Court of Queen's Bench upheld a typical warrant of a secretary of state, which stated "the particular species of crime but not the particular facts of that crime." *Queen v. Derby*, 92 Eng. Rep. 794, 795, Fortesque 140 (Q.B. 1711).

293. 1 W. HAWKINS, *supra* note 136, ch. 73, ¶ 10.

294. *Id.*

295. *Another Letter on Libels* (1770), in *THE ENGLISH BOOK TRADE*, *supra* note 251, at 14, 129.

century judges and lawyers agreed that there had to be some sort of publication or intent to publish.

Other portions of Holt's and his colleagues' work were accepted as authoritative. Law and politics seemingly conspired to make a good part of the interpretation quite palatable.

Among the reasons that the opinions of Holt and his colleagues (other than their opinion on the irrelevance of publication) met with little resistance was their basis in prior law. Some decisions, such as those on irony and innuendo, were largely clarifications and restatements of precedents. The reception of other decisions, however, requires more explanation.

Acceptance of Holt's and his colleagues' interpretation was facilitated by a verbal confusion that created the appearance of continuity with Coke's pronouncements about libels. The law of libel of magistrates, which in the early seventeenth century had been delineated by Coke as a branch of defamation, acquired a much broader definition in the course of the seventeenth century, largely as a result of its association with the name "libel" and "seditious libel." This association had already begun in the early seventeenth century. The identification of the name "seditious libel" with Coke's offense became especially pronounced in about 1700, since by then Coke's law was the only remaining practical means of regularly prosecuting antigovernment writings, which were known as "seditious libels." The law's new name brought with it a change in the law's purpose and definition, for Coke's law had become the law for punishing seditious libels (in the sense of antigovernment writings). It seemed natural, moreover, that a law concerning criticism of the state, rather than just defamations of officials, should not be bound by precedents relating to personal defamation.²⁹⁶

The appearance of continuity with the past was also facilitated by the misuse of precedents concerning other defenses. During the late seventeenth century, the single offense called seditious libel gradually became equated with the entire group of laws that had at various times been used against antigovernment writings (which were also known as seditious libels), and as early as 1699 Holt mentioned trials for licensing violations, *Scandalum*

296. Some eighteenth century lawyers recognized that "misrepresentation of the Government" was something that "Coke did not reckon . . . as a species of Libels" but nevertheless accepted Tutchin's case. *The Doctrine of Libels Discussed and Examined* (1729), in *THE ENGLISH BOOK TRADE*, *supra* note 251, at 68.

Magnatum, and provocative letters (punished in the Star Chamber) as guides for seditious libel prosecutions.²⁹⁷ From the 1720s onward, publicists cited as seditious libel precedents the trials under prerogative licensing law in the early 1680s.²⁹⁸ Even when trials for licensing were not adopted as precedents, the assumption that such trials involved the law of seditious libel prompted comparisons with seventeenth century trials that were for seditious libel and thereby led to the belief that in the seventeenth century the law of seditious libel was either amorphous or inconsistently applied. This conclusion discredited seventeenth century seditious libel precedents, and thus the trials over which Holt presided in the decade after 1696 became leading cases.²⁹⁹

Contributing to the stature of the early eighteenth century cases for seditious libel was their fair and standardized trial procedure. In striking contrast to many of his predecessors, Holt administered the law with considerable concern for the rights of defendants; his name became a symbol of all that was just and equitable in English law; and his behavior set a pattern for other judges, thereby improving the character of the whole bench. In matters of procedure he was usually, by seventeenth century standards, blameless. Holt's high standards were acknowledged by a prominent defendant, Tutchin:

I have been allow'd all the fair play that possibly could be allow'd. I have made perhaps the longest defense that ever was made in such a cause, and more pleadings allow'd upon it, than in the trial, condemnation, and the transportation of some thousands in the West, in the reign of King James.³⁰⁰

This was eloquent testimony from a man of Tutchin's history and

297. *Rex v. Bear*, British Library, Hardwicke Papers, Add. M.S. 35981, at 13, 16.

298. The first printed example known to me is *The Doctrine of Libels Discussed and Examined*, *supra* note 296, at 38, 41. Since then, almost every publicist, historian, or lawyer who has attempted to describe the late seventeenth century law of seditious libel has cited licensing cases, especially Carr's, as seditious libel prosecutions.

299. Ironically, the authority of Holt's interpretation probably benefited from attempts to reform the law of seditious libel. In the last half of the eighteenth century, the law of seditious libel was most frequently and vociferously challenged not on account of Holt's modifications, but rather on account of other rules, at least one of which was of ancient authority. The maxim that truth could not justify a libel was as old and well-established as libel law itself, and the fact that a judge could decide whether a libel's content was defamatory if the libel's words were described in the indictment was a consequence of the judge's obligation to determine whether the indictment stated an offense. By concentrating their criticism on these two rules, the eighteenth century reformers probably distracted attention from some potentially vulnerable modifications made by Holt and his colleagues.

300. L. HANSON, *supra* note 276, at 57.

biases. Because Holt was as fair as he was severe, his cases on seditious libel encountered no criticism on procedural grounds.

Thus, Holt's decisions became highly influential. In his *Pleas of the Crown* (1716), Hawkins summarized most of Holt's opinions.³⁰¹ Lord Mansfield, in his judgment in the Dean of St. Asaph's case in 1783,³⁰² depended almost entirely upon Holt's decisions; and in the 1880s Sir James Fitzjames Stephen simply quoted page after page from Mansfield.³⁰³

On broad political grounds too, judges probably approved of the interpretation introduced at the turn of the eighteenth century. Although most had not been as involved in the administration of government as Holt had, many judges were more than willing to protect the seemingly fragile Establishment. So long as no firm and relevant precedents appeared to be violated, judges had considerable leeway in interpreting the law, and they used their broad discretion to safeguard the government.

A measure of the success of Holt's and his colleagues' interpretation was due to the partisan political circumstances of its development. Following 1714, lawyers and especially publicists of both political parties had good reasons to avoid drawing attention to the modifications that had taken place in the law of seditious libel. During the early eighteenth century, Whig victims of seditious libel trials, such as the famous martyr Tutchin, complained bitterly of their convictions.³⁰⁴ As late as the early 'teens they were said to be spreading "a hundred Stories of . . . Persecutions on that Score."³⁰⁵ Yet the Whigs who triumphantly came into office in 1714 had no incentive to question the modified law of seditious libel, for the Whigs could now deploy that law against Tory printers. The Whigs conveniently forgot the prosecutions they had faced a decade earlier, and after 1714 they made use of the law that had been used against them. Hence, although some Whigs in the time of Queen Anne revered Tutchin as a martyr, under King George they abandoned him to obscurity. Strikingly, the Whig publicist who attempted in the mid-eighteenth century to resurrect the infamy of the Tory prosecutions of

301. 1 W. HAWKINS, *supra* note 136, ch. 73.

302. 21 STATE TRIALS, *supra* note 11, at 847.

303. 2 J. STEPHEN, *supra* note 1, at 316-25.

304. Although they criticized the law used against them and protested their innocence, they could not (as has been mentioned above) call into question the fairness of the procedures at their trials. See note 300 *supra* and accompanying text.

305. *Thoughts of a Tory Author Concerning the Press*, *supra* note 258, at 23.

the first half of Anne's reign was Oldmixon, who for years had "found nothing but Neglect and Oppression" from his own party.³⁰⁶ In the 1720s, Independent Whigs, such as Trenchard and Gordon, continued to insist upon the right of free criticism of government and acknowledged that this was no more than Whigs had advocated for many years; but they caustically reminded the public that those of the Whigs "as have lately quitted their Independence, think themselves obliged to handle a subject tenderly, upon which they have exerted themselves very strenuously in another Circumstance of Fortune."³⁰⁷ Whigs who maintained connections and offices in the administration were careful to shed the inconvenient portion of their party's history and ideology that encouraged criticism of government. Tories, meanwhile, had difficulty complaining that Whigs were prosecuting the press with a law much used by Tory administrations. Thus, during the reign of George I, the political parties maintained an embarrassed, politic silence about Holt's contributions to the law of seditious libel.

Although prosecutions provoked complaint from some Tory printers and publicists in the late 1720s, by that date the interpretation of seditious libel had become established. It had become an irrevocable part of the law, about which men could argue but which they could no longer simply reject or ignore.

In the second quarter of the eighteenth century, jurors could not readily evade application of libel doctrine; indeed, a jury acquittal was precisely the possibility that the modifications to the law were designed to prevent. After 1688, judges could no longer rely upon intimidation to dissuade a jury from bringing in an acquittal, but they could employ adjustments in the law to prevent jurors from considering various issues that might otherwise have provided the jurors with an excuse to avoid a conviction. Some such issues the judges reserved for themselves; others they eliminated altogether. In cases for merely making libels, juries lost their ability to decide intent (i.e., whether the defendant had

306. J. OLDMIXON, *MEMOIRS OF THE PRESS* 60 (1742).

307. 3 TRENCHARD & GORDON, *supra* note 261, at 304. Trenchard and Gordon did not go so far as to claim that the press should be free from all seditious libel prosecutions. Trenchard and Gordon's acid comments on changes in Whig attitudes to prosecution were borne out by Bishop Atterbury, a Tory, who already in 1714 imputed to the Whigs "a design to take away the liberty of the press. This, I own, is contrary to their avowed principles . . ." *English Advice to the Freeholders of England*, in 13 SOMERS TRACTS 539 (1714). Note that few Tories would make this sort of statement as early as 1714.

knowingly published), because under Holt's interpretation, intent was no longer an essential part of the crime of making a libel. In 1711, it was confirmed that knowledge with respect to content was irrelevant. Juries could not decide whether the content of a publication was illegal, because informations and indictments recited the language of the publication or the sense and substance thereof, thereby making the decision about content a matter of law, which belonged to the court. Thus, during the early eighteenth century, while the law was still slightly flexible, courts could deal with recalcitrant jurors by simply eliminating some of their authority.³⁰⁸ In this way, Holt's interpretation of the law of seditious libel restricted juries' opportunities to hinder the application of that law.

CONCLUSION

According to conventional accounts, the laws restraining the press in the seventeenth century and much of the eighteenth simply reflected government attitudes and policies toward political dissent. The most sophisticated version of this interpretation was that of James Fitzjames Stephen, who in a famous passage of his *History of the Criminal Law of England* portrayed the history of the law concerning the press as the evolution of a compromise between "[t]wo different views . . . of the relation between rulers and their subjects . . . each of which has had a considerable share in moulding the law of England"³⁰⁹ One view was that the ruler, like an agent, is accountable to the subject; the other (which according to Stephen, prevailed in the seventeenth and a large part of the eighteenth century) was that "the ruler is regarded as the superior of the subject . . . [and] it must necessarily follow that it is wrong to censure him openly"³¹⁰ Siebert summarized this influential view as follows: "As both

308. Although judges could grant a new trial or simply threaten a jury with doing so, it does not appear that judges ever resorted to such extreme devices in seditious libel prosecutions. In *Bear's* case, the Crown moved for a new trial without success. It should be noted, moreover, that in trials for manuscript libels, in which publication or even intent to publish was often in dispute, juries sometimes appear to have resorted to special verdicts because they were uncertain as to whether the mere writing down of a libel was criminal. Although this tactic of the jurors may have succeeded on occasion, it generally was of little help to the defendant, for it left judges free to determine the meaning of the verdict. When such verdicts came before Holt, he used the occasions to try to change the law.

309. J. STEPHEN, *supra* note 1, at 300.

310. *Id.* at 299.

Stephen and Holdsworth have pointed out the crime of seditious libel depends on the contemporary view of the relation between the ruler and the subject."³¹¹ The argument of Stephen and his followers was that in the seventeenth century and much of the eighteenth the doctrine of seditious libel and the other legal doctrines used against the press were molded by the government's attitudes and policies toward its critics.

This article calls into question the conventional account presented by Stephen and his followers. It demonstrates that, with the exception of the licensing laws, the laws available to the government for control of the printed press had not originally developed for that purpose. Such laws, moreover, were not sufficiently malleable to reflect the government's needs and policies; they were subject to precedents and legal traditions that usually prevented them from being satisfactorily adapted for use against the printed press or, when the laws could be used for that purpose, prevented them from being modified to meet changing political circumstances. As a result, the government's legal options became obsolete one by one. Prosecutions for treason and for violations of felony statutes had to be abandoned after the sixteenth century, and although treason trials were briefly resurrected a century later, they were quickly given up again. Even licensing, the most effective of the options against the printed press, could not be reinstated after being allowed to lapse in the 1690s.

The law of seditious libel was particularly inadequate as an option against the printed press. In the seventeenth century it was unsuitable as an instrument of the Crown's policies, and even in the eighteenth century it could not easily be adapted to the government's purposes. In 1642, 1679, and again in 1695, the government rejected the law of seditious libel as a regular means of prosecuting the printed press. Indeed, so unsuitable and unadaptable was the law that in 1696, when no other realistic basis for prosecution was available, the Crown nevertheless preferred for several years to attempt to use *Scandalum Magnatum* and other methods rather than to rely on the law of seditious libel. Although Holt and his colleagues managed to modify the law, this limited success did not mean the Crown was generally able to bend the law to its desires. The opportunity for modifying the

311. F. SIEBERT, *supra* note 1, at 270.

law of which Holt and his colleagues took advantage was largely fortuitous, being chiefly the product of a century-old linguistic confusion, and when Holt and his colleagues allowed the Crown the benefit of technicalities, they also required it to comply with those technical requirements, as it learned to its disappointment in Drake's case. Moreover, Holt's chief innovation, his attempt in Bear's case to eliminate the publication requirement, was rejected. The modifications that Holt and his colleagues did manage to establish did not and could not satisfy the desires of the Crown. This was expressly acknowledged by Queen Anne and manifested itself in the passage of the Stamp Act in 1712.³¹²

The view that the laws against the press simply reflected government policy has reinforced another fallacy: the belief that the Crown had little difficulty using the laws to restrain the press. In fact, the legal and political restraints on the Crown's ability to deal effectively with the press frequently left the Crown in very straitened legal circumstances. The ever changing and precarious legal position of the Crown in its relation to the printed press is evident from its continuing struggle to maintain a legal basis for prosecution. The Crown possessed a variety of options with which it could prosecute its critics in print but had to turn from one such option to another as those in use became defunct, ineffective, or otherwise obsolete—chiefly because they failed again

312. The inadequacy of the law of seditious libel also manifested itself in the Crown's use of special juries after 1730. In the late seventeenth and early eighteenth centuries, while the law of seditious libel was still slightly flexible, judges could sometimes modify doctrine to reduce the likelihood of an acquittal. By the 1720s, however, the doctrine of seditious libel had been largely settled, and not entirely to the satisfaction of the Crown. Jurors still retained the power to acquit, and they exercised that power in Franklin's first, 1728, trial probably on the basis of Franklin's innuendos. The interpretation of innuendos was, it will be recalled, one of the crucial points of doctrine that the bench was unable to alter for the benefit of the Crown. Perhaps because judges could not further limit what remained of the jury's power in cases for seditious libel, the government in 1730 obtained parliamentary approval of the use of special or struck juries in certain criminal cases. 3 George II, cap. 25 (1730). This statute was put to good use. Indeed, only a year later, the Crown successfully prosecuted Franklin in a second trial in which a special jury appears to have been used. 17 STATE TRIALS, *supra* note 11, at 625 (1731). (All of the jurors in this trial were described as esquires.) Certainly in the late eighteenth and early nineteenth centuries, the Crown came to rely upon special juries to secure convictions. Thus, being unable to rely on Jeffries' or Scrogg's intimidation of jurors or upon Holt's and his colleagues' reduction of jury powers, the Crown improved its chances of obtaining convictions from juries by controlling the selection of jurors.

It should be noted that although a special or struck jury was used in the Seven Bishops' trial, special juries did not become a regular feature of trials for seditious libel and were not used to secure convictions in such trials prior to 1730, at the earliest.

and again to meet, and could not be adapted to meet, either the government's needs or the demands of public opinion. The Crown's reliance on the law of seditious libel in the eighteenth century resulted largely from the withering away of the Crown's other options against the printed press. Rather than being the powerful and easily used instrument of a government with considerable control over the legal system, the law of seditious libel was an option of last resort pressed into a service for which it was not designed by a government facing serious legal exigencies.

The quandaries of the government, which had ever fewer and less effective options against the printed press, have gone unnoticed by historians, in part because of the incognito nature of the evolution of the law of seditious libel. Some of the most important of the early eighteenth century modifications could occur only because they were concealed from most contemporaries by a peculiarity of language. Changes that occur only because they are unnoticed by most contemporaries can also escape the observation of posterity. Not realizing that the law of seditious libel had undergone modification around 1700 and not noticing that in so doing it had acquired the generic name and precedents of earlier press laws, lawyers and subsequently historians assumed that it had been the chief instrument of prosecution in the seventeenth century; they thus failed to perceive that in that century the Crown had relied on other means of prosecution and had been obliged to abandon one law after another as those in use became inadequate, defunct, or otherwise obsolete. Such has been the fate of the history of the control of the press in the hands of Mansfield, Stephen, Holdsworth, Siebert, and those who have relied upon them.

Lawyers and historians have failed to recognize the difficulties faced by the government and the changes in the law of seditious libel, chiefly because they have examined the law as if it were a mere reflection of government policy rather than a legal doctrine subject to the constraints of precedent and legal custom. There is a long-standing tradition of treating the laws used against the press as if they were simply expressions of government policies without significant legal content. In the seventeenth and eighteenth centuries, defendants and publicists railed against licensing and later against the doctrine of seditious libel, claiming that they were merely extensions of the government's pernicious attitude toward political dissent. This point of view was part of a

broader tradition, which eventually came to be associated with the Whigs, of treating state trials as martyrological events. In recent centuries, that view has gone largely unchallenged.

This article has sought to examine the history of the laws used against the press from a different approach: It has traced the development of such laws not merely as reflections of political opinion but as doctrines with legal as well as political content and significance. The fruits of this approach are numerous. It reveals that the law of seditious libel was not regularly used against printed material until the eighteenth century; that most of the seventeenth century trials heretofore characterized as trials for seditious libel were, in fact, for violation of licensing law; that the seventeenth century law of seditious libel was far different than has been thought; that the eighteenth century doctrine was the product of modifications made by Holt and his colleagues around 1700; that the Crown abandoned censorship because it hoped to use treason prosecutions instead; that public opinion affected the laws against the press chiefly by limiting the government's options; and that the idea of a free press first surfaced not in the 1790s but in 1704, in response to the first institution of a policy of prosecuting the printed press for seditious libel. This article thereby suggests a revised interpretation of the relationship between the English government and the press from the late sixteenth until the early eighteenth century. Above all, it shows that the laws used against the press, including the law of seditious libel, had legal as well as political content that neither Crown nor bench could ignore.

APPENDIX

For the convenience of the reader, I have listed in Part A some of the seditious libel trials that took place before 1696. In Parts B, C, D, and E, I have given some examples of the types of trials that occasionally in the past have been mistaken for seditious libel cases. Minimal information concerning the dates and sources of the trials has been noted. Trials that are classified only tentatively are grouped at the end of each part and are marked with a question mark.

A.

PROSECUTIONS FOR SEDITIOUS LIBEL BEFORE 1696: (Trials for printed material are marked with a star (*).)

Pickeringe (*Libellis Famosis*), 1605; 5 Coke 125; HAWARDE, REPORTES 222 (1894).

John Lamb, 1610; 9 Coke 59; P.R.O., STAC, 8/205/20.

Wraynham, 1618; 2 STATE TRIALS 1059 (W. Cobbett ed. 1809-1828).

George Close, 1621; P.R.O., STAC 8/33/8.

Jeffes, 1629; Cro. Car. 175.

*William Prynne, 1633; 2 J. RUSHWORTH, HISTORICAL COLLECTIONS 220 (1721).

*Thomas Brewster, Simon Dover, & Nathan Brooks, 1663; 6 STATE TRIALS 539.

Pym, 1664; 1 Sid. 220.

Aaron Smith, 1683; Skinner 124.

Sir Samuel Barnardiston, 1684; 36 Charles II; 9 STATE TRIALS 1333.

*Richard Baxter, 1685; 11 STATE TRIALS 494.

Dr. Eades, 1686; 2 Shower K.B. 468.

Seven Bishops, 1688; 12 STATE TRIALS 183.

? Pemlie, 1607; HAWARDE, REPORTES 341.

? Oliver St. John, 1615; 2 STATE TRIALS 899.

? Lumsden, 1615; 2 STATE TRIALS 1021.

? Edward Morgan, 1629; J. BRAMSTON, AUTOBIOGRAPHY 62 (1845).

? Julian, 1684; 1 N. LUTTRELL, A BRIEF HISTORICAL RELATION 309, 319-20 (1857).

B.

PROSECUTIONS OF LIBELS THAT DEFAMED PRIVATE PERSONS:

Want, 1601; Moore 628 (K.B.).

Buck, 1667; 2 Keble 138.

Fitton & Car, 1669; 2 Keble 502.

Anonymous, 1669; 1 Ventris 31.

Saunders, 1670; Sir T. Raymond 201.

Alme & Nott, 1699; 3 Salk. 224; 1 Lord Raymond 486.

C.

PROSECUTIONS OF WRITINGS FOR BREACH OF THE PEACE (i.e., writings sent only to the person defamed):

Barrow v. Lewellin, 1615; Hobart 62.

Sir Baptist Hickes, 1618; Popham 139; Hobart 215.

Dr. Edwards v. Dr. Wooton, 1607; 12 Coke 35.

Summers & Summers, 1664; 1 Lev. 138; 1 Keble 771, 788.

Executors of Summers (continuation of above case), 1665; 1 Keble 931; 1 Sid. 270.

D.

PROSECUTIONS FOR *SCANDALUM MAGNATUM*:

Goodrick (The Earl of Northampton's Case), 1612; Moore 821 (K.B.); 2 STATE TRIALS 862.³¹³

The Bishop of Lincoln and Lambert Osbaldtson, 1638; 2 J. RUSHWORTH 803.³¹⁴

? Prynne, Bastwicke & Burton, 1637; 2 J. RUSHWORTH 380.³¹⁵

E.

PROSECUTIONS FOR VIOLATIONS OF VARIOUS LICENSING LAWS:

(1) Prosecutions prior to 1641 for violations of prerogative licensing law:

Richard Knightly and others, 1589; 1 STATE TRIALS 263.

Lilburne & Warton, 1638; 2 J. RUSHWORTH 463.

(2) Prosecutions from 1662 until 1679 and from 1685 until 1695 for violations of statutory licensing law:

313. Another report of Goodrick's case said, "this is false news and a slander," confirming that the trial was for *Scandalum Magnatum*. Great Britain Historical Manuscripts Commission, 3d Rep., App. 61 (1872).

314. The language of the information indicates that this case was for *Scandalum Magnatum*. An anonymous reporter, possibly J. Hearne, wrote that "the substance of the Informacon was for publishing Newes and matter of state . . . [H]e . . . published false news . . ." Reports of Star Chamber Cases, 1624-1640, at 263 (J.H. Baker ed.) (Harvard Law School manuscript no. 1128 published in microfiche in English Legal Manuscripts Project). There is a possibility that the defendants also were charged with seditious libel. The uncertainty stems from the fact that the Attorney General cited Coke's libel cases as precedents for the rule that it was illegal to conceal letters reflecting on a public person. J. RUSHWORTH, *supra* note 38, at 807. Such a reference does not, of course, mean that the case necessarily involved charges of seditious libel in addition to charges of *Scandalum Magnatum*. The rule applied equally in cases of *Scandalum Magnatum* and seditious libel. Coke's libel cases could have been cited in a *Scandalum Magnatum* case since they were the most recent authoritative discussions of the rule. Whatever the charges against Osbaldtson and the Bishop of Lincoln, it should be noticed that the lawyers and judges, when referring to Coke's precedents, used Coke's name for the law involved—libel of public persons—rather than the modern term, seditious libel.

315. See note 53 *supra*.

? Henry Nevill (alias Henry Payne), 1679; TREMAINE, PLEAS OF THE CROWN 43.

? Samuel Johnson, 1685; 11 STATE TRIALS 1339.

(3) Prosecutions in early 1680 for violations of the first and second opinions of the judges as interpreted by Scroggs:

Benjamin Harris, Feb. 5, 1680; 7 STATE TRIALS 926.

Francis Smith, Feb. 7, 1680; 7 STATE TRIALS 931.

Jane Curtis, Feb. 7, 1680; 7 STATE TRIALS 959.

(4) Prosecutions from 1680 until 1685 for violations of the judges' third opinion authorizing prerogative licensing of news:

Henry Carr [or Care], 1680; 7 STATE TRIALS 1111.

Elizabeth Cellier, 1680; 7 STATE TRIALS 1183.

? Nathaniel Thompson, William Pain, & John Farwell, 1682; 8 STATE TRIALS 1359.

? Francis Smith, 1683; P.R.O, KB 33 5/5.³¹⁶

? Sir William Williams, 1684; 13 STATE TRIALS 1370.

? Thomas Dangerfield, 1685; 11 STATE TRIALS 503.

316. Smith's 1683 prosecution was for his 1681 poem, *A Raree Show*. King's Bench Indictments, P.R.O., KB 33 5/5 (1683).