The seditious libel trials of the eighteenth century constitute an important chapter in the history of freedom of the press and the growth of democratic government. While much has been written about them and about the administration of the criminal law in eighteenth-century England, little has been said about the relationship between the libel prosecutions and the more pervasive and longstanding problems of the criminal law.\footnote{E.g. Holdsworth, *History of English Law*, 10:672–96. (Much of Holdsworth’s account of the seditious libel law, its interpretation by Mansfield and others in the major trials, and Fox’s Libel Act and its aftermath remains adequate. I sketch in the necessary details but do not replicate Holdsworth’s lengthy account. I stress those details essential for my own purpose, which is to assess the manner in which those contemporaries who commented on the matter thought about the problem of the jury’s role in seditious libel cases.) See also e.g. Leonard W. Levy, *Legacy of Suppression* (Cambridge, Mass., 1964), pp. 88–175; Frederick Seaton Siebert, *Freedom of the Press in England, 1447–1776* (Urbana, Ill., 1965), pp. 269–75, 380–92; H. M. Lubasz, “Public Opinion Comes of Age: Reform of the Libel Law in the Eighteenth Century,” *History Today*, vol. 8 (1958), pp. 453–61; Robert Rea, *The English Press and Politics: 1760–1774* (Lincoln, Nebr., 1963); John Brewer, “The Wilkites and the Law, 1763–1774,” in Brewer and Styles, eds., *An Ungovernable People* (New Brunswick, N.J., 1980), pp. 128–71; Patrick Devlin, *The Judge* (Oxford, 1981), pp. 119–26.} We have perhaps gone too far in positing—or simply assuming—a separation between political high misdemeanors and common-run felony cases such as homicide and theft. There were, however, points of contact between the two; most notably, the trial jury was employed in both. This conjunction raises the question of whether the use of the jury in the one kind of case influenced thinking about how it ought to be used in the other. I shall explore this subject in light of the tract literature of the seditious libel crisis. I hope thereby to elucidate the oft-repeated arguments concerning the jury’s right to decide law as well as fact, and to characterize the kinds of knowledge that pro-jury writers thought jurors were to bring to their task. Finally, I shall set forth some tentative conclusions concerning the place of the seditious libel episode and its resolution in the history of the jury and the administration of criminal law.

At the time of the seditious libel crisis the two strands of jury law-finding theory that we have traced remained intact, one still active, the other largely historical. The tradition of merciful acquittals and partial
verdicts in common-run cases continued apace with something close to official acquiescence. Although true nullification of judicial instructions was not officially approved, some very respectable jurists not only lauded the nullifying behavior of juries in certain pre-1689 political cases, but, more significantly, could be read as suggesting that there might be occasions on which juries would once again be duty-bound to play that role.

The seditious libel tracts reflect the influence of these strands of thought in a variety of ways. Especially, they reveal both the extent to which the radical jury proponents were able to build upon the views of the more conventional, establishment writers and the importance of the interplay between notions of true nullification in political prosecutions and the tradition of merciful verdicts in common-run cases. After briefly describing the seditious libel controversy (section I) I shall examine these and other themes in the course of considering varying views of the constitutional role of the criminal trial jury (section II) and the tract writers' approach to finding law (section III), finding fact (section IV), and applying law to fact (section V). My conclusion (section VI) puts the seditious libel controversy into historical perspective regarding social, political, and constitutional aspects of the institution of trial by jury.

The common law crime of seditious libel can be broadly characterized as the intentional publication of a writing that "scandalized" the government, i.e., tended to bring it into disesteem. Although indictments for seditious libel generally alleged that the accused had acted "falsely, seditiously, maliciously and factiously," the jury was to render what amounted to a special verdict in the form of a general verdict of "guilty" if it found that the accused intentionally published the writing and if it found that the writing bore the meaning alleged by the prosecution. The origins of the seditious libel doctrine lay in Star Chamber practice, but the doctrine was given final form early in the eighteenth century by Chief Justice Holt.2 Significantly, the law did not recognize truth as a defense.3 Moreover, as we have seen, it assigned to the court as matters of law two questions that had the appearance of questions of fact: whether the act was done with criminal intent, and whether the writing was seditious or defamatory. It was perhaps plausible to consider the latter question one of

law because the nature of the crime typically meant that the entire record of the allegedly criminal act was embodied in a physical specimen that survived for judicial inspection. It was less plausible to cast the question of criminal intent as one of law to be inferred by the court. On both counts the doctrine was strongly resisted, from the Restoration trials of Care 4 and Harris 5 in 1680 and the great case of the Seven Bishops 6 on the eve of the Glorious Revolution down to the reform of the doctrine by means of Fox’s Libel Act in 1792. 7

We may note briefly the major phases of the seditious libel debate in the eighteenth century. From the perspective of nearly all the participants in that debate, the Seven Bishops’ Case had taken on the garb of hallowed precedent. Most writers saw that great courtroom drama as an act by which the people paved the way for the constitutional settlement that followed the Glorious Revolution of 1688–89, wherein Englishmen consigned the law to its rightful place—the protective arms of an independent judiciary. 8 The case, which was tried in a highly charged political atmosphere, involved the prosecution of seven bishops who refused to read James II’s Declaration of Indulgence in their churches. Because the bench divided on the question of whether the petition constituted a libel, that question was left, de facto, to the jury. 9 The acquittal of the bishops was taken to be both a rejection of James’s pro-Catholic policies and a vindication, against the views of the bench, of the jury’s right to determine the questions of intent and libelousness. The case became a precedent for opposition to tyranny, an act of last resort: jury nullification of the official doctrine of seditious libel, on which the bench had not una voce insisted, had saved the constitution. Yet for some, this did not require rejection of the Stuart doctrine of seditious libel. An independent and impartial bench could be trusted (or so the theory ran) to assign and

5. Ibid., pp. 926–32 (1680).
7. 32 Geo. 3, c. 60 (1792). Technically, criminal intent was not at issue in seditious libel. If the court found that the writing was seditious, it held that the defendant constructively intended the consequences of the act of publication. Fox’s Act left the jury in a position where it could apply the judge’s instructions on seditiousness; in the course of doing so, the jury was supposed to imply the requisite intent if it found the publication seditious. The jury was thus in a position to consider whether in fact there had been actual defaming intent—only in that sense had the issue been “left” to the jury—though to do so was to go against the instructions and, hence, against the Act. See below, text at nn. 62–64.
8. Act of Settlement (1701), in E. N. Williams, comp. and trans., The Eighteenth Century Constitution (Cambridge, 1965), p. 59: “[J]udges commissions be made quamdiu se bene gesserint and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them.’’
9. See above, Chapter 6, text at nn. 232–34.
determine all questions of law. Thus, in the century after the Glorious Revolution, much of the legal establishment both accepted the constitutional settlement and adhered to the essential elements of the Stuart law of libel. For many others, however, the _Seven Bishops' Case_ stood for more. It was a vindication of the integrity of the general verdict. For some this meant only that the traditional role of the trial jury, the finding of fact and the application to fact of the law as given by the bench, was preserved. Others, as we shall see, envisioned the general verdict as including not merely application of the law but also true law-finding.

From the outset the eighteenth-century debate concerning the seditious libel doctrine was couched largely in Restoration terms. Chief Justice Raymond succinctly restated Holt’s formulation of the Stuart doctrine in _Rex v. Franklin_ in 1731, setting forth a division of judge-jury responsibilities that the courts would attempt to enforce until the passage of Fox’s Libel Act. His opinion, in turn, revived the Restoration defense of the criminal trial jury. Late in 1732, John Hawles’s 1680 tract, _The Englishman’s Right_, was reprinted for the first time. The new preface, signed by one J. K., warned of developments that threatened to destroy all that had been won in the Glorious Revolution and commended the tract “in which the original design, duty and power of jurors are so clearly

10. Mansfield, in _St. Asaph’s Case_ (State Trials, 21:1040) espoused the commonly held point of view as follows: “Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now, in the present state of things, puerile rant and declamation. The judges are totally independent of the ministers that may happen to be, and of the King himself.” (Emphasis added.) Mansfield took the view that the opponents of the official doctrine sought to make an exception of the law of libel: in that case alone the jury would find law as well as fact. A similar view can be found in an unpublished manuscript, “Sketch of an answer to a Pamphlet, entitled ‘Letter concerning Libels, Warrants and Seizures of Papers,’ ” (B.L. MS Add. 35, 887, fols. 171 et seq.), probably written in 1765 in reply to the second edition of “Father of Candor’s” famous work (see below, n. 117). As the present study makes clear, most pro-jury writers took the view that the jury was to find law as well as fact in libel, as in other cases. From their perspective, libel was currently an exception under the official doctrine, and ought not to be so.

11. Hamburger (“Origins of the Law of Seditious Libel,” see above, Chapter 6, nn. 210, 238) argues that the doctrine was still loosely formulated at the time of the Harris and Care prosecutions (1680) and that it received its crystallization between 1696 and 1706, mainly at the hands of Chief Justice Holt. What I refer to as the “Stuart law of libel” is the set of doctrines that I believe were emerging in the period before the _Seven Bishops’ Case_ and that some Restoration tract writers understood (perhaps wrongly) to be the settled official doctrine. As Hamburger demonstrates, Holt’s modification of these doctrines toward the end of the Stuart period was of great importance, but these changes concerned the definition of libel, not the allocation-of-powers question. Holt did not place greater restrictions on the jury’s fact-finding responsibilities than the major Restoration critics of seditious libel assumed were already part of the law. The response to the _Seven Bishops’ Case_ must be understood, at least in part, in the light of the assumptions made by earlier critics.

explained, that it will be sufficient to instruct all those, who shall, on these occasions, have the lives and properties of their fellow subjects in their hands.'

In the tract itself Hawles argued that in all cases, including libel, juries were the true judges of law as well as of fact, not simply that in libel cases seditiousness and intent were matters of fact for the jury.

The reprinting of Hawles was closely followed by the publication in England of the report of Zenger's Case (1735). Defense counsel for the New York printer, Zenger, had drawn upon Hawles, and in England the combination of the tract and the trial (Zenger had been acquitted) now helped to launch a half-century-long attack on the law of libel and the abuse of trial by jury it allegedly involved.

After Franklin's trial the contest over the doctrine of seditious libel falls into three principal stages. In 1752, the Crown tried by special jury (frequently the practice in seditious libel cases) a bookseller named William Owen for the sale of a tract critical of the House of Commons. Chief Justice Lee, on the urging of the solicitor general, William Murray (the future Lord Mansfield), charged the jury in accordance with Raymond's statement of the law. The jury, after hearing testimony regarding Owen's character and loyalty to the Crown and Camden's argument that the right to criticize Parliament was fundamental, acquitted the defendant. Underlying Camden's argument for the defense was the principle that, notwithstanding the bench's view of the law of seditious libel, the jury, unless it was convinced that the allegations of falsity and

15. State Trials, 18:1203-30 (1752). The special jury was employed in a wide range of civil and criminal cases, though not in felonies. Typically, in seditious libel prosecutions, special juries were drawn from a panel of persons of higher social and economic status than those on panels for ordinary juries. Their rank was by no means exalted. The jurors who tried Owen were described as follows: merchant, sugar-baker, linen-draper, draper, draper, grocer, hosier, grocer, oilman, merchant, merchant, grocer. No doubt authorities attempted to secure a jury that would defer to the bench on rulings of law, but authorities met with little success in seditious libel. Owen's jury was hardly alone in resisting strict application of the seditious libel doctrine. Contemporaries occasionally criticized the use of special juries in seditious libel cases, but surprisingly little attention was paid to the matter, perhaps because many defendants fared well at the hands of the middling sort who sat on special juries. Indeed, at least one defendant complained that summons for special jurors had not issued sufficiently early to ensure a full complement, with the result that talesmen had to be used to fill out nearly half of the jury. [John Miller, the publisher, tried in 1770. See The Freeholder's Magazine (London), vol. 2 (July, 1770), pp. 252 et seq.]. The Freeholder's Magazine (ibid., p. 195) ended its report of Woodfall's trial with the comment that the jury (which found the defendant "guilty of printing and publishing only") was composed of seven special jurors and five "tales or common jurymen." For the background to the special jury see generally the excellent account in Oldham, "Origins of the Special Jury."
scandalous intent in the indictment had been proved, must acquit.16

Two anonymously authored, strongly pro-jury tracts followed immediately upon the prosecution of Owen. The tracts reflect the two quite different approaches that opponents of the seditious libel doctrine adopted over the course of the eighteenth century. An Address to the Jurymen of London17 drew heavily upon Hawles, arguing that the jury must acquit if it is convinced that the facts charged in the indictment do not amount to a crime. Attached to the tract was a 'Letter to be read to all Jurymen,' signed: 'Britannicus,' which also drew upon the Restoration tracts and Zenger's Case and which asserted that the jury must be convinced of the 'crime of the fact.'18 On the other hand, The Doctrine of Libels and the Duty of Juries fairly Stated19 at once conceded that juries were judges of fact only and insisted that the jury must consider all the 'circumstances,' (e.g., truth, intent) involved.20 The author thus seems to have adopted Camden's strategy, and, like Camden, made much of the analogy to the jury's fact-finding role in cases of homicide. Inflammatory rhetoric about 'law-finding' had no place in this style of argument.

The second stage in the English government's use of seditious libel laws to silence criticism of its policies began in 1763 with the prosecution of John Wilkes for his famous No. 45 of The North Briton,21 and climaxed in 1770 with the prosecution, on informations ex officio, of those who published and sold the 'Junius' letter protesting the official policy on the American colonies. Mansfield, as Chief Justice of King's Bench, enunciated what had become the established law of seditious libel in the trials of the bookseller John Almon,22 and the publishers Henry Woodfall23 and

16. State Trials, 18:1227–28. "Then, gentlemen, to show you how necessary it is to prove the intention; if there is an indictment preferred against a man for an assault, with an intention to ravish; the intention must be proved, or else the jury cannot find him guilty. The same of an assault with an intention to kill, if the intention is not proved, he must be acquitted. If he kills, and the intention is not proved, that is, if it is not proved that he killed premeditatedly and of forethought, it is but manslaughter. Therefore in the case before us, if that part of the information is not proved, that he published maliciously, etc., you must acquit him."


18. Ibid., p. 22.


John Miller.\(^{24}\) Glynn, who defended all three, followed Camden’s arguments in *Rex v. Owen*, at times verbatim. The Crown obtained a conviction in the case of Almon. The Woodfall jury, however, returned a verdict of ‘Guilty of printing and publishing only,’ which resulted in a judicial order for a new trial that was never held, and at the close of Miller’s trial the jury returned a verdict of ‘not guilty’ despite clear evidence of publication. These widely publicized ‘Junius’ trials, together with Mansfield’s consistent refusal to charge the jury that it should consider the question of criminal intent, provoked debate in Parliament over the seditious libel law. Glynn introduced the question of reform in the Commons;\(^{25}\) Camden and Chatham supported him in the Lords.\(^{26}\) They could not, however, agree on a new formulation. On the other side, opponents of an enquiry into the matter voiced their complete trust in the judges, including Mansfield. Solicitor General Thurlow may have spoken for many when he raised the specter of jury control over the law and of the dissolution of judicial authority.\(^{27}\) Some twenty years would elapse before sufficient support could be mustered to pass a bill giving the jury the right to return a true general verdict in cases of seditious libel.

The period 1764–70 produced a spate of major seditious libel tracts. These tracts fall into two groups: the first in the wake of Wilkes’s arrest and prosecution in the mid-1760s; the second around 1770, when the Wilkites and proponents of Almon furiously attacked Mansfield. The first series of tracts was composed of attacks on the official doctrine and replies to those attacks; it is not always possible to determine to which pro-jury tract a defender of the prevailing doctrine meant to reply. Possibly the earliest of the dissident tracts was Joseph Towers’s *Enquiry into the Question, Whether Juries are, or not, Judges of Law as Well as of Fact*.\(^{28}\) Like the writings of the preceding decade, *Enquiry* seems very dependent upon Hawles and recites as well from the *Guide to Juries* of 1682 ‘that all that the judges do is but advice.’\(^{29}\) Towers analogized to homicide, but he chose to characterize his description of the jury’s role in such cases as determining law as well as fact. Perhaps the most important

\(^{24}\) *State Trials*, 20:869–96 (1770). See also *The Freeholder’s Magazine*, vol. 2 (July, 1770), pp. 252 *et seq.*


\(^{26}\) Ibid., cols. 1302–6, 1312 *et seq.*

\(^{27}\) For Thurlow’s speeches see ibid., cols. 1146, 1290–93.

\(^{28}\) Joseph Towers, *An Enquiry into the Question, Whether Juries are, or not, Judges of Law as Well as of Fact; With a particular Reference to the Case of Libels* (London, 1764).

\(^{29}\) Ibid., p. 54.
early pro-Administration tract was the Letter from Candor to the Public Advertiser (1764). According to "Candor," there was nothing new about the prevailing doctrine: Mansfield applied the law largely as it had been applied by Jeffreys, a point that most critics of Mansfield were willing (even anxious) to concede. In defending the law against the claims of the pro-jury writers, "Candor" recognized that there might be mitigating circumstances. But these, he said, were for consideration by the judge after the jury convicted, as it must do if it found that the defendant had published the alleged libel. "Candor" understood how defendants were relieved from overly harsh sanctions in criminal cases generally, but he strongly denied that it was appropriate for the jury to undertake such mercy.

In reply to "Candor" came An Enquiry into the Doctrine . . . concerning Libels, Warrants, and the Seizure of Papers by "Father of Candor," and in counterpoint to "Father of Candor," the famous Considerations on the Legality of General Warrants, to which was added "A Postscript on a late pamphlet concerning juries, libels, etc." "Father of Candor" characterized intent and seditiousness as questions of fact, thus matters for the jury, and proceeded to discuss how a jury ought to go about deciding whether a writing was libelous. "Father of Candor" suggested that, simply put, "plain truth and fact, and common sense" were at issue. He thus opened up discussion of what was required of jurors and of the competence of the average jury, issues that loomed large in the debate over the next several decades. The "Postscript" to Considerations contained a particularly trenchant attack on the pro-jury position, one that referred to jurors as "illiterate" and "unused to legal ideas." While conceding that jurors played a full role in homicide, the "Postscript" insisted that they merely found the facts and were bound to follow the judge's direction upon the law. If the jurors had any doubt about the law, they were to return a special verdict summarizing the facts they had found and to leave pronouncement of the general verdict to the

31. Ibid., p. 5.
32. Ibid., p. 18.
34. Considerations on the Legality of General Warrants, and the propriety of a Parliamentary regulation of the same. To which is added "A Postscript on a late pamphlet concerning juries, libels, etc." (2nd ed., London, 1765, orig. published 1765).
35. Enquiry into the Doctrine, p. ll.
judge. This, according to the author of "Postscript," is what the jury ought to have done in the Seven Bishops' Case.) In libel more than in other cases, the jury was likely "to be under the influence of popular passions," and thus ought to hold closely to finding fact.

"Postscript" to Considerations drew its own reply, Postscript to the Letter, on Libels... In Answer to a Postscript in Defence of the Majority, and... Considerations... which asserted that in libels it was particularly important that the jury play its historic role, for the Court in such cases was not likely to be impartial. That role, the tract stated, was set forth by Lilburne at the end of his 1649 trial. Thus, the tract suggested a far-reaching interpretation of law-finding, though it is not entirely clear that the author understood what Lilburne had been getting at. Postscript... In Answer charged that the author of the "Postscript" to Considerations took a view of the jury that was "much too lowly and contemptuous, owing I presume to his education on the Northern side of the Tweed, where very little use is made of them."

The positions rehearsed in these and other tracts were repeated by proponents and critics of the prevailing doctrine in the heated political atmosphere of 1770. Virtually all of the London papers carried news stories, editorial comments, book reviews, and letters to the editor dealing with the trials of Almon, Miller, and Woodfall, with important jury tracts and with the progress of the jury debate in the Commons. Among the most interesting of the second series of tracts were those produced in 1770 by the Wilkites Robert Morris and George Rous. Morris's Letter to Sir Robert Aston and Rous's Letter to the Jurors of

37. Ibid., pp. 41, 44.
38. Ibid., p. 45.
39. Ibid., p. 47.
41. Ibid., p. 24.
42. Ibid., p. 19.
43. Idem.
44. For an excellent discussion of the political strife of this period and of the sources of the "radicalism" that forms a background to the major seditious libel trials see the works by John Brewer cited below, n. 50.
45. On the 1770 debates see e.g. The Political Register (London), vol. 8, no. 47 (Jan., 1771), pp. 31–36.
46. Robert Morris, A Letter to Sir Richard Aston, ... Containing a reply to his scandalous abuse of R.M.; and some thoughts on the modern doctrine of Libels (London, 1770). This work was reviewed in The Political Register, vol. 8, no. 47 (Jan., 1771), p. 56. See the anonymous reply to Morris's tract, A Letter to Robert Morris, Esq. (London, 1771), reviewed in The Political Register, vol. 8, no. 49 (March, 1771), pp. 184–90.
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Great Britain47 dwelled at length upon the place of trial by jury in the English constitution. By now Hawles, though still quoted, played a less significant role, and Wilkite arguments concerning the susceptibility of the bench—especially of Mansfield—to bias in cases involving allegations of seditiousness came to the fore.

The agitation over the jury was, of course, only a small part of the political turmoil of the day. Wilkes's followers, middling men of some property who came largely from merchant communities of the country, focused on the criminal trial jury only fleetingly. Their main efforts concerned issues of more general significance: criticism of the government's foreign and domestic financial policies; impurities of the political process; private law, with its inequities for the small businessman; and the movement for speech and press, to which the jury debate was significantly but rather loosely attached. Nonetheless, the Wilkites were acutely aware of the importance of the jury as an element in the constitution48 (especially as a necessary surrogate for what they viewed as a corrupt and unrepresentative parliament) and as an investigative as well as a protective body.49 In this last capacity the jury, whose members were frequently drawn from their own social groups, was particularly crucial to their embattled movement, and they made certain that jurors in important political cases were apprised of their "rights." This campaign caused the administration to view the jury as all the more likely to act out of political bias.50

47. George Rous, A Letter to the Jurors of Great Britain (London, 1771), p. 50. This work was reviewed in The Political Register, vol. 8, no. 48 (Feb., 1771), p. 105.

48. See below, text at nn. 76 et seq.

49. See e.g. The Political Register, vol. 9, no. 50 (Sept., 1771), pp. 128–29. "Whatever twelve good men and true do in their consciences think to be against the peace . . . they are bound by their oath to present and to bring to justice . . . [A] jury is sworn to do this, not only on information, but of their own knowledge" (editorial, p. 129).

Throughout the entire period 1763–70 the jury debate remained several different debates. Some jury proponents opposed what was now called Mansfield’s law/fact distinction in seditious libel, insisting instead that seditiousness and intent were matters of fact for the jury. In this, they drew support from the arguments of Glynn and Camden at the major trials. The more interesting debate, however, still concerned the jury’s right to “find law,” especially since the law-finding argument involved the confusing concession by jury proponents that the questions of intent and seditiousness were indeed “matter of law.” Having accepted the bench’s characterization, these publicists concluded that because these questions were of a sort that were traditionally in all other cases questions for the jury, the jury must therefore be a law-finding body. This, in turn, intensified the squabble over the competence of jurors, who now had to be defended as law finders, a proposition that authorities, thrown on the defensive by the size and force of the Wilkite movement, regarded as both preposterous and dangerous.

The third stage of the seditious libel controversy commenced with the trial in 1783 of William Shipley, Dean of St. Asaph. Unquestionably, Shipley’s case was the most important seditious libel prosecution since the Seven Bishops’ Case. Shipley had published a tract by his brother-in-law, Sir William Jones, that allegedly incited to rebellion; after the trial judge entered a conviction upon a verdict of “guilty of publishing only,” a new trial was refused despite Thomas Erskine’s ringing defense on Shipley’s behalf. Yet after carrying the day on the law of libel, the bench set the conviction aside for a defect in the indictment.

The tracts that followed upon St. Asaph’s Case made use of Erskine’s defense, some taking a narrow line and others going beyond Erskine’s \(\text{men of rank, character and fortune}^\prime\), see The Political Register, vol. 8, no. 49 (March, 1771), pp. 169–70.

51. E.g. 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). See also the speeches by Mr. Cornwall and Mr. Dunning in the Commons in 1770. Hansard, ed., Parliamentary History, 16: cols. 1135, 1160.
52. See the speeches of attorney general De Grey and solicitor general Thurlow in the Commons in 1770. Hansard, ed., Parliamentary History, 16: cols. 1146, 1185–86.
55. State Trials, 21:1041–44. “The Court . . . [said] there were no averments to point the application of the paper as a libel on the king and his government.” Willes, J., thought that “if the indictment had been properly drawn, it might have been supported.” Mansfield, C. J., and Buller, J., did not give an opinion on that hypothetical (ibid., p. 1044).
relatively controlled arguments to reiterate the vaguer law-finding claims that had now become a part of the tradition.\textsuperscript{56} Joseph Towers’s \textit{Observations on the rights and duty of Juries in trials for Libels} revived Hawles’s strong claims and based its endorsement of broad jury powers in part on the view that the bench could not be trusted to determine the proper limits of judicial power.\textsuperscript{57} Perhaps the most ringing defense of the jury was Manasseh Dawes’s \textit{England’s Alarm! On the Prevailing Doctrine of Libels}, which appeared in 1785. Dawes retreated to a historical perspective in making the case that juries had for so long been entrusted with plenary power to determine cases that it was no longer appropriate to claim they were incompetent to vindicate that duty.\textsuperscript{58} Six years later Thomas Leach, who was himself trained in law, produced a still different defense of the jury, \textit{Considerations on the Matter of Libel}.\textsuperscript{59} Through juxtaposing the issues for determination in homicide and libel, Leach made the case for the jury and against the official doctrine in a way that must have put the proponents of Mansfield’s position on the defensive.

Despite the outpouring of pro-jury writings, the debate was by no means entirely one-sided. Authorities drew the conclusion from years of jury resistance to the law of seditious libel that juries could not be trusted in such cases to return verdicts that accorded even loosely with the government’s interpretation of facts. Juries, they believed with some justice, were open to political pressures; verdicts could, and sometimes did, depend upon the heat of the political passions of the day. The anonymously authored \textit{An Examination into the rights and duties of Jurors} (1785), which was a response to Joseph Towers’s law-finding tract, drove home the point against a position that had, to be sure, been carelessly overstated:

When we see this position, that juries are to judge all the criminality of a libel, as well as the truth of the fact of publication, supported, not by arguments drawn from the peculiarity of the case, which may require an exception to the general rule, but by general assertions, that jurors are complete and uncontrollable judges of the law in every instance, it


\textsuperscript{58} Manasseh Dawes, \textit{England’s Alarm! On the Prevailing Doctrine of Libels as laid down by the Earl of Mansfield} (London, 1785), pp. 8 et seq. For discussion of Dawes’s writings urging reform of the law of sanctions in common-run cases see above, Chapter 7, text at nn. 114–20.

\textsuperscript{59} Leach, \textit{Considerations on the Matter of Libel}. 
is time for every honest man to oppose an innovation of the most
dangerous tendency.⁶⁰

Some of Mansfield’s defenders responded to the law-finding argument in
a more legalistic manner. For them, the argument for a narrow scope of
fact proceeded along the lines of an argument for certainty of the law.
John Bowles’s tracts, written on the eve of passage of Fox’s Libel Act,
pressed that point effectively, at least at the level of debate.⁶¹ They were
among the most cogent writings of the half-century of debate, and they
lent great rhetorical (if no practical political) force to Mansfield’s opinion
in St. Asaph’s Case.

Mansfield had won the battle but he soon lost the war. The campaign
against the seditious libel law culminated in 1792 with the passage of
Fox’s Libel Act. The Act did not explicitly convert the questions of intent
or seditiousness into questions of fact but did state that in trials for
seditious libel

> [the] jury sworn to try the issues may give a general verdict of guilty or
not guilty upon the whole matter put in issue . . . and shall not be
required or directed . . . to find the defendant or defendants guilty,
merely of the proof of the publication . . . and of the sense ascribed to
the same.⁶²

The “whole matter” included the question of criminal intent, which might
or might not have to depend solely upon inferences drawn from the
publication itself, and the question of whether the writing was seditious.
The statute affirmed the jury’s right to return a general verdict. It was
clear that in doing so the jury would necessarily have the right—and
duty—to apply the law regarding criminal intent and seditiousness as
stated by the bench.⁶³ But in the Commons at least it was neither stated
nor implied that the jury possessed any more right in libel than in other

⁶⁰. An Examination into the rights and duties of Jurors; with some strictures on the Law
⁶¹. E.g. 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).
⁶². 32 Geo. 3, c. 60 (1792). For the debates on the form that the Act ought to take, see
Hansard, ed., Parliamentary History, 29: cols. 551–602 (Commons), 726–42 (Lords),
1036–47 (Lords), 1293–1300 (Lords), 1361–71 (Opinions of the Judges), 1404–31 (Lords),
1534–38 (Lords). The Act began: “Whereas doubts have arisen whether . . . it be competent
to the jury . . . ; be it therefore declared and enacted . . .” Holdsworth (History of English
Law, 10:690) accepts the view that the Act was couched in declaratory form in order to
suggest that the courts had been mistaken in their view of the law.
⁶³. The second section of the Act states that the judge shall “according to his discretion
give . . . his opinion and directions to the jury on the matter in issue . . . in like manner as
in other cases.”
cases to reject the law as stated by the bench.64 That the jury might do so in a concealed fashion was undoubtedly understood—and feared.

II

The post-1750 discussion of the constitutional role of the criminal trial jury was pervaded by arguments that drew upon history. Virtually all commentators were convinced of the pre-Conquest origins of the jury. A few writers searched for its prototype in the classical world;65 some traced the jury to the Goths;66 most posited a Saxon origin, identifying the early

64. Erskine openly addressed the jury’s right to reject the judge’s instructions in the debate in 1791 in the Commons, stating that “[i]f a jury, in despite of law and evidence, were to acquit a felon, he was immediately discharged; such was the wisdom of the constitution in the interposition and augmentation of the powers of a jury, lest the Crown should bear too hard on the life of a subject; nor could a jury be amerced or imprisoned for their verdict.” This was true in felony and, Erskine argued, ought to be true in libel. Hansard, ed., Parliamentary History, 29: col. 598. His remarks were not adverted to by others. Fox had spoken more ambiguously. He asserted that in all trials the judge could give his “opinion and advice.” The bill, he said, would not prevent the judge from doing so in libel; it only “put the case of libels on a footing with all other cases.” Ibid., cols. 597–98. Pitt stated that juries were bound in libel (under the bill) as much as in other cases. Ibid., cols. 601–2. In the Lords, Camden in 1791 came close to stating that the jury ought to have more leeway to decide the law in seditious libel than in other cases. His remarks can be read as in agreement with those of Erskine. Ibid., cols. 728–32. Lansdowne thought libel was an anomaly: in libel “law and fact were but one thing. . . . [W]here, in God’s name, could it be so safely entrusted as to twelve men, and how much better was it for the judge to be freed from such a critical duty, in all cases of libel, whether it were a public or a private libel.” Nonetheless, the reporter recorded his next remarks as: “When judges confined themselves to their own province, to aid the jury by their advice, experience, and authority, without attempting to influence their decision, they should then have his best wishes.” Ibid., cols. 738–39. See also his remarks in 1792. Ibid., cols. 1417–23. Presumably, in libel cases juries were to have more leeway than in other cases; i.e., they were not bound to follow the bench in any case, but the bench might exert greater influence in other cases. Stanhope took the strongest law-finding position, but he viewed the jury’s power as unlimited in all criminal cases. Ibid., col. 1409 (1792). Loughborough is reported to have said that “[e]xperience had convinced him, if the judge did his duty by explaining the law with care, juries would decide with perfect justice.” Ibid., col. 1296 (1792). The bill was silent on the matter. In the House of Lords, six opponents of the Act signed a protest against its passage, predicting “confusion and destruction.” Hansard, ed., Parliamentary History, 29: cols. 1537–38. As it happened, juries proved relatively inclined to convict in seditious libel cases in the years following passage of the Libel Act. See below, n. 150 and accompanying text.

65. E.g. John Pettingal, Enquiry into the use and practice of Juries among the Greeks and Romans; from whence the origin of the English jury may probably be deduced (London, 1769), pp. iv–ix. See also Manasseh Dawes, England’s Alarm! On the Prevailing Doctrine of Libels, p. 12.

66. E.g. Historical sketches of civil liberty From Henry VII to the accession of the house of Stuart, with an account of the antiquity, use, and duty of juries (London, 1788), pp. 96–97.
laggamanni as combining the roles of judge and jury. For the most part, however, this fascination with the origins of the jury remained an antiquarian exercise. It is true that eighteenth-century jury proponents thought that the jury’s antiquity bolstered its place in the constitution, but no one disputed that the jury deserved some place. Exactly what place the jury ought to have was the question on which contemporaries disagreed. Here the eighteenth-century theorists had little in common with their mid-seventeenth-century forerunners. Few of the later writers contended, as had some Levellers, that historically the jury had preceded the judiciary or that the law flowed forth from the community through the jury. Whatever their perspective on the law-finding power of the jury, the eighteenth-century writers implicitly accepted the Lockeian view of the origins of civil society. They took for granted the quasi-balance of powers created by the settlement of 1689 and the dominant role of Parliament in the making of law. The jury, even in the view of most of those who favored jury law-finding, was supposed to guarantee that English law, whether common law or statutory law, was fairly stated and fairly applied.

For some eighteenth-century jury proponents the jury was not so much a part of the constitution as a symbol of the source of power that created civil government and the constitution itself. Henry Burtenshaw maintained that juries are not

the creatures, even of the constitution, but coeval with it—with the constitution which declares all power to be in the people, and which has survived and remained unviolated through many revolutions of state government: they are themselves a government in miniature, and a symbol of that general democracy in which resides, and through which, under various modifications, is dispersed, all the functions of power, of justice and of policy.

But even Burtenshaw recognized that laws were made in Parliament or “abroad, by [the people’s] habits of life and usages,” so that the jury, in his view, was to “interpret those laws when made.” Most commentators took an even more frankly instrumental view of the jury: the jury was

70. Ibid., p. 79.
a part of the constitution, established in order to fill a gap or to balance lay against official influence. Blackstone lent important support to this watchdog theory of the criminal trial jury. He cautioned against creation of more “convenient” procedures; the “delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.” 71 Despite ambiguity in its characterization of the jury’s role, Blackstone’s theory strongly implied that the jury remained a safeguard against some future recurrence of executive or judicial tyranny.

Blackstone’s contemporary Henry Dagge traced the origins of civil society in terms familiar to eighteenth-century political theorists. He began with a discussion of man in his natural state and with a depiction of his resolution of disputes by private revenge; this period of continual strife, he asserted, gave way to government and, eventually, to the creation of distinctive elements of government: legislative, executive, and judicial. Even at this stage, “after the three powers were divided,” difficulties remained:

The judicial power being entrusted with the exposition of the law, and as it depended on their judgment whether the case or fact sub lite, was or was not within the description of the law, there was evidently a great latitude still left for the exercise of partiality or oppression. 72

The “remedy,” he concluded, was “the invention of juries.” 73 Dagge assured his readers that it seldom happened that juries rejected the judge’s instructions: “The opinion of the bench has generally its due weight.” 74 For the most part, the jury was to find fact and no more, and the better the primary institutions of government worked the less the jury would be needed as a safeguard of the liberties those institutions were designed to protect. This view of the jury was adumbrated even by William Paley, who exhibited tolerance for a complex, sometimes unpredictable, legal process. In his view, there would and ought to be countervailing pressures, from which an equitable solution would emerge. The jury’s role could not be given clearly defined limits; thus Paley cautioned against “urging too far the distinction between ques-

71. Blackstone, Commentaries, 4:344.
73. Ibid., p. 125. See also “A Sketch of the British Constitution” in The Court Miscellany, or Gentleman and Lady’s New Magazine (London) (June, 1768), pp. 315–18 and 361–63. This unsigned article, which gives the jury a prominent role in the constitution, seems to reflect Wilkite views, but it is careful to employ standard propositions in its creation of a powerful place for the jury.
74. Dagge, Considerations on Criminal Law, p. 135.
tions of law and questions of fact.'

None of these prominent academic legal writers directed his attention specifically to the debate resulting from trials for seditious libel. Indeed, none set out to write mainly about the jury. Rather each developed a distinctive approach to the legal system generally, fitting the jury into the larger scheme of things. None subscribed to a far-reaching theory of endemic jury law-deciding, but all believed—or strongly implied—that for the legal system to operate fairly, recourse to the jury-monitoring of judicial instructions on the law would sometimes be necessary. This conception of the jury was of course shared—and fruitfully used—by most writers who wrote in response to the government’s doctrine of seditious libel. For these latter writers, however, the jury was not incidentally, but rather in the main, a safeguard against oppression.

Robert Morris, the Wilkite barrister and secretary of the Society for Supporters of the Bill of Rights, sounded a theme to which many of Mansfield’s opponents rallied when he wrote: “The great province of a jury in criminal matters is to make true deliverance of the subject from false accusation, and especially from oppressive prosecutions of the Crown.” The jury, Glynn was quoted as stating at the trial in 1770 of the publisher John Miller, are “in times of danger the asylum of the people.” It was to protect “every subject of the state, from the abuse of executive power,” wrote Thomas Leach, that the English constitution required “the unanimous suffrage of twelve of his equals.” Judges, who were still dependent upon the Crown for “pensions” and “places, which they hold at the mere pleasure of their minister,” were not above “crafty distinctions and ensnaring eloquence”; they “throw dust in the eyes, and confound the sense of a well-meaning jury.” Such invective became a commonplace in the years between the Wilkes affair and the Dean of St. Asaph’s trial.

The encomiums of the more radical supporters of the jury typically began with generalities from Hale or Blackstone and went on to the limits

75. Paley, Principles of Moral and Political Philosophy, p. 505.
77. Paraphrase of Glynn’s speech in Bingley’s Journal (London) (July 21, 1770), p. 3, col. 3. Glynn appears actually to have said (State Trials, 20:880): “For we all know, that in all times, the honest, intrepid, upright conduct of a jury must be the refuge of the people of this kingdom. . . . They must and will, in the natural course and evolution of things, flee again to the same asylum.”
78. Leach, Considerations on the Matter of Libel, p. 9.
of their authors' imaginations. Jury trial was, e.g., central to "the grand or principal law of this land, on which the justice of all the rest depend."82 It was through the jury that subjects judged "when the fundamental laws are violated; when an attempt is made to subvert the constitution."83 Even the charges that jurors lacked legal training, were just plain ignorant, or were subject to popular passions became occasions for praise, albeit at times with a defensive tone. Jurors, it was frequently said, did not lack the natural capacity for the role they were being asked to play. They have, wrote Manasseh Dawes, "generally a just sense of right or wrong."84 "Juries have not a knowledge of the technical niceties of the law, as a profession," Capel Lofft conceded, "but the Constitution presumes them to understand it as a rule of civil rights in a general sense."85 "Thanks be to God!" Anthony Highmore exclaimed, "there lives in mankind a sense of right and wrong that compels them to form the most impartial judgment they can."86 All three of these writers were trained in law; all opposed one or another Crown policy; and all resented use of the libel laws to silence criticism.

To find law a general sense of civil rights and a sense of right and wrong were required, but not deep grounding in Scripture, custom, or the common law. For some, this was the irreducible core which law-finding theory had reached by the late eighteenth century.87 So long as law-deciding was linked to "pious perjury" or to egregious cases where the jury was required to stand as a bulwark against judicial overreach, even the moderate, bench-oriented Blackstone could be put to some use. George Rous, yet another Wilkite barrister, quoted Blackstone's admonition to subjects that they learn the law; their lack of such learning, Blackstone had written, "has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended."88

Some who supported the law-finding jury conceded that juries might make too much of their powers or misunderstand how they ought to be employed. Rous, e.g., wrote: "Jurors, like judges, may err through

82. "Letter to be Read by all Jurymen" (Signed: "Brittanicus"), printed with An Address to the Jurymen of London, p. 19.
87. An editorial in The Political Register, vol. 9, no. 50 (Sept., 1771), p. 129, commented: "The wise institution of juries has contrived to make the conscience of every man a minister of the law to the utmost extent."
ignorance, or be misled by passion." But the constitution wisely contained a remedy—where, i.e., a jury wrongly convicted the defendant. Drawing, as did many other tract writers, upon practice in common-run felonies, Rous asserted that "grace is always extended to the prisoner upon a proper representation from the judge. A refusal would be contrary to the duty of a sovereign, who swears, at his coronation, to execute justice in mercy." In the case of seditious libel, however—at least before 1792—the government feared what it viewed as unwarranted acquittals, not unwarranted convictions. Those radical jury writers willing to face this problem manipulated the language of the moderates Dagge and Blackstone, characterizing truly unwarranted acquittals as a "lesser inconvenience" and retreating to the well-worn maxim that it was better that many guilty went free than that one innocent man was convicted. However tolerable this maxim may have been in cases of manslaughter or petty theft, it was unlikely that authorities would be content to apply it to cases involving government critics.

III

Only a minority of pro-jury writers who addressed the problem of seditious libel dealt openly and at length with true law-finding: the jury’s right to reject an indictment, regardless of the judge’s instructions, on the grounds that it failed to charge the defendant with a crime. Those who advanced this theory drew directly upon the late-seventeenth-century tracts by Hawles and Care, and the anonymous author of A Guide to Juries, all of whom had, in turn, drawn upon claims made by Lilburne and Penn. Perhaps the strongest version of this argument was the statement of the printer and bookseller Joseph Towers:

It cannot be supposed . . . that any jury should be arbitrarily directed to bring any man in guilty, when they are not convinced in their own minds, whether the action the accused person is charged with be a crime or not . . . not only whether he has been guilty of the action alleged against him, but whether he has been guilty of a crime.

89. Rous, Letter to the Jurors, p. 60.
90. Ibid., p. 61.
91. Dagge, Considerations on Criminal Law, p. 135. See Blackstone, Commentaries, 4:344: "The "delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."
92. Joseph Towers, An Enquiry into the Question, Whether Juries are, or are not, Judges of Law, as well as of Fact; With a particular Reference to the case of Libels (London, 1764), p. 52.
The most offensive aspect of the seditious libel doctrine—so far as pro-jury writers were concerned—was that truth was not a defense; moreover, the prosecution did not have to convince a jury that a libel in fact brought the government into disrepute or created a threat to public order, even though indictments for seditious libel alleged that the defendant had published certain statements "seditiously" and "factiously." Thus one writer, who reproduced some ten pages of Hawles's famous tract, concluded in his own terms:

From all which it is evident, that however heinous a fact may be represented by hard work and artful innuendoes in an indictment or information, the jury may with impunity, and ought in conscience to bring in the general verdict, not guilty, not only when they think the fact has not been proved by sufficient witnesses, but also when they think the fact is not such a heinous fact as is charged in the indictment or information.93

Another writer made the point in his comments upon the Penn-Mead trial of a century earlier:

[A]s the jury were not convinced, that the fact, with which Penn and Mead were charged was in itself a crime, they were unwilling to condemn them; though, attending to the matter of fact only, they could not avoid it, because the fact was fully proved. . . . [I]t is plain, the jury had respect, in their last verdict, entirely to the matter of law. For as they were convinced, that Penn and Mead had not been guilty of any criminal or illegal action, they could not honestly and conscientiously do any thing but acquit them.94

In their arguments for true law-finding powers, jury proponents looked for support to the rules of criminal procedure and to the nature of the substantive criminal law. Most of the arguments devolving from procedure touched upon the supposed theoretical liability of the jury to an attainant. Although this ancient procedure had probably never been applied in criminal cases,95 most eighteenth-century jury proponents referred only to its "disuse," drawing the conclusion (perhaps from Restoration tracts)

93. Address to the Jurymen of London, p. 16. See also The North Briton, no. 168 (June 16, 1770), p. 426 (Letter from "Cato"); The Freeholder's Magazine, vol. 1 (Jan., 1770), p. 236 (anonymous tract, asserting that the jury, which applies law to fact, acquits where someone is indicted for "fact that is no crime"); The Political Register, vol. 9, no. 51 (Oct., 1771), p. 189 ("On the Perversions of Law from its Constitutional Course," asserting, "The judges may advise, and if their arguments convince a jury, the jury is conscience bound to find as they advise; but it is the finding of the jury which is the determination and interpretation of the law").
95. See above, Chapter 6, section IV.
that attaint, like the fining of jurors, had once been but was no longer permitted by English law. The original law of attaint, they asserted, must have assumed the right of juries to decide law as well as fact, for attaint had applied only in those cases where the jury had found "bad" law.96 A Treatise on the Right of Juries (1771) carried this analysis one step further: the fact that since Bushel's Case the law had supplied no certain means of controlling jury verdicts in the case of an acquittal proved not only that the jury had the power but also that it had the right to find law.97 Even Justice Willes, who voted with the majority in St. Asaph's Case, found this argument persuasive.98 His views were rephrased on the eve of Parliament's consideration of the Libel Act by Thomas Leach, a barrister and police magistrate, who wrote:

In the institutions of civil government, power and right, are, and must be, convertible terms. Civil power, and civil right, are the mere creatures of the law and know no other limits, than the law imposes upon them. The law speaks the language of prohibition, not of admonition. What it permits to be done, uncensured, and confirms, when it is done, it has delegated the power to do, and the exercise of that power, is of right.99

Similarly, jury writers argued that the theory of the special verdict presumed that juries had a valid law-finding role. A jury could render a special verdict in a case if it doubted the validity of a certain application of the law to the facts.100 If the jury had no such doubts, it was therefore said, the jury might find law as well as fact.101 This argument, however, established nothing more than that juries applied law to fact. The law might still be said to have been taken from the bench, a point that many tract writers well understood.102 Finally, many writers cited the practice of defense counsel in seditious libel cases for the proposition that juries

97. Ibid., pp. 15–16.
98. 4 Douglas 171, 99 Eng. Rep. 824–25: "Where a civil power of this sort has been exercised without control, it presumes, nay, by continual usage, it gives the right."
100. Blackstone, Commentaries, 4:354.
101. Morris, Letter to . . . Aston, p. 48: "[W]here they are certain [of the "operation of law"'], they may and ought to take the determination upon themselves. The power juries most undoubtedly have, of determining, upon the general issue, both the fact and the law which arises out of that fact." Rous, Letter to the Jurors, p. 9; Dagge, Considerations on Criminal Law, p. 131.
102. See e.g. Romilly, Fragment on the Constitutional Power and Duty of Juries upon Trials for Libels, p. 8.
had the right to consider questions of law. The bench frequently allowed counsel to argue points of law to the jury, or even to question the validity of the official doctrine of seditious libel in their summations.\textsuperscript{103}

Yet arguments that relied upon the nature of criminal procedure and trial practice were entirely too fragile to support a far-reaching claim to jury law-finding. The attaint issue was dead (indeed, it had never been a live consideration in criminal cases); the existence of special verdicts, it could be countered, proved only that in some cases the jury had doubts concerning a very restricted "law-applying" role. As for the leeway allowed counsel in their summations, such judicial leniency was hardly a sound foundation for the construction of a matter of jury right. Few laymen sufficiently understood criminal procedure to appreciate what were, in any case, tepid rejoinders to Mansfield's dissertations on the ever-growing body of precedent.

Of greater importance, though equally limited in logic, were arguments based upon the nature of the substantive criminal law, not only in political cases but in common-run cases as well. The criminal law, it was stated, was "within reach of the plainest understanding."\textsuperscript{104} Such claims, it is true, were only a pale reminder of mid-seventeenth-century assertions concerning the relationship between criminal law and the Scriptures; nor was it the point that the common man could know the law merely by examining his heart. But the criminal law was knowable. The entire system of criminal justice assumed as much:

To say the truth, one could hardly imagine a more extravagant absurdity, than to hold, that a criminal shall not remove the imputation of guilt by pleading ignorance of the law; and yet, that a jury who try him have no capacities to judge of that law.\textsuperscript{105}

The logical conclusion of the argument that only the bench and bar possessed the ability to understand the law, it was said, was that "we may daily transgress without being wilfully guilty."\textsuperscript{106} The robber, the sneak thief, the slayer: they knew the law as it applied to them. The point was frequently repeated, always with a certain tone of astonishment: if the jury was not to decide law because men of their station lacked the necessary understanding, then the rationale for the official doctrine of seditious libel was inconsistent with the common understanding of mens

\textsuperscript{103} London Evening Post (London) (June 21, 1770), p. 3, col. 3; Stanhope, Rights of Juries defended, pp. 128 et seq.

\textsuperscript{104} Treatise on the Right of Juries, p. 15.

\textsuperscript{105} Idem. See also Loughborough's remarks to the same effect in the Lords. Hansard, ed., Parliamentary History, 29: cols. 1297 (1792).

The analogy to common-run cases—to the common suspect, the "daily transgressor"—lent force to the point, but at the same time the line of argument here involved did not ground a true law-finding theory. To say that the jury possessed the ability to apply the law was not to say that the law they were to apply was to be "found" by them rather than to be set forth by the bench.

IV

For many commentators the issues of freedom of the press and, more generally, of the subject's right to criticize the government were more important than the jury question. The jury was significant not as an end in itself but as a safeguard against what were seen as the government's self-interested and abusive prosecutions.

Arguments asserting that the jury was the protector of liberty were made both by those who conceived of the jury primarily as a fact-finder and by those who adhered to one or another variant of law-finding theory. Distrust of the government did not commit one to any particular conception of the jury. Yet the doctrine of seditious libel posed a special sort of problem. By drastically reducing the scope for factual determinations, the doctrine placed the defendant's fate almost wholly in official hands. To assert the jury's right to play its traditional fact-finding role required an attack on the libel doctrine itself. Hence, all appeals to the jury necessarily contained an express or implied demand that the jury reject the bench's instructions regarding the allocation of duties between judge and jury. Only a few writers bothered to focus on the problem—it seemed to go without saying. Of the pro-jury writers, Joseph Towers most effectively united the themes of distrust of government and the jury's right to decide the allocation-of-duties question raised by the seditious libel doctrine:

It would, perhaps, be as unreasonable, that kings should be suffered themselves to determine the bounds of their own prerogative, as that judges should be permitted finally to decide, when the point in contest

107. Joseph Towers, Observations on the rights and duty of Juries, in trials for Libels (London, 1784), p. 42. But see the anonymously authored reply to Towers, An Examination into the rights and duties of Jurors; with some strictures on the Law of Libels. (By a Gentleman of the Inner Temple) (London, 1785). The author admitted that the promulgation of comprehensible laws was a necessary reform project. But in the meantime: "The end of the laws is obedience: but who will obey them farther than it shall please himself, if every man be allowed to plead an ignorance, almost impossible to be disproved?" (p. 61).

is, what is the extent of their own jurisdiction, and what is the extent of that of juries.\textsuperscript{109}

Thus, much, if not most, of the literature proclaiming the jury’s right to find law as well as fact was concerned with the problem of the allocation of duties between judge and jury. Though many tract writers seem not to have realized it, this conceptualization of the problem hid important disagreements on the law itself. For many writers assigned as facts for the jury matters that the bench did not consider at all relevant. Nonetheless, for many opponents of the official doctrine the claim regarding jury law-finding was simply an exhortation to jurors that they insist that certain questions were matters of fact rather than matters of law. Once the jury had claimed the questions for its own it would merely find the fact, in seditious libel as in other cases.

In the years following \textit{Rex v. Franklin}\textsuperscript{110} the assertion that seditiousness was purely a question of fact became quite common. Pro-jury writers argued that, at one level, the question of the seditiousness of the writing could be reduced to the question, Had the writing “scandalized” the government? But what test should the jury apply when making this assessment? The proponents of free speech and press and of the trial jury insisted that mere evidence of negative criticism was not sufficient, that a writing was not criminal unless, at the very least, measurable harm was its probable result.\textsuperscript{111} Some characterized the test as more complex still. Robert Morris thought it should be “[t]he purport of expressions, the tendency to sedition, the infamy, the reproach of language”; that, he said, “can never so well be decided as by the common class of mortals to whom the publication is made. Who [is] more interested than juries (for juries are composed of the people) to preserve the peace and order of the state? . . . Juries are a tribunal ever changing as the times; they judge of men’s writings and actions by what they see and feel.”\textsuperscript{112} The decider of fact, George Rous asserted, sounding a theme dear to the hearts of all Wilkites, “must enter into common life . . . must attend to the politics of the day . . . must imbibe the sentiments of the people. . . . Juries taken by lot . . . are peculiarly the proper judges in cases of libel.”\textsuperscript{113} The

\textsuperscript{109} Towers, \textit{Observations on the rights and duty of Juries}, p. 29. In his reply to Towers, the author of \textit{An Examination into the rights and duties of Jurors} asserted: “Where else shall we seek the boundaries, by which authority of different courts is restrained, but in the solemn adjudication of the superior courts of justice?” (p. 69).

\textsuperscript{110} See above, n. 12.

\textsuperscript{111} Highmore, \textit{Reflections on the distinction usually adopted}, pp. 8 \textit{et seq}. See also the letter from “B. L.” in \textit{The Freeholder’s Magazine}, vol. 2 (June, 1770), p. 203: “tendency to subvert . . . liberty.”

\textsuperscript{112} Morris, \textit{A Letter to . . . Aston}, pp. 42–43.

\textsuperscript{113} Rous, \textit{Letter to the Jurors}, p. 51.
determination that must be made, wrote Joseph Towers, required practically no knowledge of the law; the allegedly seditious publications were "generally addressed to men of all professions, and such of them as can be understood only by lawyers, are not very likely to produce tumults or insurrections." Highmore developed the same theme: if one argues that a libel is dangerous because it might arouse the common people, then one assumes that the people understand the writing and therefore must be qualified to be jurors, to determine whether a writing is, in fact, likely to arouse. "No man ever wrote, or read, sedition, but he knew that it was so: and this, without a little more knowledge of the law than is amply sufficient to answer all the purposes of his civil capacity as a citizen." Here, where pro-jury writers referred specifically to the kind of fact-finding they believed relevant to the matter of seditious libel, they frequently drew attention to the jury's traditional assessment of the element of provocation in cases of homicide. It is possible that some pro-jury tract writers, in their attempts to portray seditiousness as a question of fact (as in other cases), were induced to concede more than they otherwise might have. They were led to define seditiousness in terms of a writing's tendency to arouse people, especially that class of common people from which jurors were typically drawn. Some writers seem at times to have turned their attention from the question of the truth or of the intrinsic value of the criticism, matters that were less easily portrayed as facts within the competence of the average jury.

At yet a second level, most writers insisted that proof of scandal did not suffice to establish true seditiousness. There had also to be a finding of intent to scandalize—true criminal intent—indeed, true malice. This,

115. Highmore, Reflections on the distinction usually adopted, p. 35.
116. See below, text at n. 126.
117. It is possible that most writers thought that three separate tests ought to be applied: the writing must be false; it must have a tendency to "arouse"; the defendant must have intended that the writing "arouse." Indeed, a fourth test may be implied: the defendant must have known that the writing was false. Few authors approached these questions systematically; the highly polemical characters of the tracts leaves the impression that their authors would have required any or all of these tests, although they sometimes addressed one of them as though it were the "true" test. For an excellent discussion of "Father of Candor's" near rejection of the "bad tendency" test see Levy, Legacy of Suppression, pp. 149-54. "Father of Candor" [An Enquiry into the Doctrine, Lately Propagated, concerning Libels, Warrants and the Seizure of Papers . . . in a Letter to Mr. Almon from the Father of Candor (London, 1764)] implied that true harm or injury ought to be required. This position went beyond that taken by other writers, but it seems that (to the extent "Father of Candor" actually espoused it) it did not include statements that were "wilfully false" (pp. 48, 160). This tract has been reprinted (New York: Da Capo Press, 1970).
118. E.g. Another Letter to Mr. Almon, in matter of Libel (London, 1770), p. 31. The author states that the jury ought to acquit if the defendant acted "without any wicked
too, was at times portrayed as a matter of pure fact-finding in terms with which we are now familiar. What words were intended to mean, said Morris, was a factual, hence a jury question. Though establishing that meaning, as Francis Maseres argued, required the jury to draw inferences from facts, those inferences were "secondary" facts, which required "common sense, not technical learning." Juries were especially qualified in cases of libel since they knew "street talk" and could draw the proper inferences. As another writer put it: a "jury of common coffee-house politicians in London" was best qualified to determine the fact of whether words were meant to be scandalous.

In most tracts, however, the discussion of criminal intent moved well beyond the immediate issue of seditious libel. Here, more than at any other point, writers looked to the role of juries in common-run felonies. Traditionally, juries assessed guilt or innocence largely on the basis of the intent with which an act had been committed. It was within this assessment that the jury, consciously or otherwise, had always applied its own standards of justice, weighing intent and conduct (and perhaps reputation) against the prescribed sanction. By ruling that criminal intent would be inferred by the bench from the writing itself, the bench threatened the more modest but ancient law-finding tradition and, hence, the values that the right to jury trial had long epitomized.

The pro-jury writers’ failure to maintain consistently the idea—ought one say, the tactical stance?—that the question of intent could be reduced to a purely factual matter is reflected in their constant analogizing to the jury’s role in homicide cases. In homicide cases, as many tract writers pointed out, the bench drew the jury’s attention to the differences among malice aforethought, sudden deliberateness, unintentional homicide, and intentional but justifiable homicide, and thereupon left the matter to the jury. The homicide analogy was in fact cited to prove that juries had the intent. He analogizes this to a finding that a defendant in homicide slew "without malice," and then continues: "If the jury are convinced, that although [the defendant] wrote or printed and published it, he did so without any traitorous, seditious, scandalous, or malicious intent, they ought to find him ... not guilty." (idem). See also A Dialogue between a Country Farmer and a Juryman (London, 1770), p. 8.

119. Morris, Letter to ... Aston, p. 42.
121. Idem.
122. Another Letter to Mr. Almon, p. 48.
123. E.g. The Doctrine of Libels and the Duty of Juries fairly stated (London, 1752), pp. 14–15; Another Letter to Mr. Almon, p. 31; Towers, Observations on the rights and duty of Juries, p. 21. Standard treatment of the jury’s role in homicide encouraged this understanding. See e.g. Readings upon the Statute Law, by a Gentleman of the Middle Temple
right to apply law to the facts. It was this traditional law-applying role that the bench was attempting to remove in seditious libel cases, or so many pro-jury writers charged. Thomas Leach, extrapolating from homicide to "all other cases of crime"—by which he meant seditious libel—declared:

On indictment for murder, the jury decide, not only that the person, charged to have been murdered, did die, in consequence of the act of the defendant, and that such act resulted from a design to kill; which are matters of fact: But they also decide, whether from the particular circumstances, attending the homicide, it is to be ranked in that class, which the law justifies or excuses; or whether from the degree of criminal intention in the defendant it comes within the legal definition of the crime of manslaughter; or amounts to murder, which, if the intention of the libeller be matter of law, are evidently also matters of law.

For Leach, as for so many others across the half-century of active debate, the homicide analogy provided the basic model. Did the defendant strike (did he publish); did the blow cause death (did the writing scandalize); were the blow and death (or the scandal) intended and, if so, was there true malice or was the act justified or excusable? There was bound to be occasional disagreement between judge and jury on what constituted one or another degree of malice, on the limits of justification and excuse, or on their application to a given case. That was often true in homicide and it was certain to be true in seditious libel. The centuries-long tradition of allowing the jury leeway in its application of the law of homicide appears to have colored assumptions about the appropriate judge-jury role in seditious libel. And just as disagreements between judge and jury on the law of homicide were conceptualized as disagreements merely about application of law to fact, so were such disagreements conceptualized by many opponents of the official doctrine of seditious libel.

It is not surprising pro-jury writers drew primarily upon common practices in cases of homicide, a shrinking category, rather than upon such practices in prosecutions for theft, which accounted for most of the business of the assize courts. In the case of theft, mitigation operated


125. Leach, Considerations on the Matter of Libel, p. 7.

typically as an open means of commuting the death sentence for many defendants who had clearly committed the act with which they had been charged. Although it was also employed where the evidence was doubtful, we have seen that in this context the concept of "safe" evidence was itself a function of the desire to use execution only sparingly. The thief's behavior was viewed as premeditated and insidious, virtually always as reprehensible, rarely as excusable. It is true that in most cases, especially where there had not been physical violence, the act itself was deemed by many as not meriting capital punishment. Moreover the thief's behavior was often seen as in part the product of social conditions; it was hoped that the thief might be reformed. But the thief's behavior was viewed nonetheless as intrinsically evil.

Homicide presented a more complex problem. The taking of a life had always been viewed as a particularly serious matter. But the defendant's intent could be very evil or fully justified, or something in between. It might be (and often was) excusable under the law. In many cases, verdicts of self defense, accident, or manslaughter served to mitigate the law of sanctions in favor of defendants whose acts (like those perpetrated by thieves) were nonetheless viewed socially as evil. But in other cases, such verdicts reflected a very different social response. The behavior of the true self-defender was fully accepted. And like the true self-defender, the true "public defender" deserved at least vindication, if not approbation.

The homicide analogy was also attractive because the process of the jury's resolution was often hidden from view, perhaps from the conscious understanding of the jurors themselves. It was a process around which myths might grow. Eighteenth-century commentators could suppose that jurors in homicide trials were engaged mainly in a subtle assessment of the defendant's intent at the time he committed the homicide in question. To the observer, the jurors' consideration of the defendant's reputation and character might be assimilated to their determination of the defendant's intent. This consideration need not be understood as the largely separate matter that all contemporaries knew it was in theft cases, where more often than not it influenced the jury only in its "sentencing" role.

Finally, opponents of the official doctrine of seditious libel were greatly influenced by Hawles, who had cited the jury's right to decide among the various kinds of homicide verdicts as evidence of their right to decide law as well as fact. Through Hawles eighteenth-century writers—perhaps without realizing it—reached back to the parliamentary censure of Chief Justice Kelyng and, ultimately, to de facto practices of medieval juries. The daily practice in cases involving theft conditioned attitudes regarding the role of mercy and the right of the jury to share assessment of just deserts. But it was the jury's role in homicide cases that allowed the
strongest, most attractive, and best documented argument for the jury’s right to “apply” the law within the “factual” assessment of whether the defendant had acted with a truly criminal intent.

V

The claim that the jury’s inalienable role was that which it played daily in routine felonies—the application of the law that had been set forth by the bench—lay close to the core of the attack on the law of seditious libel. The true law-finding issues of the debate—the jury’s capacity to comprehend the law sufficiently to determine whether the judge had chosen apt precedents or had interpreted the relevant common law or statutes correctly—would continue to attract great attention, but the more routine discussion of whether the jury had the right merely to apply the law in seditious libel “as in other cases” was perhaps an equally important aspect of the debate. When the jury writers addressed this most basic level of law-finding they revealed something of their conception of the nature and purpose of the jury trial in all criminal cases.

We have seen that in practice the criminal trial had always been person—as well as act—oriented. Assessment of the defendant’s character had traditionally affected the jury’s view of his just deserts.127 Character and credibility of course bore on the question of whether the defendant had committed the act alleged in the indictment, and in that sense the jury found the fact that it was charged to find. This observation was contained in The Doctrine of Libels and the Duty of Juries fairly stated, published in 1752:

[I]f from the character of the person libelled they think they have reason to believe, that he has been guilty of those facts, and that from the character of the person accused of libelling they have reason to believe [the defendant] would not have charged any man with such facts unless he had known him to be guilty, they ought to bring their verdict Not Guilty. . . . This is a latitude which every jury ought to take, and a latitude which will be of great importance for every man to endeavor to preserve a good character in his neighborhood.128

127. See Beattie, “Crime and the Courts,” pp. 173–74, 179, for a discussion of the impact of reputation and character on verdicts in the eighteenth century. These considerations were influential also at the reprieve and pardoning stages. See above, Chapter 7, nn. 50–54 and accompanying text. It is likely that judicial and royal attitudes influenced those of trial jurors, and vice versa. Indeed, this dialectical pattern of influence was probably present from the beginning of trial by jury.

128. Doctrine of Libels, p. 10.
This "latitude" was implicit in every jury trial. Thus George Stanhope in his sermon entitled *The Duty of Juries*, which was delivered in 1701 at the Lent Assizes, conceded that in close cases

[w]e may allow some abatements for a criminal action alleged against a person unblameable for the main, and impute it to ignorance, or sudden transport or passion, or misadventure, rather than to malice and wicked design; which abatements cannot fairly be allowed to those abandoned wretches, who are scandalous for mischievous dispositions and a profligate conversation. 129

The problem was how to delineate between appropriate and inappropriate "abatements." That depended upon the sufficiency of the proof offered at trial, of which juries were without dispute the final judges. The official doctrine of seditious libel avoided this assessment entirely. The only facts left to the jury were so fully proved as to be virtually undeniable, and there was in any case nothing to balance against them, since intent was "implied" as a matter of law. What the opponents of the official law were demanding was the return to the jury, as a question of fact, or of application of law to fact, of the complicated, intensely social question of criminal intent.

The seditious libel literature often assigned to the jury an even more open-ended role than the above discussion of criminal intent suggests. Fundamentally, according to jury writers, whether in prosecutions for seditious libel, homicide, theft, or any other criminal offense, the defense of the general verdict amounted to the defense of the defendant's right to a "merciful" judgment by peers. And "mercy" might be appropriate even in cases where the defendant was guilty under the law. The core of the power to decide "law as well as fact" was the jury's right to nullify the law in particular cases without rejecting it as a general matter.

That the English criminal law was a "merciful" law was a cliche in the eighteenth-century literature. 130 The identification of the jury with mercy operated on two levels. Most writers, referring to the fact-finding process, asserted that, as Towers put it: "Where the matter is doubtful, in criminal prosecutions, an acquittal is always most consonant to the spirit of the

129. George Stanhope, *The Duty of Juries* (London, 1701), p. 12. Stanhope added: "But still ... these are but probabilities and presumptions and must come in their proper place. For where they are admitted to overbalance credible and full peremptory proof, there we offend against the Text (i.e., Levit. XIX, 15) and have respect of persons in judgment" (idem).

law of England.” 131 Hinting at a yet broader role for the granting of mercy, Highmore observed: “[T]he jury know that by their verdict alone, and not by the knowledge of law in the judge, the prisoner at the Bar must be acquitted or suffer death.” 132 As in the capital felonies of murder or theft, he implied, so in the noncapital high misdemeanor of seditious libel. Morris drew an analogy to the royal power of pardon: “Like the king in the extension of mercy [the jury] make so noble a use of their power when their consciences permit them to acquit.” 133 The anonymous author of A Treatise on the Right of Juries (1771) introduced his discussion of seditious libel with a conventional encomium of the merciful quality of the law in common felony cases:

Mercy is the characteristic and leading feature of an English jury. They are apt now and then to err upon the favourable side: but let us consult the gentle spirit of our law, and we shall find it would rather dispense with the punishment of a hundred guilty persons, than permit a single innocent man to suffer. If on the other hand the jury should happen to be vindictive, the King’s pardon interferes, to counteract them. The good sense and liberal feelings of the law in this well tempered regulation cannot be enough admired: It impowers juries to acquit absolutely, but reduces and softens their power to convict by enabling the Crown in its mercy to withhold punishment. 134

In his Address to the People of Scotland, William Smellie described this commonplace but significant aspect of the jury’s application of mercy. Commenting upon the statutory extension of jury trial to Scotland, and borrowing the terminology of the English seditious libel debate, he asserted:

If, therefore, the power of judging of the law as well as the fact, were annihilated, the very intention of the legislature would be defeated; because the courts, and not the jury, would then be the sole judges. Intention is the essence of crimes. The facts [charged] may be distinctly proved. But, if from particular circumstances, the jury are convinced in their own minds, that the [defendant] either had no intention to commit a crime, or that the crime is not of so heinous a nature as to merit the punishment concluded for in the indictment, in all cases of this kind, the jury have not only a right, but they are bound,

133. Morris, Letter to . . . Aston, p. 40. Morris and other Wilkites opposed the widespread use of discretion in the courts, seeing it as a device by which authorities extended or withdrew the subjects’ rights almost at will. They appear to have made an exception of the jury. See Brewer, “Wilkites and the Law,” pp. 160–61.
by the spirit of their oaths, and by the laws of God and man, to find the [defendant] Not Guilty of the crime. . . . They consider the nature of the crime, and the punishment that ought or ought not to be inflicted. In all such cases, the jury must necessarily determine both the law and the fact. 135

Finding law as well as fact, applying law to fact, or rendering a “merciful verdict,” amounted to assessing the nature of both the defendant’s intent and his act in the light of the punishment that would follow upon his conviction. The jury might approve of the defendant’s behavior, as in some political cases, or might disapprove of it but deem the prescribed punishment too severe, as in some common-run felonies. Very different underlying motives, to be sure, but nonetheless, at least within the confines of some jury tracts, the fusion of jury theories was complete. 136

VI

Fox’s Libel Act marked a triumph for those whose concept of the English constitution was grounded in history. It vindicated the historic role of the jury as the last line of defense against executive tyranny. Although precedent could be found for treating seditious libel as an anomaly, the prior official doctrine nonetheless seemed to many a dangerous departure from deeply held assumptions about English governance. At one level Parliament’s concern was with the law. Fox’s Act was couched as a declaration of the common law, resting not on precedent but on general principles of that law. 137 Parliament looked first to the law regarding criminal trials generally. That law was assumed to govern; exceptions would be tolerated only where that law itself provided compelling reasons for them. Parliament’s solution to the seditious libel problem was also the result both of politics and of the nearly irresistible force of broad constitutional principles. The pressures for the expansion


136. But see Maseres, An Enquiry into the extent of the power of juries. Maseres argued that consideration of the seriousness of an offense found by the jury was a matter for the court: “For if it shall be made to appear by just and legal reasonings at the bar, that the writing and publishing the paper in question, though it was done deliberately, and has the tendency ascribed to it in the information [as found by the jury], yet it is not an offense of such great and public consequence as to have been an object of legal punishment, it will be the duty of the court to forebear giving judgment. . . . But this. . . is a matter which judges only have a right to determine, either upon a motion made before them on behalf of the defendant in arrest of judgment, or of their own accord” (p. 34).

137. See above, n. 62 and accompanying text.
of rights of speech and press were enormous. 138 Those rights might still be limited (few questioned punishing truly seditious writings), but they could not be reined in through what appeared to society at large to be a drastic revision of the historically vindicated balance of power between judge and jury. Retreat to the technical high ground of "questions of law" served only further to expose the government to attack by the opposition. In manipulating the balance of authority at trial, 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. Having administered the law largely with the aid of the jury (one is tempted to conclude), the Crown and courts found they could not now govern mainly through the bench. 139

To appreciate the way in which the government was captured by its own administrative history, we must recognize how little England's rulers controlled the circumstances that made law-finding, or discretionary fact-finding, a dominant element in the administration of the criminal law. For the most part, prosecution for felony proceeded in accordance with the attitudes of society at large. The alliance between authority and mercy-granting juries reflected a mixture of wise policy, acquiescence in the inevitable, and shared assumptions about justice. 140 We have seen that we must be cautious about extending the argument that authorities manipulated the selective enforcement of the criminal law in order to secure the deference of those they ruled to the problem of the use of the criminal trial jury. 141 If we focus too narrowly on the administration of the criminal law in the eighteenth century, we obscure the question of the roots of the system of mitigation. These practices were historically the

138. Holdsworth, *History of English Law*, 10:672-74. Holdsworth took the view that the judges were right in their statement of the law, but that "it was clear that the law as laid down by the judges was quite out of harmony with the practical ideas and public opinion of the time" (p. 674). Levy (*Legacy of Suppression*, pp. 249-52) briefly discusses the tract campaign that preceded the passage of Fox's Libel Act. I discuss some aspects of the debates concerning the Act above, n. 64. Much remains to be said concerning those debates and the political views and interests of those in Parliament. Relatively few members of the Commons and the Lords spoke on the bill. Their views cannot be taken as the views of all, or even most, members. A true legislative history of the Act is badly needed; its results might lead to reconsideration of my analysis of the meanings of law- and fact-finding in the extraparliamentary debate concerning seditious libel in the period 1732-92.

139. This conclusion is necessarily tentative. I have stated the point broadly, and mean it to say as much, but it may be that it applies mainly to the disparity between the treatment of routine cases on the one hand and seditious libel on the other and that contemporaries viewed that disparity as an isolated phenomenon.

140. See above, Chapter 7, section IV.

141. Hay ("Property, Authority and the Criminal Law") makes the argument with respect to Parliament's refusal to reform the law of sanctions. He makes little reference to the role of the jury. For discussion of Hay's views on the jury see above, Chapter 7, n. 156.
by-product of the criminal law in theft and homicide cases where complainant, defendant, and jury had frequently been (and often still were), relatively speaking, members of the same class. 142 The Crown and the bench and their attendant officials had an interest in overseeing the maintenance of order, but frequently they played the role of referees who lacked the resources, time, or stake in the outcome to prevent the jury from reaching a verdict according to its own sense of justice. Moreover, these practices, which long predated the eighteenth century, reflected social attitudes that were not easily managed or always willingly tolerated. This is not to say that authorities failed to capitalize on these sources of potential weakness, consciously or otherwise. It is to say that to the extent authorities reaped the benefits of governing through merciful justice, the interaction of rulers and ruled was complex and two-sided. In important ways, authorities prevailed at the behest of those they sought to rule.

Our study of the seditious libel debate suggests that in yet another, related respect we must modify our understanding of the political and social implications of eighteenth-century law enforcement. The two strands of theory regarding the jury's rightful role could not forever remain separate. Jury law-finding in political cases could not be kept distinct from jury resolution in common-run felonies. In the popular mind at least, the strength and reach of the arguments against the seditious libel doctrine were almost certainly influenced by the nature of jury practice in common-run cases. Might it be that the same authorities who allowed juries to share the powers of mitigation in common-run cases found themselves by virtue of that policy on the defensive in prosecutions for seditious libel? If so, we must recognize that authorities sometimes reaped not deference but a bitter harvest largely of their own making. The irony is less striking than might at first appear: the policy of sharing powers of mitigation was, as we have seen, little more than acquiescence in practices authorities could not have eliminated easily. Having (over the

142. See Beattie, *Crime and the Courts*, chs. 5, 6; Langbein, "Albion's Fatal Flaws," p. 107. But see Douglas Hay, "War, Dearth, and Theft in the Eighteenth Century," *Past and Present*, no. 95 (1982), p. 154, n. 100. There is need for more research on this matter. My essential point is that, whatever the status difference between suspects and their accusers (and jurors), the status difference between accusers (and jurors) and the bench was frequently far greater. Moreover, accusers and accused were sometimes from the same locale, nearly always from the same county; judges oversaw resolution of local disputes to which they were themselves outsiders, both geographically and socially. This was probably as much or even more the case in earlier centuries. So long as jurors typically took their lead from the bench, the bench countenanced substantial leeway in less serious cases. And even when jurors took their lead from the bench, they were responding to judicial attitudes that were themselves in part the reflection of long-held and widely shared community standards.
centuries) converted great weaknesses into moderate strength, England’s rulers found that that strength had, after all, its natural limits.¹⁴³

It has been wisely observed that English authorities came to accept as binding certain concepts of due process in which they had cloaked their exercise of pure power.¹⁴⁴ Something akin to this phenomenon seems to have been at work in Parliament’s resolution of the seditious libel crisis. The Libel Act debates reflected a consensus on one principle only, that the criminal trial jury should have a right to return a general verdict on all facts in issue. That principle was recognized as having long constitutional standing. To deny it (or seem to deny it) in trials for seditious libel was not only to offend that principle but to risk political fire for offending it precisely in those circumstances that suggested the worst sort of motives.¹⁴⁵

Many in Parliament as of 1770 were persuaded by Mansfield’s defense of the official doctrine of seditious libel.¹⁴⁶ Precedent and the uniqueness of seditious libel seemed to ground an exception to the general rule.¹⁴⁷ What, then, doomed the exception? Constitutionalism and politics are rarely separable. Parliament responded to both without being able to isolate either. The principle of a right to a general verdict in all cases had come to be identified socially with the prevailing theories regarding the purposes of the criminal trial jury. The principle was accepted by some

¹⁴³. I have made this argument in the present essay with regard to the administration of criminal law in the eighteenth century. I believe that it applies as well to earlier periods. Judges in the medieval period may have sensed that their relaxed treatment of juries in most cases made it difficult for them to control juries in those few cases in which they took a real interest. The early modern bench may have analyzed the resistance to fining jurors in similar terms. The phenomena I am describing were present from the outset of the jury-trial experience. The contest over the doctrine of seditious libel was of special importance because it involved widespread political debate and revealed the limits of authority during the very period in which authority was (ostensibly) coming to have relatively substantial control over the administration of criminal law. I shall return to this point in the conclusion to this book (Chapter 9).

¹⁴⁴. Thompson, *Whigs and Hunters*, pp. 258–69. “And the rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away.” See also Hay, “Property, Authority and the Criminal Law,” pp. 32 *et seq.*; “Introduction,” in Brewer and Styles, eds., *An Ungovernable People*, p. 20: “[T]he imprimatur of the law conferred only limited power on those who were its beneficiaries. Both the modus operandi of the law and the ideology that lay behind it served to constrain authority and to limit those who tried to manipulate the legal process.”

¹⁴⁵. For references to the Libel Act debates see above, n. 64.

¹⁴⁶. See above, n. 25.

¹⁴⁷. But see the speech of Sir Thomas Townshend, who refused to make an exception in the case of libel. Hansard, ed., *Parliamentary History*, 16: cols. 1162–63. “He whom nature or education has not qualified for determining the guilt of a libel, is unqualified to sit as judge in cases of life and death” (col. 1162).
because they believed its rejection would appear (wrongly) to be a rejection of more general principles that all in fact accepted. It was accepted by others who would themselves have viewed a rejection in that way. At base in seditious libel was the historic role of the jury as a safeguard against tyranny. So long as that issue could be kept from being entangled with others, the sides might be clearly drawn; much would depend upon whether one viewed the settlement of 1689 as having rendered the safeguard unnecessary. But it could not be kept separate. So long as there were many in society who distrusted the role of authorities in seditious libel cases, the settlement would never be solely a matter of institutional framework as such. It would of course be a matter of the movement for free speech and of the liberties of subjects generally. No doubt that is how most members of Parliament saw the issue. But it would also be a matter of how society regarded the practice of institutions, of the very real importance of de facto powers, such as those of the jury in common-run felony cases. The idea that discretionary lay fact-finding was central to the administration of justice had taken on a life of its own, and no part of that administration could be shielded from it. Authorities could not, as it were, "bifurcate" the practice of trial by jury. The same judges who tolerated, or even encouraged, mitigated verdicts in homicide or theft could not easily explain why juries ought to play so limited a role in seditious libel. Notions of consistency and coherence were integral to the late eighteenth-century conception of justice. Nothing could gainsay them, not even the attendant risk of more subtle forms of inconsistency and incoherence—i.e., inconsistent jury verdicts—as the price of seditious libel law reform.  

148. Mansfield in *St. Asaph's Case* (State Trials, 21:1040) stressed the problem of inconsistent verdicts: "To be free, is to live under a government by law. . . . Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law to protect individuals, or to guard the state. . . . In opposition to this, what is contended for? That the law shall be in every particular cause what any twelve men . . . shall be inclined to think, liable to no review, and subject to no control. . . . Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable." See also 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), p. 4: "It would be next to impossible that their [i.e., the jurors'] decision should accord with any uniform and fixed principles. The consequence would be, the prevalence of confusion and uncertainty in all legal proceedings where intervention of a jury takes place. A total loss of freedom must of course ensue; for the essence of freedom consists in the certainty of law." These considerations surfaced in Parliament both in 1770 [e.g. Hansard, ed., *Parliamentary History*, 16: col. 1146 (Thurlow); col. 1186 (De Grey)] and 1792 [e.g. *ibid.*, 29: col. 1297 (The Lord Chancellor)].
The recognition of the right of the criminal trial jury to return a general verdict resolved one immediate political problem, but it contributed little to the resolution of some other longstanding problems of the criminal law. One of the important side effects of the seditious libel controversy was its intensification of the prevailing social conceptions of the criminal trial jury. The magnification of those conceptions and their translation to the sphere of political misdemeanors may have affected the administration of the law generally and delayed the movement for reform of the law of sanctions.\textsuperscript{149}

It is possible, of course, that the seditious libel problem and its resolution only temporarily delayed and then ultimately accelerated the movement for reform of the law of sanctions. The penal reformers' argument against jury law-finding—i.e., against merciful fact-finding in common-run cases—lost some of its appeal when the integrity of the jury system seemed to be threatened in political misdemeanors. Resistance to the bench involved a glorification of jury independence; criticism of juries on all fronts may have become unfashionable. But in the years following passage of the Libel Act, juries, as is well known, convicted more often than they had before in cases of seditious libel.\textsuperscript{150} The general verdict allowed the tenor of the times to take its toll, and perhaps reminded observers of the volatility of jury attitudes. In those years, the warnings of Mansfield, John Bowles, and others might have seemed well taken: the defendant's security was at risk; no one could be certain how juries would "apply" the law. One obvious solution to the problem of the jury that convicted against the law was a fuller right of appeal.\textsuperscript{152} But for the

\textsuperscript{149} This is, of course, a matter of speculation. Doubtless, many factors delayed the impact of the criticisms of the late-eighteenth-century reformers. See below, Chapter 9, section I.


\textsuperscript{151} See above, n. 148.

\textsuperscript{152} The Act itself (32 Geo. 3, c. 60, sect. IV) provided "[t]hat in case the jury shall find the defendant or defendants guilty, it shall or may be lawful for the said defendant or defendants to move in arrest of judgment, on such grounds and in such manner as by law he or they might have done before the passing of this act." See Holdsworth, \textit{History of English Law}, 10:691-92. Holdsworth takes a view of the act that is perhaps too sanguine. He correctly stated that the question for the court was "whether the prosecution has satisfied the onus of proving that [the writing] is libellous." Whether "the settlement made by Fox's Act [was] very favourable to the accused" rests to some extent on one's view of the legal standards (including the relevance of truth) then existing that the court were always ready to apply and that juries might or might not apply depending upon the political climate. It rests also as a practical matter, on the way in which trial courts typically assessed the prosecution's case in seditious libel cases. Until a thorough study has been made of the
time being, the uncertainty of the law produced by the general verdict in seditious libel cases may have made it easier for penal reformers to resume criticizing jury discretion in common-run cases. The solution there was not to do away with the general verdict—that matter had been placed beyond reach—but rather to achieve certainty of law and punishment through the unmitigated imposition of humane and moderate sanctions.

The constitutionalization of the general verdict perhaps raised the stakes for the penal reformers. Having reidentified the jury as the quintessential democratic institution in English society, Parliament would have to demonstrate definitively what eighteenth-century reform proponents had only suggested: that the prevailing practice of jury-based mitigation in routine felonies had grown to such proportions that it was making a mockery of the law. Nothing less would suffice before Parliament could reduce the jury’s role in common-run cases. Changes in jury trial would follow, rather than precede, changes in English attitudes toward the entire problem of the administration of the criminal law.¹⁵³

treatment by the post-1792 bench of motions in arrest of judgment—in the light of the evidence proffered at trial by prosecution and defense in seditious libel cases—our own judgment must be reserved.

¹⁵³. See below, Chapter 9.