The Jury Debate and the Foundations of Fox’s Libel Act, 1792: ‘A proposal the most serious in its nature that can exercise the attention of a legislative body’

List of Abbreviated Primary Sources


John Bowles, Considerations on the Respective Rights of Judge and Jury, particularly upon trials for libel, occasioned by an expected motion of the Right Hon. Charles-James Fox, (London, 1791) — Bowles, 1791

A. Highmore, Reflections on the Distinction usually adopted in Criminal Prosecutions for Libel; and on the Method Lately Introduced, of Pronouncing Verdicts in Consequence of Such Distinction, (London, 1791) — Highmore

Thomas Leach, Considerations on the Matter of Libel. Suggested by Mr. Fox’s Notice in Parliament, of an Intended Motion on that Subject, (London, 1791) — Leach

John Bowles, A Second Letter to the Right Honourable Charles James Fox, occasioned by his motion in the House of Commons respecting Libels..., (London, 1792) — Bowles, 1792

T. B. Howell (Ed.), A Complete Collection of State Trials, and Proceedings for High Treason, and other Crimes and Misdemeanors, from the Earliest Period to the Year 1783, (London, 1819) — S.T.
Introducing his Libel Bill into the House of Commons on May 20th 1791, Charles James Fox protested that judges ‘knew it was the province of the jury to judge of law and fact; and this was the case... of every other criminal indictment. Libels were the only exception, the single anomaly; and if it was so, it was a great one indeed!’ To Fox, and to those who rose to speak in the vigorous parliamentary debates, the issue of contention— the right of the jury to pass a general verdict in a trial for seditious libel— was central to the British constitution. At stake was the question of who would control the limits of free speech. The debate was not a new one; radical tracts throughout the eighteenth century had argued for the rights of juries in libel trials, at the same time as the courts, under the direction of Lord Mansfield, cemented the distinction between the judge’s right to decide points of law, and the jury’s only to decide points of fact.

In this context of these long-standing debates, the passage of Fox’s Act in 1792, declaring the right to a General Verdict, is apparently paradoxical. It seems surprising that parliament was inclined to liberalise the controls on speech— in a Bill almost identical to one that had been defeated in parliament in 1770— at the same time as fears over the course of the French

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1 Bowles, 1792, 16
2 ParlHist29, cols.565-6. The Bill, 32 Geo. III c.60, provides that ‘On the trial of an indictment for a libel, the jury may give a general verdict upon the whole matter put in issue, and shall not be required by the court to find the defendant guilty merely on proof of the publication, and of the sense ascribed to it in the information.’
revolution led to repression, even ‘Terror,’ in other areas of the law. This question is not usually addressed in the historiography of the eighteenth-century jury debates as a whole. It is argued herein that in order to understand the reasons for the Act, it is necessary to recognise the new emphasis of the jury debate in 1791-2, which focused on the ability of jurors, and, most originally, on legal process. In the context of revolutionary fear and repression, these questions, as echoed in parliament, created a battle-ground for competing conceptions of the British constitution. After setting out the context and historiography of these debates in section I, I shall explore in detail the pamphlet debates of 1791-2 in section II, before returning, in section III, to the parliamentary debates, and the wider significance of libel in revolution-era Britain.

I

The historiography on the development of libel law, though not always explicitly addressing the causes of Fox’s Act, can be divided into two points of view. The first is that of Green, whose seminal account of the pamphlet debates is a study in radical politics. Green implies that external pressure gradually forced parliament to change the law—though no reason is given for this change occurring at the moment it did. ‘In manipulating the balance of authority at trial,’ he argues, ‘the government was seen to be manipulating one of the institutions through which it had historically ruled and on which it rested its claim to legitimacy.’ Here he cites E. P. Thomson’s argument that the authorities bound themselves by the elements of due process that they created to legitimise their power.

The force of the radical tracts on libel must certainly be noted. Green characterises three phases of the pamphlet debate: From 1752, following the acquittal of William Owen for seditious libel, tract authors emphasised that juries should consider intent as a matter of fact. From 1764-1770, Wilkite tracts on free speech noted the susceptibility of the bench to political pressures, whilst

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5 Green, Verdict, 349
7 The following is from Green, Verdict, 319-31
conservative respondents stressed that Mansfield doctrine was supported by precedent. A third wave of tracts, written after *St Asaph’s Case* in 1784, tended to reject the typical earlier radical argument that intent and seditiousness were matters of fact, arguing instead that the jury, as in other criminal trials, ought to have the right to try matters of law. It was this argument, combined with a detailed discussion of legal process, that was central to both radical and parliamentary debate in what I consider to be a fourth wave, 1791-2. This is explored below in pro-jury pamphlets by Thomas Leach and A. Highmore, and pro-judge pamphlets by John Bowles.

The second historiographical point of view is that of Holdsworth, Oldham, and Lobban, whose concern with legal judgements, leads them to conclude that libel law had become unworkable during the eighteenth century. These accounts note the contradictory precedent of the *Seven Bishops Case*, in which the jury ruled on intention and seditiousness as well as matters of fact, and *Rex v. Tutchin*, in which Lord Holt appears to reserve that right to the bench. That latter opinion was held by Lord Lee in *Rex v. Owen*, but ignored by the jury, which returned a verdict of not guilty, contrary to Lee’s direction and the plainness of publication. During Mansfield’s tenure, Oldham argues, defence counsels continued to argue for the jury’s right to return a general verdict, whilst ‘Mansfield, in turn, would continue to insist that the issues of intent and sedition were questions of law— a posture necessary, in his view, to avoid anarchy.’

These legal accounts also point to the confusion caused by the jury’s verdict in the famous 1783 *St Asaph’s Case*, that the defendant was ‘guilty of publishing the pamphlet... [but] we don’t decide upon its being a libel or not,’ after which the defence was refused a motion for a new trial, but granted a motion to arrest judgement. In this case Mansfield stated most clearly his

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9 Joseph Towers, *An Enquiry Into the Question, Whether Juries are, or are not, Judges of Law, as Well as of Fact...,* (London, 1764); Anon, *A Letter from Candor to the Public Advertiser,* (London, 1764); ‘Father of Candor,’ *An Enquiry into the Doctrine, Lately Propagated, Concerning Libels,* (London, 1764); Anon, *Considerations on the legality of General Warrants,* (London, 1765); Anon, *A Postscript to the Letter on Libels, Warrants; &c.,* (London, 1765)


11 Probably published in the order: Bowles, 1791; Highmore; Leach; Bowles, 1792


13 ‘Trial of the Seven Bishops,’ 12 S.T. 183 (1688)

14 14 S.T. 1095 (1704)


16 Oldham, *English Common Law,* 219

17 21 S.T. 847 (1783-4). See Oldham, *English Common Law,* 228-30. A similar verdict— guilty of ‘printing and publishing only’— had been registered in the case of Woodfall [20 S.T. 921 (1770)]. A new trial was ordered, but did not take place. See Holdsworth, *History,* 674-6
opposition to the jury’s deciding on law, an argument repeated in Bowles’ later pamphlets: ‘What is contended for? That the law shall be in every particular cause what any twelve men, who shall happen to be the jury, shall be inclined to think... subject to no control.’

There is much value in these accounts of libel law, for their insight into the problems of its application by 1783, though such analysis doesn’t address the question of the timing of parliament’s concern with issue of libel. I contend herein that the key to understanding Fox’s libel Act lies in uniting these areas of historiographical study. It is only through a detailed consideration of the state of the debate in 1791-2 that we can see a unity of concern– across radical and conservative tracts– for the process by which questions of law were to be addressed. It is this issue of legal process that appealed to parliamentarians in 1791-2, when the context of revolution and repression made ‘the constitution’ more prominent in political discourse.

II

One key issue in the jury debate of 1791-2 concerned the ability of jurors, on which writers drew on the arguments of earlier tracts. Leach, in 1791, had restated the radical argument that jurors in libel trials should hold the same rights as in other criminal trials, noting that jurors in murder cases judged between homicide, manslaughter, or self-defence. Bowles’ 1791 tract, whilst repeating the conservative argument that libel law was too complex for common jurors, also addressed this point in an original way, stating that in such cases jurors judged not the defendant’s intention to murder, but his intention to do the act that constituted murder. In like manner, he argued, jurors in libel cases should determine only the intent to the the illegal act, i.e. publication. Thus he saw coercion as a legitimate defence, but not the truth of the claim, since there the intention to publish remained.

More notable than these arguments by analogy to criminal trials, were new arguments in fact distinguishing seditious libel from other crimes, since it required a judgement not on the fate of an individual, but on the public good. This was an idea adopted, for contrasting reasons, by writers on both sides. Leach argued, in support of the Bill, that ‘It is utterly repugnant to reason, that in the case of libel, where the executive power itself, may be a party, and the abuse of its authority is, therefore, most to be dreaded,... the law should recognise the single instance of

\[18\] 21 S.T. 847, at 1040-1
\[19\] Leach, 7
\[20\] Bowles, 1791, 31-2
exception to its general rule [that jurors could judge matters of law].”

Highmore noted that in cases of sedition, common men were better placed than judges to estimate the likely effect on the people. It was, he suggested, a contradiction to suggest that common men were susceptible to sedition from a given libelous writing, and then to argue that they couldn’t, as jurors, fully understand it. Bowles argued, conversely, that since in public libel ‘the concern is that of the whole community,’ the court itself is best place to determine law. He also argued that the truth of a claim is a legitimate defence for a jury to consider in private (civil) libel, since truth negates the injury done to the individual libeled, but not in a public libel, since a breach of the peace is likely to be even more serious if the libel is true.

A second, and more important feature of the jury debate in 1791-2, however, was its new focus on the legal process, an issue on which the conservative argument was articulated in much greater detail than it had been before. The first question of debate was on the Bill’s effect of legal procedure. Bowles’ 1791 pamphlet appealed to the consistency of the law, claiming that jury decisions on matters of law would create unreliable legal principles that evolved ‘sub silentio,’ obscured by a general verdict. Such unpredictability in future cases, he argued, would amount to ‘an Inquisition.’ He noted further that judicially-determined law allowed for appeal to higher courts on points of law, which he claimed would be impossible were ‘the share of influence that [the point of law] has upon the verdict’ unclear. Highmore addressed this issue of procedure by arguing that in fact a separation of law and fact would allow the state to try a person once on a charge of publishing and again on a charge of sedition, for a single libel. Leach argued that the different standards for civil and criminal libel allowed a vengeful claimant, against whom a truthful statement had been published, to pursue a criminal trial, where truth was no defence, in order to exact revenge.

On the issue of procedure, Highmore argued in 1791 that a troubling precedent would be set by Bowles’ suggestion that a guilty verdict on the facts be taken to mean ‘that if I the judge think this book libelous you declare the writer guilty of a libel,’ since to do so would authorise ‘half-

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21 Leach, 9
22 Highmore, 15-17.
23 Bowles, 1792, 20
24 Bowles, 1791, 53-4
25 Bowles, 1791, 12
26 Bowles, 1791, 13-14
27 Highmore, 28
28 Leach, 11-17
verdicts.’

Perhaps in response, Bowles developed a further argument in his 1792 tract considering the precedent set by Fox’s Bill. He considered that jurors would come to think of themselves as ‘the sole arbiters of the law in all criminal cases,’ leading ‘not so much [to] decision according to rule, as a decision founded in honest intentions.’

He elaborated on consequent uncertainty of future litigation, claiming that it would lead to tyranny. For Bowles, in alarmist language certainly resulting from the imminent vote on Fox’s Bill, the observable development of judicial principles would be usurped by jurors’ ‘ex post facto’ declarations.

The second key question of debate on legal process concerned the formality of the indictment. Bowles’ 1791 tract argued that the distinction between law and fact in libel created the optimal form of justice, since the allegations against the defendant—the facts of publication, and the meaning of the passages cited—could be specific, and thus the defence case fought only on these grounds. In other trials, he argues, one might ‘be obliged without preparation to argue points of law.’

However, the ambiguity of the indictment, which cited ‘false, scandalous, and malicious’ libel, was much criticised by radical writers throughout the eighteenth century, since these allegations were not subject to the jury’s judgement. These points, restated by Leach and Highmore, were addressed by Bowles in 1792.

His response, that ‘the epithets being merely inferences of law from the printing and publishing, are to be presumed, unless rebutted by proof,’ considered the act of publication to be a sign of intention, by analogy to the assumed maliciousness of the act of murder.

The third, and most innovative, aspect of the debate on legal process concerned the alternative means of ruling on the law, those of demurrer (prior to trial), and arrest of judgement (after conviction). This option was first raised in Bowles 1791 pamphlet, which saw the judgement on legality as a necessary premise, which, if combined with proof of the facts, led to a conclusion of guilt; on this basis, the guilt could be disproven if the premise of illegality was rejected by the court, either before or after trial.

Highmore, in response, argued that a demurrer would be too great a risk for a defendant, since it would involve implicitly conceding the facts of the case, and

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29 Highmore, 34
30 Bowles 1792, 17-18
31 Bowles, 1792, 29-30
32 Bowles, 1791, 26-8
33 Towers, Observations, 20
34 Highmore, 14; Leach, 20
35 Bowles, 1792, 15
36 Bowles, 1791, 22-6
thus jeopardise a future criminal trial.\textsuperscript{37} Bowles, by way of response, in 1792, relied upon the same new argument that he used on the issue of the indictment; by separating the points of law and fact in demurrer and criminal trial, he claimed, a defence case was in fact made easier, since one could build a single case at a time.\textsuperscript{38}

Thus we can see that the pamphlet debate in 1791-2 drew upon earlier arguments about the role and ability of jurors, extending this debate to judgement upon the public good. Most notable were the new emphasis and arguments on the issue of legal process, which was manifest in three questions: on procedure, on the indictment, and on demurrers. To understand the effect of these arguments, we shall look to the parliamentary debates on Fox’s Bill, in particular the attention that the debate on legal process drew to the British constitution.

\textbf{III}

It is possible to observe the adoption of these new arguments on legal process into the parliamentary debates of 1791-2. The Solicitor General considered jury trials ‘the greatest blessing which the British constitution had secured to the subject.’\textsuperscript{39} The Lord Chancellor, in opposition to the Bill, adopted the argument used by Bowles, that a general verdict ‘shut out the question of law, and deprived the defendant of any advantage that might arise to him from it,’ presumably in seeking an arrest of judgement.\textsuperscript{40} He argued further that the Bill would set a problematic precedent of jury power, ‘opening a much wider door to the discretion of juries.’\textsuperscript{41} He expanded on this in a later debate, concluding as Bowles had that ‘endless confusion’ would arise form the unpredictability of future cases, since juries in different parts of the country would decide on the law in contradictory ways.\textsuperscript{42} Finally, the House, in seeking an opinion from the Judges in May 1792, sought clarification on the indictment; the judges replied that epithets (‘false’ etc.) applied only ‘to the aggregate criminal result.’\textsuperscript{43} Interestingly, Lord Porchester argued against seeking the judges’ opinions, on the basis that ‘the principal object of the bill was to limit their assumed powers.’\textsuperscript{44}

\begin{thebibliography}{9}
\bibitem{Highmore} Highmore, 29-31
\bibitem{Bowles} Bowles, 1792, 32
\bibitem{ParlHist29} ParlHist29, 592
\bibitem{ParlHist29} ParlHist29, 1038
\bibitem{ParlHist29} ParlHist29, 1039
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\bibitem{ParlHist29} ParlHist29, 1041
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This focus on legal process made fundamental the nature of Britain’s constitutional settlement. Indeed, James Epstein has characterised British political discourse in the era of the French Revolution as defined by ‘the constitutionalist idiom.’ It is my argument that it was the coincidence of the new terms of the debate from 1791, with its focus on the legal process, and the sentiment of revolution-era politicians, that caused parliament to address the long-standing problems of libel at this seemingly surprising moment. Thus Lord Grenville argued that ‘the subject was entitled to every degree of discussion, at a time especially when libels were published against the constitution itself.’ To see the conservative fears of revolution in the 1790s as provoking only overwhelming repression is, as Emsley notes, to ignore the more nuanced reality of political debate. The revolution, though provoking a conservative reaction by Pitt’s government in many respects, emphasised the importance of the British constitution, especially those features of the rule of law that distinguished England’s ‘Glorious’ Revolution of 1688– so often referred to in the parliamentary debates on the Bill– from the French Revolution a century later.

Thus, immediately after Lord Lansdowne made reference both to the Revolution and to the effect of Painite pamphlets in his speech on the Bill, Lord Porchester admitted that ‘with regard to the temper of the times, he feared it, but he thought they ought on that very account to pass the present Bill.’ Such a view is corroborated by one biographer of Fox, who sees the Bill as a reaction to the perception that ‘freedom of speech would be the first casualty of heightened anxiety over the situation in France.’ The link between the 1791-2 debates on the law and the passage of Fox’s Bill is best observed in Fox’s opening speech, partially quoted above. Fox emphasised that the Bill was ‘a duty which he owed to the public, and the more particularly at this time, when it was the fashion to go into discussions on the theory of the constitution for


46 ParH Hist29, 1041

47 Clive Emsley, ‘The Impact of the French Revolution on British Politics and Society,’ in Ceri Crossley and Ian Small (Eds.), *The French Revolution and British Culture*, (Oxford, 1989), 58. Henry Addington, later Prime Minister, saw the decision to arm against France as ‘a pledge on the part of the government, that they should never attempt anything hostile to the constitution... [and] a pledge on the art of the people that they valued as well as understood its excellence.’ (Linda Colley, *Britons: Forging the Nation 1707-1837*, (London, 1992), 309). See also Emsley, ‘Repression,’ 801-9

48 The ideological importance of the centenary of 1688 is emphasised in George Woodcock, ‘The Meaning of Revolution in Britain, 1770-1800, 2-5, and Emsley, ‘The Impact,’ 32, both in Crossley and Small (Eds.), *French Revolution*.

49 ParH Hist29, 1422-5. Lubasz recognises that ‘perhaps events in France were partly responsible for the cautious attitude of some of the peers.’ (‘Public Opinion,’ 461)

50 Derry, *Fox*, 316
various purposes. As Peter Mandler has argued, such ‘loyalty to institutions’ was central to British political culture in the 1790s. Thus Fox and his supporters, in the context of the revolution-era, argued for the right of juries to pass a general verdict in libel trials on the basis of constitutional necessity.

I have argued herein, through examining the nature of the jury debate in 1791-2 and its effect on parliamentary discussion, that the apparent paradox of the timing of parliament’s liberalisation of libel trials is no paradox at all. In bringing to attention new arguments about jury rights and the legal process, these tracts, which were echoed in parliament, appealed to the British constitution itself. It was precisely the coincidence of these arguments and the context of the French Revolution that encouraged parliamentary opinion towards a defence of the English legal system, and the passage of Fox’s Act. Its precise timing is of more interest than has previously been recognised.

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51 ParlHist29, 575-6
52 Peter Mandler, The English National Character: The History of an Idea from Edmund Burke to Tony Blair, (New Haven, 2006), 28
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