The Historical Journal, 44, 1 (2001), pp. 107–134 Printed in the United Kingdom

THE LAW OF LIBEL AND THE LIMITS OF REPRESSION, 1790–1832*

PHILIP HARLING[1]
[1] *University of Kentucky*

ABSTRACT. *The article examines the use of seditious libel and blasphemy as instruments of control during the era of Tory hegemony. It argues that the law of libel was a formidable instrument of repression, but one which was all but abandoned by the legal authorities because it proved to be too unreliable. On the one hand, it placed the writers and vendors of radical literature under the constant threat of prosecution. They could be perpetually threatened by ex-officio informations; they paid all legal costs accruing from their cases; and, if put to trial, they often faced a hostile judge and a packed jury. On the other hand, a great deal of arguably seditious literature circulated freely because the Home Office lacked the institutional means to embark on a policy of wholesale prosecution; enforcement of the libel laws was scattershot at best; and defendants ultimately managed to undermine the government's prosecutorial strategy by exploiting the flexibility of language to win acquittal in some well-publicized cases. Thus the profound uncertainty of libel proceedings made them double-edged weapons which often damaged the government and the accused at the same time.*

How repressive were the administrations of the younger Pitt and his Tory successors? One can of course dwell on a long list of measures that suggest they were repressive in the extreme: the suspensions of Habeas Corpus in peacetime as well as wartime; the Two Acts, Six Acts, Combination Acts, and acts to prevent seduction from duty and administering of unlawful oaths; the suppression of 'seditious and treasonable societies'; the hangings and transportations for treason; the invitations to legal intimidation that the Home Office occasionally extended to magistrates, and the comfort it gave to them when, at St Peter's Field, for instance, they abused their powers; and the use of spies to provoke radicals into insurrectionary violence. Faced with what they considered the real threat of a French-style revolution, Tory ministers were ever ready to use the mailed fist – not only beyond the Tweed and the Irish Sea (where harsher rules applied that deserve their own analysis), but even in the heart of London.

Still, there was an important distinction between the readiness to use the mailed fist and the frequency of its use. According to one telling measurement,

* Many people have heard or read versions of this article. I have especially profited from the advice and encouragement of Arthur Burns, Penelope Corfield, James Epstein, Dan Gargola, Michael Lobban, Peter Mandler, Joanne Melish, Karen Petrone, D. A. Smith, Gretchen Starr-LeBeau, Mark Summers, and Dror Wahrman.

for instance, the Pittite 'Terror' *in England and Wales* does not seem all that terrible. The turbulent 1790s saw fewer than 200 state prosecutions for treason and sedition; relatively few of these prosecutions were initiated under new legislation; and their total number 'pales into insignificance' beside the number of Jacobite prosecutions in the 1710s and 40s.[1] Thus there seems good reason to suggest that, like the notorious 'Bloody Code' on which they relied,[2] the Tories were not as harsh as at first it might appear.

At one level, their use of the law of libel seems to bear out this benign conclusion. Between 1790 and 1832, a grand total of 73 indictments and 166 ex officio informations for seditious and blasphemous libels were filed in the court of King's Bench. While a handful of the indictments were brought by groups of private citizens, such as the Constitutional Association, with little or no help from the government, it is nevertheless safe to assume that the crown lawyers were directly involved in well over 200 prosecutions for libel over this period.[3] It is also safe to assume that this approximation falls short of the total number of libel cases in which the crown played some role. Records of many libel cases initiated at quarter sessions at the request of the Home Office made their way into the crown rolls of the court of King's Bench from which this grand total has been counted, but by no means all of them did. Still, the King's Bench rolls provide the fullest information to date on the government's attempt to eradicate 'licentious' publications in the age of revolution (see table 1).

This total of over 200 prosecutions marked a substantial increase over previous eras. According to one estimate, there were about 120 of them between 1702 and 1756, and just under 70 between 1760 and 1789.[4] But the number of prosecutions tells us little about how the libel law was actually enforced, and even in this tumultuous era, it was enforced fitfully, sporadically,

[1] Clive Emsley, 'Repression, "terror" and the rule of law during the decade of the French Revolution', *English Historical Review*, 100 (1985), esp. p. 824. See also idem, 'An aspect of Pitt's "terror": prosecutions for sedition during the 1790s', *Social History*, 6 (1981), pp. 155–84.

[2] See e.g. John Beattie, *Crime and the courts in England 1660–1800* (Princeton, 1986), esp. chs. 8–9; John Brewer and John Styles, eds., *An ungovernable people: the English and their law in the seventeenth and eighteenth centuries* (New Brunswick, NJ, 1980), esp. pp. 11–21; John Langbein, 'Albion's fatal flaws', *Past and Present*, 98 (1983), pp. 96–120; Joanna Innes and John Styles, 'The crime wave: crime and criminal justice in eighteenth-century England', *Journal of British Studies*, 25 (1986), pp. 380–435; Peter King, 'Decision-makers and decision-making in the English criminal law', *Historical Journal*, 27 (1984), pp. 25–58.

[3] PRO King's Bench (KB) 28/351–523: crown rolls, King's Bench, 1790–1832. I consulted these rolls at the Public Record Office in Chancery Lane, but they have since been moved to Kew. The most comprehensive statistics previously available are in William Wickwar, *The struggle for the freedom of the press, 1819–1832* (London, 1928), pp. 314–15, but these significantly understate the number of indictments and informations filed by the crown lawyers, because they rely on incomplete official returns: *Commons Journals*, 76 (1821), p. 1209; *Parliamentary papers* (*PP*) 1834, 48 (no. 410), pp. 269ff. See also *State trials*, new series, 1 (1820–3), cols. 1385–7. The only way to get an accurate tally of indictments and informations is to carry out the irksome task of counting them from the King's Bench rolls.

[4] See Michael Lobban, 'From seditious libel to unlawful conspiracy: Peterloo and the changing face of political crime, c. 1770–1820', *Oxford Journal of Legal Studies*, 10 (1990), n. 11. Lobban extracted his figures from PRO KB 33/24/2.

Table 1 *Informations and indictments for seditious libel and blasphemy filed in the court of King's Bench, 1790–1832*

	Info.	Indict.	Total
1790	1		1
1791	1		1
1792	9	1	10
1793	12	6	18
1794			
1795	2	1	3
1796	4		4
1797	1	1	2
1798	3	2	5
1799	2		2
1800			
1801	3		3
1802	1		1
1803	2	1	3
1804	3	1	4
1805	2	2	4
1806			
1807			
1808	12	2	14
1809	8		8
1810	13	3	16
1811	6		6
1812	3		3
1813	1		1
1814	2	1	3
1815	1		1
1816			
1817	20	3	23
1818		1	1
1819	4	3	7
1820	32	11	43
1821	7	25	32
1822	2	2	4
1823	3	1	4
1824			
1825			
1826			
1827			
1828			
1829	5	3	8
1830	1		1
1831		3	3
1832			

Source: PRO KB 28/351–353: crown rolls, King's Bench, 1790–1832.

and not very effectively. Table 1 makes it clear that the government brought substantial numbers of prosecutions only at a few particularly stressful moments. Most of these prosecutions were aimed at a handful of publications, so at any given time a great deal of arguably seditious material circulated freely. Moreover, the majority of people against whom indictments or informations were filed went unpunished. A good many were acquitted, many more threw themselves on the mercy of the court and were let off after paying sureties for future good behaviour, and others were never made to stand trial. During one period of intensive prosecution, from 1808 through 1812, the *sentencing* rate in libel cases was only 20 per cent.[5] Moreover, only some 38 per cent of those prosecuted at the height of the post-war repression, between 1817 and 1822, were tried, convicted, and actually sentenced to serve time in prison.[6] Thus the chances of getting away with published attacks on the king, his ministers, and the church were always very good. The authorities were well aware of this fact, and as table 1 indicates, by the early 1820s they had all but abandoned libel prosecutions.

The argument here, however, is that this surface impression of complacent indifference conveyed by fitful enforcement and eventual abandonment is in its own way just as misleading as the surface impression of deep repression conveyed by an unqualified recitation of the Pittites' security measures. For they gave up on libel not because they believed in prosecutorial restraint, but because they failed to attach subversive meanings to radical language consistently enough to make libel an effective weapon of exemplary justice, and also because the state lacked the institutional means to sustain a widespread campaign of prosecution. One of their chief problems was that the customary legal definition of seditious libel and blasphemy, i.e. any form of printed matter whose content had a tendency to provoke a breach of the peace, was dangerously vague. For what it meant in practice in this era was any form of printed matter *that the government chose to prosecute*, and whose content *it could convince a jury* had a tendency to provoke a breach of the peace: by provoking mutiny among the troops, for instance, or riot among the plebs, or contempt for the king, the king's ministers, parliament, or (in the case of blasphemy) any tenet of the Christian religion, criticism of which was construed to be subversive in a legal system that was based on judicial oaths. After Fox's Libel Act of 1792 gave the jury the right to judge not only the fact of publication of an alleged libel, but also its tendency to provoke a breach of the peace, libel trials became a perilous gamble for the government. The trial itself gave considerable publicity to the allegedly libellous passages, because they had to be read in open court and because the newspapers habitually provided extensive coverage of the legal proceedings. Thus it also gave the accused the opportunity to play

[5] PRO KB 28/424–442; *PP* 1821, 26, pp. 399ff.
[6] PRO KB 28/443–83; *Commons Journals*, 78 (1823), pp. 1082–1091.

the martyr in self-defence before the newspaper-reading public. Finally, and most importantly, even the packed juries that the crown routinely secured for libel trials could vote to acquit or to deliver an embarrassing special verdict such as 'guilty of publishing only', which suggested that the government had not proved its case for malicious intent. Above all else, it was a series of humiliating defeats in court that led to the decline of libel as a means of controlling political expression. Ultimately, the uncertainty of language doomed the crown lawyers to failure, because they had too much difficulty convincing juries that what they called libels were indeed libellous.

It must also be stressed, however, that the uncertainty of language, and indeed the uncertainty of the legal process as a whole, was just as much a hindrance as it was a help to critics of the government. There was no predictable line between libel and not-libel and no predictable line of Home Office conduct, so the writers and vendors of radical literature faced the constant threat of prosecution. The lack of any prior censorship, in giving radicals licence to publish anything, gave them boundless opportunities to be charged with libel. If brought up on an ex officio information, as were most of the accused, there was no certainty that the government would bring one's case to trial, but also no certainty that it would not. Even if the crown lawyers decided against a trial, they could visit all manner of indignities upon their victim. If it came to a trial, acquittal was anything but certain. Defendants occasionally scored victories against the authorities, but only against long odds, as the procedural form of the trial was deeply biased against them. In short, the profound uncertainty of libel proceedings turned them into double-edged weapons. They could damage the government, but they could also damage the accused, and often they did both.

In short, the prosecution and sentencing statistics for libel do not tell the whole story. As in other areas of the late Georgian criminal law,[7] there was an arbitrariness in the exemplary prosecutions under the law of libel that made it a formidable instrument of harassment, if ultimately not an efficient instrument of repression. So I wish to tell two intertwined tales of uncertainty here. The first one will stress the ways in which the government's opponents suffered from the perplexities surrounding the very definition of libel, as well as those surrounding the legal mechanisms designed to secure their conviction. The second will stress the government's structural difficulties in attempting to enforce the law of libel, as well as its failure to overcome the linguistic perplexities that made the prosecution of libels such a risky business. Taken together, the hope is that these stories will suggest a more complicated

[7] See e.g. Douglas Hay, Peter Linebaugh, and E. P. Thompson, *Albion's fatal tree: crime and society in eighteenth-century England* (New York, 1975), esp. ch. 1; Douglas Hay and Francis Snyder, 'Using the criminal law, 1750–1850: policing, private prosecution, and the state', in Hay and Snyder, eds., *Policing and prosecution in Britain, 1750–1850* (Oxford, 1989), pp. 3–54; V. A. C. Gatrell, *The hanging tree: execution and the English people, 1770–1868* (Oxford, 1994), introduction.

approach to the difficult question of the limits of Tory repression, one which highlights the instability of political language.

I

Technically speaking, freedom of the press came to England in 1695, when parliament permitted the ineffective Licensing Act to lapse and the government no longer had the power to impose any prior restraint on publication. While several revenue laws – taxes on paper, advertisements, newspapers, and pamphlets, for example – no doubt limited the circulation of many ideas by raising the price of the literature in which they appeared, the authorities had no power to prevent publication. This licence to publish was one of the most obvious ways in which Britain was the exception to European norms in the eighteenth century. Thus, according to Hume, 'nothing is more apt to surprise a foreigner, than the extreme liberty, which we enjoy in this country, of communicating whatever we please to the public, and of openly censuring every measure, entered into by a king and his ministers'.[8]

Nevertheless, the law of libel made the liberty of the press in Britain profoundly uncertain. It meant that there was a limit to the government's permissiveness, but that limit was constantly shifting, and it was never clearly discernible. '[I]t is competent for all the subjects of his Majesty' to discuss 'every question connected with public policy', Lord Chief Justice Ellenborough noted, but they must be careful not to 'make this privilege a cloak to cover a malicious intention'.[9] The problem was that nobody could know for certain when they had stepped over the line – when, legally speaking, their intention had become 'malicious' – because it was constantly being redrawn by the Home Office in consultation with the crown lawyers. So long as a libel prosecution was the only means of distinguishing between 'liberty' and 'licence', the freedom of the press rested on the whim of the government. Libel enabled the authorities to attempt to punish a posteriori objectionable language which they could no longer stifle a priori.

If the deliberate vagueness of the libel charge provided the government with advantages over its publishing critics, so too did the procedural rules which came into play once it decided to prosecute. The Tory ministries routinely used a variety of legal tools to harass their opponents in libel proceedings. The low sentencing rate in libel cases tells us nothing about the intense legal pressure thus brought to bear on the accused. Even defendants who were ultimately acquitted had to pass through ordeals of legal intimidation that often left mental and financial scars. A comprehensive assessment of the repressive force of the law of libel must take these ordeals into account. For they suggest that

[8] Quoted in Sir William Holdsworth, *A history of English law* (17 vols., London, 1903–72), x, p. 673 n. 1.

[9] *Report of the proceedings on an information … against John and Leigh Hunt* (Stamford, 1811), pp. 60–1.

while the Tories ultimately abandoned libel prosecution as an instrument of control, this was only after they had used it to inflict considerable pain on a good many people.

It is worth inspecting these features more carefully in order to appreciate just how harassing they could be for the accused. Take, for example, the ex officio information. Technically, this was merely a summons filed by the attorney general that required the accused to appear in court when called upon to defend himself. But the attorney general could and sometimes did require the accused to post securities for good behaviour before admitting him to bail. Since the required securities could run as high as £1,000, an accused libeller who was fortunate enough to find creditors incurred heavy debts to them, while the less fortunate would have to remain in prison pending trial. Since the interval between the filing of an information and the trial could take the better part of a year,[10] a man who was ultimately found innocent but who could not come up with the requisite sureties could end up spending more time in prison than a convicted man who had been speedily tried and sentenced to only a few months. Regardless of the outcome of his case, the accused could not recover any of his legal costs. Even an information that was never followed up by the government put him substantially out of pocket; there were heavy legal expenses incurred in simply appearing to answer an information.[11] The threat of a trial could and sometimes did follow the accused to the grave. Nobody rebutted Lord Holland when in 1819 he asserted on the floor of the Lords that some forty informations were still hanging over the heads of journalists and vendors, and that some of these men had been living with the threat of prosecution for over ten years.[12] As Lord Folkestone pointed out, even treason suspects were treated more leniently by the authorities, for the government was required to put them on trial within three years of their indictment.[13] Only in 1820 were the crown lawyers statutorily obliged to bring a libel information to trial within a year of the filing date.

The target of an ex officio information could literally be picked up off the street and forced into the court of King's Bench to answer an information of which he knew nothing, as happened to the brilliant radical satirist William Hone in 1817. In one particularly appalling incident, a group led by a Birmingham alderman invaded the house of Robert Swindells in an effort to find evidence that Swindells had been selling copies of Hone's parodies on the

[10] John Cuthells, accused of seditious libel for publishing Gilbert Wakefield's *Reply* to the bishop of Llandaff in the late 1790s, had to wait a full year between his arrest and his trial simply because the attorney general refused to replace two absent jurors with bystanders who happened to be in court on the originally scheduled day of trial. F. K. Prochaska, 'English state trials in the 1790s: a case study', *Journal of British Studies*, 13 (1973), p. 71.

[11] For general information, see James Epstein, *Radical expression: political language, ritual, and symbol in England, 1790–1850* (Oxford, 1994), p. 39; Donald Thomas, *A long time burning: the history of literary censorship in England* (London, 1969), pp. 139–40; Friedrich Gentz, *Reflections on the liberty of the press in Great Britain* (London, 1819), p. 47; Prochaska, 'English state trials', pp. 69–70.

[12] *Hansard*, 41, col. 691 (3 Dec. 1819).

[13] *Hansard*, 19, cols. 552–3 (28 Mar. 1811).

Anglican form of worship. Swindells claimed that after entering the house without showing a warrant, they ransacked the place while threatening him with their staffs and then made off with a bundle of papers and pamphlets. His pregnant wife took ill from the shock of this invasion, and died a couple of days after giving birth. Swindells was left with two small children, but shortly thereafter the newborn died 'for want of a mother'. His sole surviving child went on the parish after he was imprisoned for want of sureties after being called to the court of King's Bench to answer the information that was ultimately filed against him. After this ordeal, it could not have been much comfort to him that his case never went to trial.[14]

Virtually the only way for the accused to discover just what it was he was being accused of before the alleged libels were read at trial was to obtain a copy of the information by paying exorbitant fees to the crown office. A copy could cost as much as £10.[15] Judges sometimes treated the accused with contempt when they appeared in court to answer the information. Thus Chief Justice Ellenborough responded to the ill and exhausted Hone's request to sit down as the second information against him was being read with a resounding 'No!', and loudly insisted that Hone must follow customary practice and enter a plea even though he had not yet had a chance to examine the informations.[16]

Proof of the accused's good behaviour after the filing of the information did not always prompt leniency from the government. Hone, for instance, was shocked when he was summoned to trial nine months after he had stopped selling the parodies that had been named in the informations against him. 'As it would be extreme hardihood in me, with a very large family and wholly inadequate means to court a contest with the purse and power of the Crown so I should feel no less pleasure in being indebted to your liberality for putting an end to the prosecution', he pleaded with the attorney general. '[I]n that case I pledge myself not to reissue the publications and indeed the entire quantity in my possession may be disposed of as you direct.'[17] The only response to his appeal to pity was a curt note informing him of his trial date.

Accused persons who were actually brought to trial, moreover, were given extremely short notice of their trial dates, thus giving them very little time to put together a defence. Hone, for instance, was given official notice of his libel trials less than a week before they came on.[18] If the defendant faced trials on more than one information, the attorney general was not obliged to inform him of the order in which he planned to try them. Thus T. J. Wooler, editor of the

[14] *Reformist's Register*, 2, no. 10, cols. 289–310 (27 Sept. 1817).

[15] *The three trials of William Hone* (London, 1818), p. 11 (1st trial); *Reformist's Register, and Weekly Commentary* (ed. William Hone), 1, no. 21, col. 644 (14 June 1817); *A verbatim report of the two trials of Mr. T. J. Wooler* (London, 1817), p. 30. The official statement that fees for copies of informations in 1816–17 averaged between £2 and £3 needs to be taken with a grain of salt. *PP* 1818, 16, no. 46, p. 193.

[16] *Reformist's Register*, 1 , no. 16, col. 494 (10 May 1817).

[17] William Hone to Sir Samuel Shepherd, 23 Nov. 1817, Add. MSS 40120, fo. 73, Hone papers.

[18] Sir Samuel Shepherd to William Hone, 15 Dec. [1817], Add. MSS 40120, fo. 76, Hone papers.

Black Dwarf, protested that the prosecution decided to try the informations against him in an order different from the one he had been led to expect, and that he had a difficult time knowing where to begin his defence against the first information tried, as it consisted of an entire parody from which the attorney general had not bothered to select specific passages.[19]

The crown could also harass the defendant by changing the venue of his trial at short notice. For instance, when Joseph Russell of Birmingham was finally put on trial for selling Hone's parodies after a very long delay, he had already been 'pecuniarily ruined' by the long journeys that the government had forced him to make in order to defend himself. First he was told that his case would be tried at the Warwick assizes, but then it was moved to the court of King's Bench by a writ of *certiorari*, so he was obliged to make the long journey to London 'at great expense to himself'. He was then informed that the trial had been moved back to Warwickshire. Nevertheless, he had to go back to London in order to obtain a copy of the information against him, which he was able to do only after the payment of 'heavy fees'. Russell was worried that the jurors impanelled to hear his case might be politically biased against him, so after he was provided with their names he felt obliged to travel another hundred miles in order to make inquiries about their characters. The trial was then put off once again, and after Hone's acquittal Russell assumed that the authorities would take no further action against him. But they did, almost a year and a half later, and the wretched financial position in which these legal peregrinations had placed him left him feeling desperate. His wife had died a couple of years earlier, he had 'a family of unprotected children that must go into the poor-house; and if a fine should be laid upon me, I have nothing to pay, and perpetual imprisonment must be my doom'.[20] Russell was convicted, and while he was spared a fine, he was sentenced to eight months in prison and was obliged to find sureties to keep the peace for three years.

Alleged libellers who were compelled to stand trial did not find a neutral referee in the trial judge, and the judge still held formidable power in libel proceedings. It is true that his influence had been considerably greater before the passage of Fox's Libel Act in 1792. It was only then that juries in libel cases had been given a statutory right to issue a general verdict that weighed the intent of the publisher. Before passage of the Act, they had been asked to make a judgement based on two much more narrow questions: did the defendant publish the words charged as libellous, and did the words really carry the libellous meaning affirmed in the information or indictment? In practice, however, the line between the law-finding powers of the judge and the fact-finding powers of the jury had long been a matter of confusion.[21] Fox's Act

[19] *A verbatim report*, pp. 39, 68.

[20] *The trial of Joseph Russell, for a political libel, being Mr. Hone's parody on the litany* (Birmingham, [1819]), pp. 26–9.

[21] See e.g. Thomas A. Green, *Verdict according to conscience: perspectives on the English criminal trial jury, 1200–1800* (Chicago, 1985), esp. pp. 328–9; Wickwar, *Freedom of the press*, pp. 40–1; John

appeared to settle matters in favour of the jury's law-finding power, but a proviso added to it by the then solicitor general, Sir John Scott (later Lord Chancellor Eldon), conferred upon the trial judge the discretionary power to give his opinion on the general issue in his charge from the bench. Thereafter, judges virtually always took advantage of this proviso, sometimes wrongly affirming that the Act obliged them to do so, and they almost always spoke against the defendant.[22] Jurors would sometimes acquit or deliver an exculpatory special verdict anyway; indeed they did so in some of the very first libel cases tried under Fox's Act.[23] But the deference that eighteenth-century jurors had traditionally paid to the opinions of judges[24] was not yet a thing of the past, and what one critic of Scott's proviso called 'the influence which the judges must enjoy from the respect paid to their high character, and from the general opinion of their learning, wisdom, and legal experience'[25] was likely to give his charge considerable weight with the jury, and there has long been a scholarly consensus that it did.[26]

It was difficult enough for the defendant to have to deal with a biased judge. But in many cases he also had to deal with a packed jury. This was a more dangerous obstacle because it was not readily tangible.[27] By the late eighteenth century, it had become common for libel cases to be tried before special jurors. These were men ostensibly of greater wealth and learning than common jurors, who were supposed to be selected randomly from lists drawn up by the sheriffs. All the eligible freeholders within the sheriff's jurisdiction were supposed to be entered in a book kept by him, from which forty-eight were to be randomly drawn to form the jury pool. The prosecution and the defence both had the right to strike twelve names from the pool, and it was common practice for the Treasury solicitor to try to ascertain the political sentiments of pool members in order to dispose of the twelve who seemed most likely to go against the

---

Barrell, 'Imaginary treason, imaginary law', in his *The birth of Pandora and the division of knowledge* (Philadelphia, 1992), pp. 127–8; Holdsworth, *A history of English law*, x, p. 673; *The whole proceedings on the trial of an information exhibited ex officio, by the king's attorney general, against John Stockdale* (1790), esp. pp. 204–11; Gentz, *Reflections on the liberty of the press*, pp. 73, 79.

[22] See e.g. Wickwar, *Freedom of the press*, p. 42.

[23] See e.g. *The cases of libel, the king versus John Lambert and others, printers and proprietors of the Morning Chronicle* (London, 1794); *State trials*, 22, cols. 954ff; Emsley, 'An aspect of Pitt's "terror"', p. 171; *The trial of Daniel Isaac Eaton, before Lloyd Lord Kenyon and a special jury* (London, 1793), pp. 64–5; *The proceedings, on the trial of Daniel Isaac Eaton, for selling … the second part of the Rights of Man … at Justice Hall, in the Old Bailey* (London, 1793), pp. 41–5.

[24] See e.g. John H. Langbein, 'Shaping the eighteenth-century criminal trial: a view from the Ryder sources', *University of Chicago Law Review*, 50 (1983), esp. pp. 118–19; Green, *Verdict according to conscience*, pp. 270–1, 285.

[25] *Mr. Redhead Yorke's Weekly Political Review*, 11, no. 1 (13 July 1811), col. 15.

[26] See e.g. John, Lord Campbell, *The lives of the chief justices of England* (4 vols., London, 1874), IV, pp. 483–5; Holdsworth, *A history of English law*, x, pp. 692–6; Lobban, 'Seditious libel', p. 321; Prochaska, 'English state trials', p. 68.

[27] Jeremy Bentham, *Elements of the art of packing* (1821), in John Bowring, ed., *The works of Jeremy Bentham* (9 vols., repr. New York, 1962), v, p. 117.

government.[28] Nevertheless, the twelve jurors who were ultimately called to serve were supposed to be selected randomly from the twenty-four names remaining in the pool.[29]

There was, however, nothing random about the methods that the government used to pick jurors in politically sensitive libel cases. As James Epstein has pointed out, the furore surrounding T. J. Wooler's trial in 1817 showed just how corrupt the jury-selection process could be.[30] Thanks to the protests of Wooler's barrister, Charles Pearson, the common council of the City of London launched an investigation which showed that the list of those qualified to serve as special jurors in the City included only 485 names; that 226 of those counted were not eligible to serve because they had either already died or were not householders within the City; that only 274 of them had been summoned to appear in court during the last three terms, during which time over 100 cases had been tried; that during this period forty of them had been summoned for twenty or more cases, and fifty more for at least ten cases; and finally, that three of them had earned at least a guinea a week for regularly serving as special jurymen, thus turning into a handsome regular income the guinea-per-case rate at which special jurors were compensated for the inconvenience of serving.

In sum, there was overwhelming evidence that the master of the crown office who presided over the selection process worked hard to ensure that a small crew of trading special jurors – or 'guinea-men', as radicals called them[31] – would tilt jury sentiment in favour of the government. The common council report led to the reform of the City of London special-jury list, and the selection of an untainted jury no doubt helped to secure William Hone's famous acquittals in December 1817. But corrupt lists were still in use elsewhere. When Wooler was tried for sedition in Warwickshire in 1820, for instance, the jury pool of forty-eight had to be selected from a list that included only fifty-four names for the entire county. Now special jurors did not invariably vote to convict in libel cases, and many juries chosen for libel cases included more than a few common jurors. Still, the large majority of the men who heard libel cases were special jurors, and it is obvious that the corrupt process through which many of them were selected gave the government a distinct and palpably unfair advantage in the courtroom battle with its radical foes.

One of the few predictable things about juries in libel cases was that provincial ones were more likely to convict than London ones, particularly

[28] See e.g. James Barnes to George Maule, n.d. [1820], PRO Treasury Solicitors' papers (TS) 11/42/152: R. v. Sir Francis Burdett (1820), part 1, fo. 49; [?] to H. C. Litchfield, 4 June 1810, PRO TS 11/91/289: R. v. William Cobbett and two others (1810), fo. 12.

[29] See [Francis Place], *On the law of libel; with strictures on the self-styled 'Constitutional Association'* (London, 1823), p. 39; Epstein, *Radical expression*, p. 56; James C. Oldham, 'The origins of the special jury', *University of Chicago Law Review*, 50 (1983), pp. 137–221.

[30] This and the following paragraph rely on Epstein, *Radical expression*, pp. 56–9. See also Wickwar, *Freedom of the press*, pp. 43–5; T. J. Wooler, *An appeal to the citizens of London against the alledged lawful mode of packing special juries* (London, 1817).

[31] [Place], *On the law of libel*, pp. 45–8.

after the reform of the City special-juror list in 1817. Thus another fact that created dangerous uncertainty in the minds of the writers and vendors of 'licentious' publications was that an allegedly libellous passage that had been cleared by a jury in one place could be condemned by another one elsewhere. James Tucker, for instance, was convicted in Exeter in January 1819 for selling Hone's *John Wilkes's catechism*, one of the three parodies for which Hone himself had won acquittal at King's Bench over a year earlier. Tucker pointed out in his own defence that it seemed hard that he should be tried for a libel whose author had long since been acquitted, but the jury nevertheless found him guilty, and the recorder sentenced him to nine months in prison on the charge of blasphemy and to six additional months on a related charge of seditious libel. This was a particularly harsh sentence, since according to the prosecutor's brief Tucker was 'supposed to be in indigent circumstances' – a poor man who kept a stall in the Exeter market whose 'gains … must be very inconsiderable', as the papers he sold were 'of low price, few of them exceeding two pence'.[32] The local Tory newspaper nevertheless exulted in his conviction, for 'thus is this part of the country rescued from the foul imputation, with which a former acquittal was calculated to sully the character of the nation – and this city freed, by the exertion of our magistrates and the impartial administration of the law, from what was fast approaching to prove the most dangerous pest that ever disgraced our walls'.[33] Hence Tucker went to prison 'whilst an hundred thousand of the same parodies [for which he had been convicted] have been sold in London publicly, and have produced a considerable advantage to the publishers'.[34]

One could expect to incur heavy legal expenses whether one was convicted, acquitted, or simply forced to appear to answer an information which the government never took to trial. In fact, it was quite possible for the government to bring an innocent man to financial ruin, since the defendant paid all legal expenses even in libel cases ending in acquittal. In cases that went to trial, the defendant could expect to pay a minimum of £100 in trial-related expenses.[35] Poor vendors could rarely come up with this kind of money, and if the crown decided to move the trial far away via writ of *certiorari*, the expenses incurred from travel and time off from work could be devastating.

The much greater costs that could be incurred from a conviction were potentially crippling even for successful newspapermen. Convicted of seditious libel for his criticism of the forceful suppression of a mutiny in the Isle of Ely in 1809, William Cobbett was so worried about the effects of a large fine and a lengthy prison sentence on his family and farm that he actually wrote a letter to the authorities that took them up on their offer to drop the conviction before sentencing if he got out of the newspaper business altogether. He no doubt

[32] PRO TS 11/73/230: R. v. James Tucker (1819).
[33] *Trewman's Exeter Flying-Post* (13 Jan. 1819), p. 4.
[34] *Republican*, 3, no. 5 (26 May 1820), p. 147.
[35] See e.g. G. D. Stout, *The political history of Leigh Hunt's Examiner* (St Louis, 1949), p. 16.

saved his self-respect when he changed his mind while awaiting the government's response, but he paid dearly for his decision. In addition to the £1,000 fine that he was assessed as part of his sentence, during the two years he spent in Newgate he was forced to pay twenty guineas a week for comfortable lodgings, plus the undiminished cost of keeping his family farm at Botley. The loss of credit that ensued from his prison sentence was even more costly, as most of his debts were immediately called in.[36] He survived this financial crisis by selling off some of his business interests, but there is little doubt that one reason why he fled to America in the wake of the Habeas Corpus Suspension Act was to avoid the financial as well as emotional costs of another long prison sentence.

The rigours of incarceration varied greatly, and prisoners who were able to purchase a measure of comfort were far better off than those who were not. But a long period of confinement was bound to take a considerable toll on virtually anyone who was forced to endure it. Of course radical journalists would never admit that imprisonment adversely affected their political mission. Indeed, at first glance it did not. They were free to continue their assaults on Old Corruption while incarcerated,[37] and most of them did so with gusto. The most resounding testimony to the seeming failure of imprisonment to deter radical scribblers came from several of Richard Carlile's shopmen, who took advantage of their time together in Newgate prison to publish the *Newgate Monthly Magazine*, in which they heaped abuse on the notion of Jesus' divinity and excerpted the writings of celebrated freethinkers. Here was a 'blasphemous' journal that would never have come into the world had its founders not been confined together; regularly produced for nearly two years, it folded when they left Newgate in 1826.[38]

The reality of prison life, however, was considerably less romantic and triumphant than the braggadocio of radical convicts made it out to be. First of all, judges had the power to send libellers to any prison in the country, and would occasionally see to it that they were deposited hundreds of miles away from their base of operations. Thus Carlile was exiled to Dorchester gaol, far away from his home base in Fleet Street, and this created serious editorial difficulties for him. At least convicted libellers who had the means to do so could mitigate the mental discomfort of close confinement and removal from

[36] George Spater, *William Cobbett: the poor man's friend* (2 vols., Cambridge, 1982), I, pp. 252–3.

[37] At the behest of the Home Office, prison authorities would occasionally look at the correspondence of prisoners suspected of sending out seditious literature. See e.g. Henry Hobhouse to James Steinbank, 11 Aug. 1820 (copy), PRO Home Office papers (HO) 41/6, fo. 133; William Richards to Lord Sidmouth, 16 July 1819, PRO HO 42/195, fo. 129. But the crown lawyers knew that confiscation of prisoners' letters and parcels was very risky, since 'the legality of the seizure would depend upon the question whether the papers be libellous or not'. Henry Hobhouse to the Revd Archdeacon England, 29 July 1820 (copy), PRO HO 41/6, fo. 127. This was one reason why even a prisoner as notorious as Richard Carlile was able to continue publishing the *Republican* while he resided in Dorchester gaol.

[38] Joel Wiener, *Radicalism and freethought in nineteenth-century Britain* (Westport, CT, 1983), pp. 91–2; Kevin Gilmartin, *Print politics: the press and radical opposition in early nineteenth-century England* (Cambridge, 1996), p. 90.

the scenes of political action by ensuring their own physical comfort. Thus Leigh Hunt was able to secure two rooms in the sick ward of Surrey gaol for his own use, one of which was 'covered with a paper representing a trellis of roses'. He could also entertain himself with the lute and the pianoforte that he had brought to prison with him, and he always enjoyed the company of his family during the day, and of literary friends at dinner most evenings.[39] But whatever comforts an imprisoned libeller obtained for himself came at a high price, and impoverished vendors were routinely thrown in with common felons. In any case, prison life preyed on the emotions even of those who were able to secure comfortable lodgings for themselves. Thus Leigh Hunt's incarceration exacerbated his hypochondria. Unnerved by his close proximity to hardened criminals, he constantly heard 'the chains of felons clanking in my ears', and every day he met 'with persons, who for aught that I know (for I am by no means anxious to enquire) may ... be guilty of some of the vilest offences'.[40]

In sum, while statistics suggest that there was nothing very rigorous about the enforcement of the law of libel, its very uncertainty furnished the government with a formidable instrument of oppression. Radical journalists and the vendors of their literature could never know when they might be prosecuted. The machinery of prosecution harassed them at every turn. They could be perpetually threatened by ex officio informations. They paid all legal costs accruing from their cases. If put to trial, they faced a prosecutor who had the right not only to make the opening statement but also to rebut the arguments made in their defence, a jury that was usually packed, and a judge who was almost always predisposed to recommend their conviction. When convicted, there was only so much they could do to prevent a sentence of exemplary harshness and a bitter gaol experience. The libel law may not have been rigorously enforced, but it could and often did subject the accused to considerable rigours, indeed.

II

The deep uncertainties at the heart of the law of libel, however, posed as formidable an obstacle for the government as it did for its radical enemies. The authorities ultimately gave up attempting to enforce it because they lacked the administrative means to do so, because even successful prosecutions had the undesirable effect of advertising the libellous passages, and because the instability of language guaranteed that radicals would occasionally humiliate them by convincing the jury that the words being prosecuted did not carry the seditious meaning that had been attached to them. First of all, the harshness of the libel law was mitigated by its sporadic and uneven enforcement. Many radical journalists and vendors avoided prosecution because the central

[39] Thornton Hunt, ed., *The correspondence of Leigh Hunt* (2 vols., London, 1862), I, pp. 78–83; Cyrus Redding, *Fifty years' recollections, literary and personal* (3 vols., London, 1858), I, pp. 275–6.
[40] *Examiner*, no. 268 (14 Feb. 1813), pp. 97–8.

government, far from being a formidable instrument of coercion, was simply too weak to mount a sustained offensive. The decision to prosecute rested with the home secretary, and his staff was much too small to monitor the press on its own. The Home Office was always at the mercy of Britain's profoundly decentralized structure of governance. It was forced to rely on the vigilance of magistrates and private citizens to find proper targets. For lack of politically acceptable alternatives, the government could only remind magistrates that it expected them to use their legal authority to stymie the vendors of radical publications who were plying their trade all over the country. Prosecution for libel was not the only weapon that JPs had in their arsenal. Lord Sidmouth's notorious circular to the lords lieutenant of 27 March 1817, for instance, was issued in order to inform magistrates that the crown lawyers had determined that, under the Hawker's and Pedlar's Act, they had the power to imprison and hold to bail upon the oath of one witness anyone selling 'blasphemous and seditious pamphlets and writings' without a licence.[41] Whatever its other effects, the circular certainly prompted many magistrates more closely to monitor the radical publications circulating in their neighbourhoods and to send in to the Home Office copies of many more of them for possible libel prosecution than they had done before it was issued.[42] But while the circular encouraged magisterial vigilance in the short term, the Home Office had no means of sustaining that vigilance in the long run. The government's strategy for libel prosecution was ultimately at the mercy of the JPs, and so long as the Home Office lacked more reliable instruments to do its bidding, it lacked the ability to sustain the sort of intensive campaign that might have made the libel law a more effective deterrent against 'seditious' publications. Failing that, writers and vendors simply crossed their fingers and carried on with their business.

Most of them would have been lucky, unless they happened to be caught selling one of the handful of publications that the Home Office targeted for prosecution in this era. Lacking the means to carry out a policy of large-scale interdiction, the home secretary had no choice but to pick out a few particularly obnoxious writings and try to make examples of as many of their 'publishers' as possible, in the hope 'that when the existence of state prosecutions has acquired notoriety they will have the effect of checking the dissemination of seditious and irreligious works'.[43] Thus a libel prosecution was like roulette,

[41] The circular, along with the legal reasoning of the attorney and solicitor general, are printed in *Hansard*, 36 (1817), cols. 447–50.

[42] See PRO HO 41/2 for the contrasting situations before and after 27 Mar.

[43] Docketed note in response to the letter of B. Flanders, a North Riding JP, to Sidmouth, 22 Nov. 1819, PRO HO 42/199, fo. 180. For instances in which the Home Office instructed magistrates to pursue specific vendors of targeted publications, see e.g. Henry Hobhouse to Revd George Wilkins of Nottingham, 4 Dec. 1819 (copy), PRO HO 41/5, fo. 164; Hobhouse to Isaac Spooner of Birmingham, 27 July 1819 (copy), PRO HO 41/4, fo. 202; Hobhouse to the town clerk of Manchester, 26 Aug. 1819 (copy), PRO HO 41/4, fo. 262; Hobhouse to the mayor of Leeds, 27 Aug. 1819 (copy), PRO HO 41/4, fos. 264–5.

only the short reach of the Home Office meant that the odds favoured the gambler and not the house.

Nevertheless, the government persisted in its scattershot prosecution strategy for decades. Its hope was that ultimately enough vendors would be intimidated out of business to undermine the national distribution network of radical papers such as the *Political Register*, the *Black Dwarf*, and the *Republican*. In fact, the Home Office devoted much more energy to the prosecution of vendors than to writers. This was because it was often difficult to prove authorship in court, but also because the government reasonably enough assumed that since there was nothing it could do to keep radical scribes from writing, it made the most sense to try to curb the circulation of their scribblings. It was simply easier to harass vendors than to harass authors. The government was mainly interested in breaking the supply chain by putting stress upon its weakest links, and it was less interested in imprisoning vendors than in scaring them out of business.

The fate of several men who sold one targeted pamphlet in 1810 illustrates this point. That year, the Perceval ministry decided to make examples of several vendors of *A momentous address to the people of Great Britain and Ireland*, a plodding squib that had some Paineite things to say about the absurdity of hereditary monarchy. Its 'avowed author', according to the crown lawyers, was 'a woman by the name of Hoogstoff a native of Holland', and it was thought better to use the Alien Act to banish her from the country than to prosecute her for libel.[44] The chief culprit in the case was one William Evans, from whom all the other arrested vendors had purchased copies of the pamphlet for resale. Evans fled from the law; a record of outlawry was filed against him, and he makes no reappearance in the legal records.[45] The unfortunate men who bought his disreputable wares answered the informations filed against them, however, and their fates make it clear that the government was more interested in cowing vendors into submission than it was in imprisoning them. William Searles, for instance, a block-maker who also kept a small sundries shop, threw himself on the mercy of the attorney general, Sir Vicary Gibbs, claiming that Evans had duped him into believing that the pamphlet contained nothing subversive. When a few days later he saw that parts of it were offensive, he withdrew it from sale. Searles was convicted by default. While he gave £100 in security to ensure his appearance for sentencing, he was never called upon to receive judgement.[46] Edward Westwood likewise pleaded for mercy, suffered judgement by default, lodged £100 in security, and was never called up for sentencing.[47]

Like Searles and Westwood, William Horne was also a man with a sizeable family to support who sold pamphlets in order to supplement a meagre income. In fact, he 'ha[d] not the means of providing money for the expence of even

[44] PRO TS 11/943/3415: R. v. William Horne (1810).
[45] PRO TS 11/781/2522: R. v. William Evans (1811).
[46] PRO TS 11/975/3540: R. v. William Searles (1810).
[47] PRO TS 11/44/163: R. v. Edward Westwood (1811).

appearing to [answer] the process and taking a copy of the information which I am told will require five pounds, without distressing myself very much'. He too was released on a recognizance of £100.[48] The last vendor of *A momentous address* to be hauled into King's Bench was John Duncombe, a Holborn bookseller who also begged for mercy. He was a father of four who likewise could not afford the expense of a court appearance, and he had withdrawn the pamphlet the moment he realized what it contained. The attorney general made a more ceremonious show of lenity in this particular case. When Duncombe was pronounced guilty by default in the court of King's Bench, Gibbs made a point of telling the bench that Duncombe

> has suffered judgment … for the publication of an exceedingly bad libel and I believe is sensible of the magnitude of the crime he has committed. … He is represented to me as a very poor man living altogether upon the means his industry affords and I have reason to think (the paper having passed through the hands of his I think very young boy) that there was more of inadvertancy than is generally found. This is not like the case of editors of newspapers.

Gibbs having thus reminded Duncombe that he owed his liberty to the government's liberality, the judges were eager to give the grave warning that it was their role in this drama to pronounce:

> *Lord Ellenborough*: It is a very lenient and merciful [offer] to be sure. If he shall by his future conduct forfeit the claim to favour which the Attorney General at present feels disposed to shew him he may be called upon hereafter to receive sentence.
> *Mr. Justice Grose*: It is a great mercy on him. The publication is a very bad one. The more you consider it the more it appears aggravated.

Here was a ritual that hailed the magnanimity of British justice while it none too subtly warned its beneficiary that if he did not watch his step he would end up in prison. This would seem to have been a lot of fuss to make over a man so insignificant that the Home Office copying clerks frequently misspelled his name as 'Duncan' in the case papers – which would have constituted grounds for dismissal of his case, had Duncombe but known it. But the hope was that one more humble man thus intimidated by the majesty of the law would mean one less vendor of 'licentious' material.[49]

There were clearly established rules for this ritual of 'contrition' followed by 'lenity'. First of all, the attorney general refused to consider mitigation until the accused had waived his right to what from the government's point of view was a potentially risky jury trial. But he would make no promises even after he had obtained this waiver. With the prospect of sentencing thus hanging over their heads, it is probably safe to assume that vendors who bargained with the crown lawyers got out of the business of peddling radical literature. There is no way to know this for certain, but the fact that one re-encounters none of these

[48] Horne to H. C. Litchfield, 30 Nov. 1810; the same to the same, 21 Feb. 1811, PRO TS 11/943/3415: R. v. William Horne (1810).

[49] Duncombe to H. C. Litchfield, 30 Nov. 1810, PRO TS 11/922/3234: R. v. John Duncombe (1810–11); copy of the proceedings upon his case in King's Bench, 7 Feb. 1811.

vendors in the legal records suggests that they behaved themselves after their brushes with the law. Still, their cases did little to deter others from selling sedition. There were simply too many radical publications, and too many poor people willing to risk arrest in order to profit from selling them, to permit the central and local authorities substantially to reduce the number of either one or the other.

Nevertheless, the government carried on with its fitful campaigns of prosecution. While its efforts could never be systematic, there were certain varieties of radical propaganda that drew considerably more attention from it than others. Thus, for instance, Paineite exercises in king-bashing were heavily prosecuted in the 1790s. Passages that were deemed to be incitements to mutiny were just as likely to be made examples of as those that ridiculed monarchy. Finally, published assaults on the characters of prominent public officials were also commonly prosecuted. Published abuse of parliament as a whole was pretty broadly tolerated, but even here it was possible to go too far, as John Hunt discovered in 1820 when he was convicted for a passage in the *Examiner* which contended that the House of Commons was 'composed of venal boroughmongers, grasping placemen, greedy adventurers, and aspiring title-hunters, … a body in short containing a far greater portion of public criminals than public guardians'. This string of epithets earned him a year in Coldbath Fields prison.[50]

Inflammatory language that was obviously intended for a plebeian audience was likely to draw the attention of the crown lawyers. They generally felt that what a respectable lady or gentleman read was none of their business. But cheap pamphlets that even a common labourer might understand were another matter. Thus, for instance, in the early 1790s then attorney general Sir Archibald MacDonald did not bother to prosecute the relatively expensive first part of *Rights of man*, but he set the full weight of the law against part two, at least in part because it was circulating in more easily accessible forms. '[W]hen I found that another publication was ushered into the world still more reprehensible than the former', he concluded, 'that in all shapes, in all sizes, with an industry incredible, it was … thrust into the hands of all persons in this country …; when I found that even children's sweet-meats were wrapped up with parts of this, and delivered into their hands, in the hope that they would read it', there was no choice left but to prosecute.[51]

If there was no telling when the crown lawyers might attempt a clampdown, there were long periods when they left the libel laws virtually unenforced. They only came down hard at intervals when they felt that political chaos was at hand. But their perception of what constituted political chaos is not always readily intelligible. It is not surprising that the Paineite scare of the early 1790s, the post-Spa Fields scare of 1817, and the post-Peterloo scare of 1819–20

[50] PRO TS 11/1121/5787: R. v. John Hunt (1821); Stout, *Political history of Leigh Hunt's 'Examiner'*, pp. 36–7.

[51] *The whole proceedings on the trial of an information … against Thomas Paine* (London, 1793), p. 47.

prompted numerous prosecutions. But the government offensive of 1808–11 makes less immediate sense. Measured in terms of libel cases filed in King's Bench, only the post-Peterloo repression was harsher, and yet the Portland and Perceval ministries faced a relatively quiet domestic scene. It had to contend with the Burdettite disturbances in the spring of 1810, sporadic Luddite violence, and plenty of sullen but innocuous disenchantment with the handling of the war. But it did not have to contend with the monster reform meetings and armed drilling of the late 1810s, or, for that matter, the republicanism of the early 1790s.

The most compelling reason for the 1808–11 repression was an obsession with law and order. Perceval and his colleagues were particularly strict church-and-king disciplinarians, and they had no qualms about terrorizing the press. Fortunately for their intended victims, a series of high-profile acquittals[52] began to dampen their enthusiasm for libel prosecutions. Still, radicals could not rest easy until Perceval's murder at the hands of a deranged assassin in 1812 ushered in the comparatively tolerant Liverpool ministry. There were limits to the new administration's tolerance, however. Although they were inclined to hold a more complacent attitude towards the press than their ultra-Tory predecessors, the post-war reform agitation scared them into action. The pressure to mount a prosecution campaign had become so intense by early 1817 that Lord Sidmouth felt compelled to tell the House of Lords why ministers had waited so long before taking legal measures against seditious writings. The main problem was that 'these publications were drawn up with so much dexterity – authors had so profited by former lessons of experience, that greater difficulties to conviction presented themselves than at any former time'. Nevertheless, he assured his fellow peers that the crown officers were already preparing informations 'in all cases where a conviction was possible, trusting with confidence to the loyalty and integrity of a British jury'.[53]

By the end of 1817 Sidmouth had concluded that this trust in the jury was misplaced. For the prosecution campaign ended in disaster when T. J. Wooler and William Hone were acquitted at the end of spectacular trials, the former in July and the latter in December. The majority of the twenty informations filed in King's Bench in 1817 had been directed against the vendors of Hone's parodies, and after his acquittal the government dropped all but a couple of the cases that stemmed from them. While at least twenty-six libel charges had been brought by the authorities that year, only two of them ended with sentences.[54]

As we shall see, an even more compelling factor than this 8 per cent sentencing rate in the government's decision to abandon prosecutions was the success of Wooler and Hone in defending themselves against libel charges. But the government's forbearance came to an end in the wake of Peterloo in July

[52] See *Annual Register*, 53 (1811), pp. 244–6, for an account of one far-fetched prosecution and subsequent acquittal, of Henry White, proprietor of the *Independent Whig*.

[53] *Hansard*, 35, col. 554 (24 Feb. 1817).

[54] PRO KB 28/460–63; *Commons Journals*, 78 (1823), pp. 1082–6.

1819. More alarmed about popular disaffection than ever before, the Liverpool ministry insisted that its roots could be traced to the growth of seditious literature. The 'most efficient cause' of 'the present critical state of the country', Sidmouth observed that fall, was 'the audacious licentiousness of the press'.[55] He wasted no time in trying to curb it through vigorous application of the libel laws. Some fifty informations and indictments for libel were filed in King's Bench for 1819–20, and throughout the country there were some ninety prosecutions during this interval.[56] More narrowly focusing on humble vendors than it had done in 1817, the crown lawyers gained far more convictions. Just over half of the libel prosecutions of 1819–20 ended in some sort of sentence for the defendant, usually a few months in gaol.

Even this higher sentencing rate, however, did little to curb the 'licentious' press, and the Liverpool ministry ultimately decided that there was simply too much risk involved in libel prosecutions. The greatest risk stemmed from the government's inability to control language. For the prosecution, convincing a jury that the singled-out passages had a tendency to breach the peace in the manner prescribed was a business fraught with peril. First of all, it gave the accused an opportunity to bandy words with the king's ministers. One of the chief reasons why the Home Office and the crown lawyers were usually very reluctant to prosecute was the innumerable opportunities for publicity that a trial gave to the defendant. First and foremost, the information or indictment had to be read at the commencement of the trial by an officer of the court, ensuring that the allegedly libellous passages, reprinted in newspapers and pamphlets, would be read or heard secondhand by a vast number of people. Thus, as prosecutors themselves were all too painfully aware, 'whenever a libel is prosecuted, it draws into a second course of agitation, and … the very observations made upon the libel in a Court of Justice, become, as it were, a promulgation of the libel itself'.[57]

In many cases the defendant ushered a full account of the legal proceedings into the world, often with a running commentary, in an effort to win sympathy far beyond the courtroom. Richard Carlile routinely published accounts of his own, his family's, and his shopmen's trials, including the defence statements ridiculing Christianity which judges occasionally suppressed. Carlile managed to publish the first cheap edition of the *Age of reason* by including it in his own trial pamphlet. He entered all of Paine's book into evidence as part of his defence, and then sold some 10,000 copies of the trial pamphlet in two-penny instalments, to the consternation of Tories who wrote to the Home Office complaining of their broad distribution.[58] The Home Office gave Carlile and

[55] Sidmouth to Theodore Price of Birmingham, 3 Nov. 1819, HO 42/198, fo. 413.

[56] PRO KB 28/468–75; *Commons Journals*, 78 (1823), pp. 1082ff.

[57] Remarks of Benjamin Vaughan in *The trial of Daniel Isaac Eaton, for publishing a supposed libel, entitled Politics for the People; or, Hog's Wash* (London, 1794), p. 21. For the libel trial as an opportunity to 'aggravate' the putative offence, see Gilmartin, *Print politics*, pp. 115–27.

[58] See e.g. Revd George Wilkins of Nottingham to Lord Sidmouth, 5 Dec. 1819, PRO HO 42/200, fos. 335–6.

his wife Jane an opportunity to outdo themselves when it decided to prosecute her for selling the *Age of reason* in the form of his trial pamphlet.[59] After being summoned to answer the information filed against her, which of course contained the allegedly blasphemous passages from the *Age of reason*, Mrs Carlile obtained a copy of it and then published it.[60] Thus the trial proceedings enabled the Carliles to publish Paine's 'blasphemies' multiple times, in multiple inexpensive forms.[61]

At least the authorities had the satisfaction of putting the Carliles behind bars. Acquittal was an even better advertisement for alleged libels, because sympathetic newspapers were free to reprint them yet again with impunity once they had been cleared by a jury. Hence, for example, Cobbett reprinted in the *Political Register* the version of John Drakard's 'One thousand lashes' for which Leigh and John Hunt had been acquitted.[62] The joke on the government here was that Cobbett was advertising an anti-flogging passage alleged to have been an incitement to mutiny while he was himself serving time in Newgate for having published another anti-flogging passage alleged to have been an incitement to mutiny.

Given the myriad opportunities for advertisement afforded by a libel trial, it is no wonder that the crown lawyers were generally reluctant to risk one. But publicity was only one of their concerns. In some cases they avoided a trial because they were not confident that they could prove authorship to the jury's satisfaction. Even when the crown lawyers felt they *could* prove authorship, they were still vexed by the flexibility of language. They knew full well that conviction depended not simply on the matter in question, but the manner in which it was expressed. Their succinct remarks on cases do not leave a clear impression of precisely what sort of language was likely to lead to conviction, but they make it clear that radicals who left themselves a linguistic opening against the government's libel charge were likely to be left alone. Hence the most common excuse given by the Home Office for not bringing a libel prosecution against a particular publication was the form in which it had been written.[63] The most difficult language of all to convict was the language of parody. Convincing a jury that they should ascribe a single meaning and a seditious tendency to deliberately multivalent language was a prodigious task, and the crown lawyers usually failed to carry it out. They ceded the high ground to the defendant when they took a satire before a jury, because to each libellous accusation hurled at him he could simply respond that that was not

[59] Docketed remark at the bottom of the letter of George Wilkins of Nottingham to Lord Sidmouth, 5 Dec. 1819, PRO HO 42/200, fo. 336.

[60] *Vice versus reason: a copy of the information found against Mrs. Carlile* (n.d. [1819]).

[61] For a fuller discussion of the Carliles' strategy, see Gilmartin, *Print politics*, pp. 139–44.

[62] *Political Register*, 19, cols. 484–8 (27 Feb. 1811).

[63] See e.g. John Hiley Addington to the mayor of Wigan, 5 Oct. 1816 (copy), PRO HO 41/1, fo. 157; Addington to E. Gattey of Exeter, 4 Nov. 1817 (copy), PRO HO 41/3, fos. 229–30; Sidmouth to T. Kinnersley of Newcastle, 23 Oct. 1819 (copy), PRO HO 41/5, fo. 75.

what he had meant. Ultimately, the government simply had to hope that jurors would not be inclined to permit the defendant any significant definitional latitude. If they did, the government was virtually certain to lose.

It was the crown lawyers' failure to convince three different juries on three consecutive days of the blasphemous meaning of Hone's three parodies on the Anglican form of worship in 1817 which brought them their most crushing defeat of all. Hone's trials have been perceptively examined by Olivia Smith, Marcus Wood, and Joss Marsh,[64] but it is worth inspecting them here from a rather different angle in order to show just how humiliating a libel trial could be for the authorities who insisted on staging it. The Liverpool ministry had little choice but to go after Hone. Tories were clamouring for a more vigorous application of the libel laws to quell the flood of seditious literature that seemed to be washing over the country, and they were particularly insistent that something be done about Hone's parodies – *The political litany*, *The sinecurist's creed*, *and John Wilkes's catechism*. From Manchester to Worcestershire, from Peterborough to the Scilly Isles, an extraordinary number of correspondents wrote to the Home Office lamenting the circulation of these squibs in their neighbourhoods.[65] This long string of complaints could only have bolstered Sidmouth's resolve to make an example of the parodies, and in late February he decided to take legal action against them.[66]

In hindsight, he could not have chosen a worse test case. For the proceedings against Hone showed that the government was simply unable to control libel trials, especially when the meaning of satirical language was being contested. First of all, in this case, that language was genuinely funny, and the hilarity which it inspired in the courtroom audience compromised the symbolic power of the law.[67] The attorney general, Sir Samuel Shepherd, lost the upper hand at the very beginning of Hone's first trial. Shortly after he started reading a passage from *John Wilkes's catechism*, the courtroom erupted in laughter. Justice Abbott issued a stern rebuke and Shepherd tried to recover by observing that this was a perfect example of the way in which the parody brought the Christian faith into contempt,[68] but the solemnity of the proceedings had been irretrievably lost. The political establishment was particularly vulnerable to

[64] Olivia Smith, *The politics of language, 1791–1819* (Oxford, 1984), ch. 5; Marcus Wood, *Radical satire and print culture, 1790–1822* (Oxford, 1994), ch. 3; Joss Marsh, *Word crimes: blasphemy, culture, and literature in nineteenth-century England* (Chicago, 1998), pp. 24–41.

[65] See, among many others, George Allen, MP for Durham, to Sidmouth, 10 Feb. 1817, PRO HO 42/158, fo. 300; mayor of Coventry to Sidmouth, 8 Feb. 1817, PRO HO 42/159, fo. 438; George Markham, dean of York, to Sidmouth, 8 Feb. 1817, PRO HO 42/159, fo. 458; mayor of Litchfield to Sidmouth, 12 Feb. 1817, PRO HO 42/159, fos. 554–63; town clerk of Bath to Sidmouth, 13 Feb. 1817, PRO HO 42/160, fos. 361–74; William Margett, Huntingdonshire JP, to Sidmouth, 22 Feb. 1817, PRO HO 42/160, fos. 575–80; Joseph Taylor, Worcestershire JP, to Sidmouth, 23 Feb. 1817, PRO HO 42/160, fos. 633–8; Revd Charles Selby to George Vigoreux, lieutenant governor of the Scilly Isles, [7 Apr. 1817], PRO HO 42/163, fos. 294–5.

[66] PRO HO 42/160, fos. 275–6: Benjamin Hobhouse to John Hiley Addington, 26 Feb. 1817.

[67] Epstein, *Radical expression*, pp. 33–6; Barrell, 'Imaginary treason, imaginary law', pp. 119–20.

[68] *The three trials of William Hone*, first trial, pp. 5–6.

derisive laughter in such a pompous setting,[69] and the obligatory recitation of the 'libel' in this instance was virtually guaranteed to provoke it.

> Q. What is your name?
> A. Lick Spittle.
> Q. Who gave you this name?
> A. My sureties to the Ministry, in my political change, wherein I was made a member of the majority, the child of corruption, and a locust to devour the good things of this kingdom …
> Q. Rehearse the articles of thy belief.
> A. I believe in George, the Regent Almighty, Maker of new streets, and Knights of the Bath, and in the present Ministry, his only choice, who were conceived of Toryism, brought forth of William Pitt, suffered loss of place under Charles James Fox, were execrated, dead, and buried. In a few months they rose again from their minority; they reascended to the Treasury benches, and sit at the right hand of a little man with a large wig; from whence they laugh at the petitions of the people who pray for Reform, and that the sweat of their brow may procure them bread.[70]

It was impossible for Shepherd to wield the dignity of the law as a symbolic weapon when he had to confront this sort of waggery with a straight face.

Hone, moreover, secured for himself the symbolic high ground by portraying himself as the victim of a cruel and arbitrary ministry. Self-defence was fraught with peril. But Hone, like Wooler before him, whose trial James Epstein has brilliantly interpreted,[71] carried his off with aplomb. Depicting himself (and probably believing himself to be) a good upstanding Christian, he insisted that he was not a blasphemer, but the critic of a corrupt government who had been labelled a blasphemer because ministers thought this was the easiest way to secure a guilty verdict from a jury that was likely to take far greater offence at slurs against church doctrine than slurs against the government. His defence rested on the multiple meanings of satirical language. From start to finish, Hone insisted that his parodies were not blasphemies but political squibs, and that if the jury found them to be political squibs, they must acquit him. 'There were two kinds of parodies', he contended, 'one in which a man might convey ludicrous or ridiculous ideas relative to some other subject; the other, where it was meant to ridicule the thing parodied. The latter was not the case here, and therefore he had not brought religion into contempt.'[72] Hone freely admitted to having ridiculed the government, but ridicule of the government had not been the meaning that the government itself had ascribed to his works, and he should therefore be found not guilty.

An ardent student of satirical forms, Hone collected materials for a history of parody that he never finished. But he had an arsenal of biblical parodies with

[69] For some fascinating insights into this matter, see Joseph M. Butwin, 'Seditious laughter', *Radical History Review*, no. 18 (1978), pp. 17–34.

[70] *The three trials of William Hone*, first trial, p. 7.

[71] Epstein, *Radical expression*, ch. 3.

[72] *The three trials of William Hone*, first trial, p. 18.

which to embarrass the crown lawyers. Thus he informed the jury that Martin Luther had parodied scripture. So too had George Canning, in a poem published in the *Anti-Jacobin*. Why had the government not charged him with blasphemy? 'Mr. Hone hoped that the Attorney-General would bring Mr. Canning to justice *(cheering)*', but as of yet he had not, for reasons obvious to everyone.[73]

Hone's brilliant performance sharply contrasted with Sir Samuel Shepherd's uninspired prosecution. The former's long recitation of precedents for his biblical parody had clearly taken the latter by surprise. In order to keep within the bounds of his argument, Shepherd was forced to acknowledge that the eminent men who had preceded Hone, including Luther, had also been blasphemers, 'which, no doubt, in their later lives they often repented, more especially when the time arrived that they were to settle their account between their own consciences and their God. *(Violent coughing, and other marks of disapprobation, on the part of the spectators, here interrupted the Attorney-General)*'.[74] Making no effort to contradict Hone's argument that his was a political and not a religious parody, Shepherd only managed to convey the impression that he was casting aspersions upon the soul of the father of Protestantism. Shepherd would have had to do better than this to obtain a conviction. He could not rely on a packed jury, since the London special jury list had been reformed in the wake of Wooler's acquittal in July. The untainted jurymen brought in a verdict of not guilty after deliberating for only a quarter of an hour.

The government had only begun to fight, however. At first glance it might seem surprising that immediately after this shocking setback, Shepherd announced that he would try the information against *The Political Litany* the very next day. But the government's strategy of exemplary prosecution was predicated on the conviction of Hone, so the only thing Shepherd could do was to brazen it out and hope that another jury would see matters his way. Shepherd appeared to have learned nothing from the first trial, however, for he used the same losing arguments in the second case, with the same result. Then, astonishingly, Shepherd tried the third information against Hone the following day, and yet another jury acquitted him.

Hone's heroic resistance to Shepherd and to the legendary bullying of Chief Justice Ellenborough aside, it seems safe to say that the main reason for his acquittals was the instability of language. Shepherd's argument that Hone's words were an attack on the church rather than on ministers, and that they *were bound* to encourage subversive disrespect rather than harmless mirth in the minds of those exposed to them, was implausible on its face. As others have shown, Hone's case against the government was intricate and brilliant,[75] but the assumption on which it was predicated was obvious enough: that the language he used meant something very different from what the attorney

[73] Ibid., first trial, p. 41.

[74] Ibid., first trial, p. 44.

[75] Smith, *The politics of language*, ch. 5; Wood, *Radical satire and print culture*, ch. 3; Marsh, *Word crimes*, pp. 24–41.

general said it meant. Deliberately exploiting the ambiguity of language, Hone assaulted the law of libel at its weakest point. His success was so complete that the government did not so much as file an information for the better part of two years after his acquittals.

With the inherent weakness of the libel law thus painfully exposed, it is no coincidence that the Liverpool ministry sought to make it unnecessary at the very moment it made the broadest use of it in the wake of Peterloo. Ministers were persuaded that something decisive needed to be done about the radical press, to which they attributed the alarming growth of plebeian disaffection. 'The most difficult topic is the present state of the press', Liverpool concluded in October 1819.[76] It appears that he and his colleagues never even entertained the possibility of limiting the powers of juries in libel cases as a means of better controlling that press. Their silence on this issue is telling, for it suggests that they assumed that the rights of juries were politically untouchable, even at the height of the Peterloo scare. Ultimately, the ministry came up with a two-pronged alternative solution and enshrined it in two of the notorious Six Acts. One of them (the Blasphemous and Seditious Libels Act) proved to be largely symbolic, while the other (the Publications Act) was a revenue law that proved to be a much more effective antidote to the 'licentious' press than the law of libel had ever been. It put a temporary end to the two-penny radical press by stipulating that periodicals must either conform to the legally-specified size for newspapers and carry a 4d. newspaper stamp, or conform to the specified size for pamphlets and appear no more regularly than once a month at a minimum price of 6d. It also imposed a heavy liability burden on printers and publishers, requiring them to enter into recognizances of £300 if they published in the metropolis and £200 if they published elsewhere.[77]

The Publication Act had a devastating effect on the radical press. If, as it has been estimated, *per capita* newspaper purchases did not keep pace with robust population growth between Waterloo and the Great Reform Act,[78] this was chiefly because a great many of the humble readers of radical weeklies had been priced out of the market. Cobbett, for instance, estimated that his forced transition to a 6d. edition reduced the *Political Register*'s circulation by some 80 per cent. At least it managed to live on into the 1830s. Most of Cobbett's rivals were able to limp along with drastically reduced circulations for only a few years before giving up.[79]

In the very short term, however, before the Publication Act had produced a measurable effect, it seemed that the government had simply given up trying to control the radical press. The Queen Caroline agitation of 1820 produced a

[76] Liverpool to Lord Grenville, 15 Oct. 1819, Add. MSS 38280, fos. 146–7 (Liverpool papers).

[77] The ministry had initially set recognizances at a whopping £500 across the board, but succumbed to the pressure of the publisher's lobby and reduced it. *Hansard*, 41, col. 1177 (15 Dec. 1819), speech of Viscount Castlereagh.

[78] Joel Wiener, *The war of the unstamped* (Ithaca, NY), p. 7.

[79] Spater, *Cobbett*, II, pp. 390–1; Wickwar, *Freedom of the press*, pp. 155–6; Patricia Hollis, *The pauper press: a study of working-class radicalism of the 1830s* (Oxford, 1970), pp. 98, 318.

huge amount of inflammatory material, most of it aimed at the hypocrisy of the serial adulterer George IV in trying to exploit his estranged wife's sexual misadventures as a pretext for depriving her of her privileges as consort.[80] Under the circumstances, there was little that the government could do. For a great deal of the radical literature took forms that the crown lawyers knew they could not control. Ever since Walpole's day, prints had been considered legally untouchable because it was so difficult to affix a single seditious meaning and intention to them, and because displaying scurrilous prints in court was simply too embarrassing.[81] Hone's acquittals had put parodies beyond the reach of prosecution for the very same reason. Combinations of print and parody were thus untouchable, even though in skilled hands they could form an especially devastating sort of critique. Hence Hone and George Cruikshank published their brilliant squibs with impunity. They invited prosecution with *The political house that Jack built*, which Hone had provocatively subtitled 'a straw thrown up – to see which way the wind blows'. Given its earlier setbacks, the Liverpool administration was not about to go after an illustrated parody of a nursery rhyme in open court, especially one penned by Hone. So the *Political house* quickly ran through fifty-four editions, and over 100,000 copies of it were sold in short order.[82] Perceiving that they now had a licence to ridicule, in 1820 Hone and Cruikshank lampooned George IV to devastating effect in three more tremendously popular squibs – *The political showman – at home!*, *the queen's matrimonial ladder*, and *Non mi ricordo!*.[83] Left with no viable legal means of controlling satire, the king resorted to bribery, paying Cruikshank £100 'in consideration of a pledge not to caricature his Majesty in an immoral situation'.[84]

Having learned the hard way that there were certain forms of language that it simply could not control, the government virtually abandoned its efforts to control language altogether. William Hone's reader's ticket to the British Museum is a fitting monument to its surrender. In May 1820, a few months after the first publication of *The political house* and while he was still busy scribbling anti-George parodies, Joseph Planta, the head librarian, granted

[80] For Caroline, see e.g. Iorwerth Prothero, *Artisans and radicals in early nineteenth-century London: John Gast and his times* (Folkestone, 1979), ch. 7; Thomas Laqueur, 'The Queen Caroline affair: politics as art in the reign of George IV', *Journal of Modern History*, 54 (1982), pp. 417–66; Anna Clark, 'Queen Caroline and the sexual politics of popular culture in London, 1820', *Representations*, 31 (1990), pp. 47–68.

[81] John Wardroper, *Kings, lords, and wicked libellers: satire and protest, 1760–1837* (London, 1973), pp. 18–19.

[82] Frederick Hackwood, *William Hone: his life and times* (London, 1912), p. 191; Jonathan Bate, *Shakespearean constitutions: politics, theatre, criticism, 1730–1830* (Oxford, 1989), pp. 16–17. For close analyses of *The political house*, see Wood, *Radical satire and print culture*, ch. 5; Smith, *The politics of language*, pp. 165–70.

[83] See e.g. Wood, *Radical satire and print culture*, pp. 14–17, 99, 152–4; Wardroper, *Kings, lords, and wicked libellers*, ch. 12, esp. pp. 212–15.

[84] Quoted in Jonathan Bate, *Shakespearean constitutions* (Oxford, 1989), p. 18, from a receipt in the royal archives in Windsor dated 19 June 1820.

Hone permission to use the Library on a regular basis.[85] Hone undoubtedly used his reader's ticket in order to research his aborted history of parody. Thus a government appointee provided one of the government's most dangerous critics with the tools to continue the research into the flexibility of language that he had already used to brilliant effect in his assaults on the law of libel.

III

At first glance, Hone's path from the court of King's Bench to the British Museum appears to mark the triumphal progress of the freedom of the press. With the abject failure of its longstanding policy of exemplary libel prosecutions, the government simply gave up trying to control language. In its (never very systematic) effort to limit access to potentially dangerous ideas, it now had to rely on the stamp duties and the laws governing public assembly,[86] and over the years these too would be liberalized. Hone, however, doubtless would have thought that this whiggish tale conveyed too benign an image of Tory repression. In keeping with our theme of the double-edged quality of the law of libel, it is important to stress that his spectacular victory was bought at a substantial personal price. While it clearly damaged the Liverpool ministry, it also left him feeling deeply wounded. A year after his trials, he was still feeling mentally and physically exhausted, sick at heart and unable to apply himself to his publishing projects. 'I have been, and am, ill – dying, but not dead', he told a business associate.

> Blood at the head, apoplectic affection, cupping, bleeding, blistering, lowering, a fortnight at Bath &c., vexation at home & habitual melancholy, which encreases upon me, all these are indications of that sure and certain event which happeneth unto all and which may happen to me in an instant. I am in fact in a very bad way. The trials have given me a shake which has compelled me to abandon what I had entered upon with alacrity & spirit.[87]

Smarting from the accusation of blasphemy, he had provided the government with a sort of vindication shortly after his last acquittal. He sent a letter to the newspapers denouncing the men who sought to profit from his courtroom triumph by reprinting his parodies, disclaimed any acquaintance with them, and declared that he would 'never write any work of the tendency again, and when I come to publish the Report [of the trials], I shall feel it my duty most earnestly to exhort all my fellow citizens to abstain from parodying any part of the Holy Writ, or the Service of the Church of England'.[88]

Hone's supporters understandably felt betrayed by this notice. As one of them rightly pointed out to him, it was tantamount to 'admitting in some measure the justice of the charges brought against you, & weakening, if not

[85] Hone to Joseph Planta, 9 May 1820, and John Latham to George Birkbeck, 21 May 1820, Add. MSS 40120, fos. 138–40, Hone papers.
[86] See Lobban, 'Seditious libel', passim.
[87] Hone to John Childs, 8 Jan. 1819, Add. MSS 40120, fo. 110, Hone papers.
[88] *Morning Post*, 24 Dec. 1817, p. 3.

entirely doing away, the chief merit of your defence, the proof that not only there was no intention in those publications to ridicule religion, but that they had not even that tendency'.[89] In any case, it is obvious that Hone's triumph had given him no spiritual succour. Perhaps he did not find any until the early 1830s, when, bankrupt and in prematurely broken health at the age of about fifty, he had a Damascus road experience, joined the editorial staff of the *Patriot* – a self-proclaimed champion of 'unfettered Protestantism, Evangelical truth, and religious freedom' – and took up the battle against church rates.[90] Hone survived the strategy of exemplary prosecution by a good many years. But if he ultimately did more harm to it than it had done to him, his encounter with the law of libel had left an indelible impression on him. In retrospect, we would do well to consider the scars he received and not simply the battle he won.

[89] P. J. Martin to Hone, 25 Dec. 1817, Add. MSS 40120, fo. 82, Hone papers.
[90] Hackwood, *William Hone*, pp. 302–6, 328–30; Smith, *Politics of language*, pp. 173–4.