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"Guilty of Publishing Only": Jury Nullification as a Legal Defense in the Eighteenth Century

This article contends that printers and journalists operating under British common law through the eighteenth century tended to be successful when they encouraged jury nullification as a primary defence against state libel lawsuits. Jury nullification, as it is called in the United States, or jury independence or jury equity in the United Kingdom, is the process by which a jury refuses to find a defendant guilty even though the facts of the case point to conviction beyond a reasonable doubt. The jury instead "votes its conscience," regardless of what the law dictates.

Such was the determination in printer James Augustus Hicky's first trial for libel against Governor General Warren Hastings of India in 1781. Despite overwhelming evidence according to the law at the time, the jury found Hicky not guilty. According to one account, the jury debated for thirty hours before returning this verdict. Upon receiving it, Chief Justice Elijah Impey of the Supreme Court of Bengal "flew into a prodigious rage, violently declaring he would not suffer such a verdict to be recorded, it being directly and positively in the teeth of the evidence." Impey ordered the jury to reconsider its verdict, but the jurors refused. One juror replied that he "had not hastily, nor without due consideration, formed his opinion, nor should he lightly change it, or be threatened into giving a different one."

Notwithstanding any prejudice that the chief justice may have felt toward Hicky, what caused him to fly into a "prodigious rage" was the legal argument. Hicky, the founder of South Asia's first newspaper, specifically argued that the jury should consider whether his alleged libel contained malicious intent, even though legal precedent dictated that determining intent was solely a judge's prerogative. Hicky was so confident in his defense strategy

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that he fired his lawyer in the middle of the trial, saying, "I had rather read my own defense. You do not seem to understand my counsel." Hicky told the jury, "The mere writing, printing and publishing is no proof of guilt. The malicious or seditious tendency must be proved." The jury agreed. Hicky's trial, however, was but a single dramatic event within a larger trend.[1]

LIBEL TRIALS BETWEEN 1699 AND 1792 IN BRITAIN, BRITISH INDIA, AND THE AMERICAN COLONIES To date, no scholar has performed a quantitative analysis of either defense-counsel arguments, the link between those arguments and acquittal, or acquittals that followed judges' directions to juries in eighteenth-century state libel trials under British common law. State libel trials are important because of their connection with the individual liberties that evolved in anglophone societies at the time. The courtroom was a prime location for private individuals and governments to contest the boundaries of freedom or "liberty" of the press.[2]

In state libel trials, the government charged individuals with sedition, obscenity, blasphemy, scandal, or criminal defamation. "Seditious libel" prosecutions during this period have garnered significant scholarly attention, but the government was also likely to reach indictments for written material deemed wicked, malicious, or false. The doctrine of seditious libel grew out of the work of the Star Chamber during the sixteenth century. Although never specifically defined, it came to be associated with information that degraded the social order by weakening people's obedience to their leaders.[3]

This article examines state libel trials between 1699 and 1792 because of historical conditions during this period that enable comparison. By 1699, changes in laws and legal precedents

1 William Hickey (ed. Alfred Spencer), *Memoirs of William Hickey. III. 1782–1790* (London, 1918), 161. William Hickey (no relation to James Augustus Hicky) had a reputation for inaccuracy and exaggeration, but his account is largely corroborated by John Hyde, *The Judicial Notebooks of John Hyde and Sir Robert Chambers, 1774–1798*, June 26–29, 1781, available at https://hydebooks.njit.edu. Hereafter *Hyde's Notebooks*. Impey, a frequent target in Hicky's newspaper, called Hicky a "man among the dregs of the people" during one of Hicky's trials. See *Hyde's Notebooks*, June 29, 1781.

2 Wendell R. Bird, *Press and Speech under Assault: The Early Supreme Court Justices and the Sedition Act of 1798, and the Campaign against Dissent* (New York, 2016), 36; Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press," *Stanford Law Review*, XXXVII (1985), 669–670.

3 Hamburger, "Seditious Libel"; Bird, *Press and Speech*.

afforded British governments new avenues to regulate the press. By all accounts, the lapse of the Licensing Act in 1695, the passage of the Treason Trials Act of 1696, and two rulings—*R v. Paine* (1696) and *R v. Bear* (1699)—by Lord Chief Justice John Holt of the Court of King's Bench (1689–1710) precipitated this change. In the seventeenth century, jurors had generally required three criteria for successful convictions of libel—proof of defamatory content against individual(s), proof of publication or intent to publish, and proof of a malicious state of mind (intent). Holt relaxed the requirements for guilt by transferring the determination of intent from a jury to a judge. In *R v. Paine*, he declared that written libel, even without an intent to publish, was sufficient to warrant prosecution; the mere act of writing made an insult a libel because it recorded a printer's state of mind. In *R v. Bear*, he required that indictments provide a defendant's actual words or their "sense and substance," thereby allowing judges to "determine whether they be Scandalous or not." In other words, the court "tried" a person for libel in the very indictment, before the case even reached a jury. Hence, a judge, not a jury, made all decisions regarding libel, "because that determination [by a judge] was considered a matter of law." Juries determined only whether a particular printer was involved in publishing an alleged libel and whether the material in question targeted the person named in the indictment.[4]

This period ended with the passage of Fox's Libel Act of 1792 (32 Geo. III c. 60). The law, introduced by Charles James Fox, a member of Parliament, allowed juries to render a verdict of guilty or not guilty on the "whole matter put in issue," rather than requiring them to find a defendant guilty "merely on the proof of publication." Thus, Fox's Libel Act allowed juries to consider a defendant's intent. Holt's rulings lasted well into the eighteenth century, however, because of the general conservatism of the courts during this period, specifically that of Tory judges in the

4 When licensing lapsed, the Crown first used the law of treason, but the Treason Trials Act brought new regulation to the prosecution of treason. Hamburger, "Seditious Libel," 722–724, 737. Bird, *Press and Speech*, 46, 47; Hamburger, "Seditious Libel," 700; *R v. Paine* (1696), 87 *English Reports* 584, available at https://home.heinonline.org/content/english-reports/; *R v. Bear* (1699) (spelled Beare), 91 *English Reports* 1175; Bird, *Press and Speech*, 57; Paula R. Backscheider, "No Defense: Defoe in 1703," *Publications of the Modern Language Association*, CIII (1988), available at https://www.jstor.org/stable/462376, 274–284.

latter half of the century eager to curb the press. Witness the opinions of many leading judges and casebooks of the period, such as William Hawkins' *Pleas of the Crown* (1716) and the opinions of Chief Justice William Murray (the first Earl of Mansfield). Hamburger states that Murray's rulings in many important seditious libel trials of the 1770s "depended almost entirely upon Holt's decisions"—a claim that has yet to be quantitatively investigated.[5]

Although this long period underwent many changes, it provides a framework to explore certain questions about the role of juries and the construction of ideas about press freedom. Scholars have hotly debated what exactly freedom or "liberty" of the press meant in late eighteenth-century British and American culture. Until recently, the consensus was that most individuals at the time construed freedom of the press as merely freedom from prior restraint. Yet Bird maintains that the public often understood freedom of the press in its modern sense, as freedom of speech and freedom from prosecution for seditious libel. In an examination of many newspapers and pamphlets of the time, Bird argued that the dominant view of liberty of the press was broad. "Only a declining minority, led by Crown judges, viewed those liberties in the narrow way Blackstone purported to summarise."[6]

Holt's influential opinions tended seriously to restrict free expression. When William Blackstone, in his *Commentaries on the Laws of England* (1769), referred to freedom of the press, he meant the freedom from prior restraint (printers not needing to be licensed), not the freedom to print whatever they wanted. Oldham and Bird have pointed to this doctrine as expounded by Mansfield in the "Junius" libel trials of *R v. Almon* (1770), *R v. Woodfall* (1770), and *R v. Miller* (1770) (in which the three defendants were accused of printing or selling letters critical of King George III, under the pseudonym Junius). Mansfield used the narrow definition of press freedom to bolster arguments against the press having widespread

5 John Hostettler, *The Criminal Jury Old and New: Jury Power from Early Times to the Present Day* (Winchester, U.K., 2004), 92. Hamburger, "Seditious Libel," 742, 756. Scholars have argued that Holt's fairness in court contributed to the survival of his opinions. His admirers included even critics like Tutchin, who was indicted for libel in 1704. According to Hamburger, "Law and politics seemingly conspired to make a good part of the interpretation quite palatable" (*ibid.*, 754).

6 Leonard W. Levy, *Emergence of a Free Press* (New York, 1985); Bird, "Liberties of Press and Speech: "Evidence Does Not Exist to Contradict the … Blackstonian Sense" in Late 18th Century England?" *Oxford Journal of Legal Studies*, XXXVI (2016), 1.

rights to free speech. Such is the traditional Blackstone–Mansfield definition of libel law.[7]

If, as the literature suggests, judges typically perceived the Blackstone–Mansfield interpretation and Holt's opinions as established precedent, printers' only ostensible recourse was either to contest publication or appeal to a jury's wider sense of liberty. On Holt's terms, printers could be found guilty by merely acknowledging that they had published an alleged libel and that it targeted a purported individual. Faced with these constraints, however, they had ample motivation to explore other legal tactics to overcome prosecution. A counsel for the defense could prevail by urging a jury to ignore the judge's directive concerning publication and target and instead assess the intent or truth of an alleged libel for itself and thus possibly "nullify" the law. Although juries could return a verdict of not guilty regardless of a defense's arguments, this article refers specifically to defense arguments, not juries' decisions. Scholars have suggested that printers turned to arguments encouraging jury nullification as a central tactic, but until now, no one has attempted to perform a quantitative analysis of printers' tactics. This article seeks to discover the extent to which defense counsels' primary arguments in state libel prosecutions between 1699 and 1792 relied on a broad understanding of press freedom, and, if so, whether such arguments led to acquittals more often than those that did not under common law. Examining the relationship between defense arguments and trial outcomes during the eighteenth century increases our understanding of the interactions between the state and the press and the way in which liberties such as press freedoms were contested in the courts.[8]

Furthermore, central to state libel trials is how evolving notions of freedom of the press may have affected the directives of judges to juries when summing up evidence. As the last

7 The "Junius" trials were named after the pseudonym of the anonymous writer behind them, Philip Francis, who later may have become a secret correspondent for *Hicky's Bengal Gazette*. For the identity of Junius, see Alvar Ellegård, *A Statistical Method for Determining Authorship: The Junius Letters 1769–1772* (Göteborg, 1962), 13; Otis, *Hicky's Bengal Gazette: The Untold Story of India's First Newspaper* (Chennai, 2018). Bird, *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act* (New York, 2020), 1. James Oldham, *Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill, 1992).

8 Bird, *Revolution in Freedoms*, 31, 336; Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Durham, 1988), 29–44.

information that juries receive before they begin their deliberations, these directives can weigh heavily on the outcomes of cases. Bird argued that most Crown judges agreed with the Blackstone–Mansfield understanding of press freedom and applied Holt's opinions in their directions to juries. Moreover, the literature widely holds that judges during this time period generally directed juries to consider only publication and to disregard intent, though heretofore no attempt has been made to quantify Crown judges' use of this narrow definition in their summations to juries, or whether judges' directives were related to case outcomes in these trials. This article explores these questions, too, in detail below.[9]

METHODOLOGY The data set for this analysis is based on a thorough survey of case law involving state libel trials that reached petit juries in Britain, British India, and the American colonies. The data collection was not intended to represent an exhaustive listing of all state libel jury trials in the archives from 1699 to 1792, but only those cases available in printed case law books or digitized notebooks. Since all these libels were prosecuted by the state, they are generally represented as *R* (technically meaning *rex* [king] or *regina* [queen] but generically referring to the government) *v. Defendant*, rather than *Individual v. Defendant*.[10]

The data were derived from four main sources—*English Reports*, Howell's *State Trials*, the *Mansfield Manuscripts*, and the judicial notebooks of Justices John Hyde and Robert Chambers of the Supreme Court of Judicature at Fort William in Bengal

9 Irwin A. Horowitz, "Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making," *Law and Human Behavior*, XII (1988), 439–453. Bird notes one exception to the tendency among Crown judges, Charles Pratt (later Earl of Camden) of the Court of Common Pleas (*Press and Speech*, 63); *idem*, *Revolution in Freedoms*, 9–10, 93–114, 243–244; Oldham, *Mansfield Manuscripts*, II.

10 This data set excludes cases cited by other authors that did not appear to reach a petit jury, such as *R v. Bell* (1700), 88 *English Reports* 1372; *R v. James Drake* (1706), 91 *English Reports* 790; *R v. Derby*, 92 *English Reports* 79; *R v. Dodd* (1724), 93 *English Reports* 136; *R v. Dormer* (1726), 94 *English Reports* 9; *R v. Pownell* (1731), 25 *English Reports* 488; *R v. Lofeild* (1731), 94 *English Reports* 399, 416, 442; *R v. Mayer and Dowling* (1731), 94 *English Reports* 345; *R v. Earbury* (1732), 94 *English Reports* 509; *R v. Roberts* (1734), 94 *English Reports* 1084; *R v. Alderman* (1756), 96 *English Reports* 880; *R v. Almon* (1765), 97 *English Reports* 94; *R v. William Bingley* (1773) in *The Case of William Bingley, Bookseller* (London, 1773); and *R v. Jolliffe* (1791), 100 *English Reports* 1022. The data set also excludes trials incorrectly labeled by scholars as libel (written) when they were, in fact, concerned with defamation (spoken), such as *R v. Smith* (1725), 93 *English Reports* 135 and *R v. How* (1725), 93 *English Reports* 136.

(Hyde's *Notebooks*). Additional sources were also consulted when printed volumes of case law reports were lacking—as was the case for a few trials from the American colonies. The trials consulted began in 1699 after Holt's judicial precedents and ended in 1792 with the passage of Fox's Libel Act (or with the Bill of Rights in 1791 in the United States). As noted earlier, Fox's Libel Act allowed jurors to deliberate on more than proof of publication; for the first time, they could determine intent.[11]

These sources were chosen because they represent a broad record of case law from this period. The *Mansfield Manuscripts* are the notes of William Murray, the Lord Chief Justice of the King's Bench, from 1756 to 1788, reprinted by James Oldham in the 1990s in a two-volume set. *English Reports* is a 178-volume collection of more than 100,000 cases spanning the years 1220 to 1873. Printed between 1900 and 1932, it was intended to combine hundreds of previously printed case law books into one series.[12]

Howell's *State Trials* comprise thirty-four volumes' worth of trials relating to offenses against Great Britain from 1163 to 1820, as composed by Thomas Bayly Howell and his son, Thomas Jones Howell, in the late eighteenth and early nineteenth centuries. This authoritative work contains full records (to the greatest extent recoverable) of trials such as high treason, defamation, murder, and libel. Whenever possible, editors Cobbett and Holwell reprinted the text of the indictments, examinations, closing arguments, and judges' directives to the jury verbatim. Although these accounts are widely acknowledged to be truthful, the particular trials that they recorded for posterity might reflect their own biases.

The large proportion of libel trials chosen by the Whiggish editors is fortunate, given the subject matter of this article. Since common law used precedent from the British Empire at large, Howell's *State Trials* also sometimes incorporated Scotland, Ireland, the American colonies, India, and other British territories.[13]

11 Hostettler, *Criminal Jury*, 92. The end of this period has varied dates in the United States; states adopted statutes allowing juries to determine intent at different times. Moreover, though it lapsed three years later, the Sedition Act of 1798 allowed juries "to determine the law and the fact" in libel cases. See Philip I. Blumberg, *Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law* (New York, 2010).

12 Oldham, *Mansfield Manuscripts*; 178 *English Reports* vii.

13 Thomas Bayly Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time* (London, 1816), VI, 964 (hereinafter *State Trials*).

Records from British India derive largely from Hyde's *Notebooks*. Victoria Memorial Hall in Kolkata (modern Calcutta) holds approximately seventy notebooks written between 1774 and 1798, containing about 22,500 pages of conversations, testimonies, and judgments from the Supreme Court of Judicature at Fort William in Bengal, British India's highest court at the time. These records are a primary source of legal documents for early British India, then ruled by the British East India Company. Justice John Hyde, a junior court member, wrote most of these detailed proceedings of cases and events, offering a wealth of information about local people, political intrigue, and everyday existence in early British India, not to mention the tumultuous evolution of British law there. The Victoria Memorial has digitized the originals in Kolkata (though they are not yet available to the public). Additionally, in the late 1970s, the National Library of India made two microfilm copies, one of which has been digitized and used for this study.[14]

Additional records of libel trials derive from various scattered primary and secondary sources covering the American colonies. The licensing laws that allowed prosecutors to avoid resorting to libel prosecutions were sometimes in force in the American colonies (after they had lapsed in Britain), and state assemblies often chose to prosecute libel without resorting to the courts, especially after a jury found John Peter Zenger not guilty of libeling New York Governor William Cosby in 1735, demonstrating to authorities that colonial juries were potentially not reliable.[15]

Determining exactly which legal defenses printers and their counsels employed in libel trials requires a close reading of the texts

14 Thomas M. Curley of Bridgewater State University imported one of the microfilm collections to the United States in the 1980s. This collection has been digitized. See Carol Siri Johnson, "Hydebooks—Judicial Notebooks of John Hyde and Sir Robert Chambers," available at https://hydebooks.njit.edu. The other collection remains at the National Library of India, in degraded condition.

15 Michael G. Kammen, "Colonial Court Records and the Study of Early American History: A Bibliographical Review," *American Historical Review*, LXX (1965), 732–739; Blumberg, *Repressive*, 55. Zenger's trial may have had a chilling effect on colonial authorities; later colonial libel prosecutions usually occurred in front of state assemblies, where printers were indicted, tried, and sentenced, rather than in the courts. See Harold L. Nelson, "Seditious Libel in Colonial America," *American Journal of Legal History*, III (1959), 160–172; Livingston Rowe Schuyler, *The Liberty of the Press in the American Colonies before The Revolutionary War, with Particular Reference to Conditions in the Royal Colony of New York* (New York, 1905). Stanley Nider Katz (ed.), *A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of the New York Weekly Journal* (Cambridge, Mass., 1972).

describing the cases and the oral arguments of defense counsels. This article's criteria for categorizing different arguments is rigorous. Only words or phrases explicitly signifying a defense strategy counted as evidence of the defense's argument. Moreover, arguments had to be made at the trial, not just in a venue external to it, such as a pamphlet or in a newspaper.[16]

RESULTS A thorough search of sources for Britain, British India, and the American colonies discovered sixty-eight state libel jury trials between 1699 and 1792. Defense arguments generally comprised five categories—intent, truth, freedom of the press, publication, and target. Intent, truth, and press freedom can be classified as "nullification arguments" because they encouraged juries to weigh the content of the supposed libel and the printer's state of mind, to decide law as well as fact, and to deliver general verdicts that could flout Holt's precedents.

Publication and target were categorized as "standard arguments" because they operated within the legal framework that judges favored. In these cases, defense counsels argued either that their clients did not print, publish, or write the libel in question (the publication argument), or that the content did not libel the person alleged in the indictment (the target argument). Since, according to Holt's precedents, juries had to be convinced only that a defendant was involved in writing or printing the libel and that the libel applied to the person alleged in the indictment, the attorney could deny these facts in an attempt to clear the client. By working within the framework that judges and prosecutions laid out, these standard arguments did not challenge juries to contravene the law.

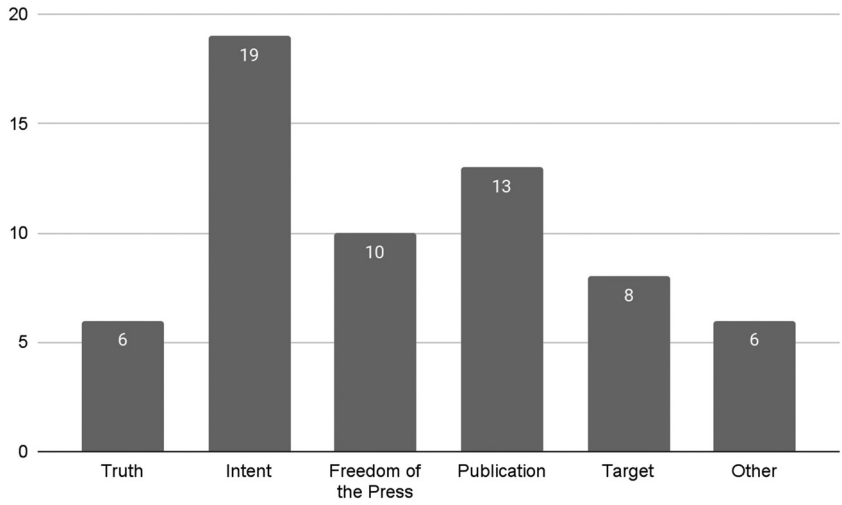
A defense based on intent carries the implication that the printer did not have a malicious state of mind. A defense founded on a truth claim means that the written material was not libelous because it was true. A defense touting freedom of the press suggests that the words in question were written to benefit society, specifically to speak truth to power. A defense mounted on the issue of publication means that the accused was not involved in writing, printing, or publishing the libel, and one focused on a target means that the libel did not refer to the person identified by the prosecution (the defense might argue that someone else was the target).

16 An appendix with details of the trials included in the dataset is available at: https://doi.org/10.6084/m9.figshare.20291580.

Defenses could use more than one argument per trial. For instance, a printer could claim both that an alleged libel was true and that it did not target the alleged individual. Figure 1 provides an overview of the frequency of the different approaches, excluding cases in which the defense arguments remain unknown. Note that the number of arguments exceeds the number of trials with known defenses (listed in the appendix), since defenses could adduce more than one argument at a trial.

Defense arguments about intent were the most common; those about truth were infrequent, potentially because many libel trials did not involve matters of fact so much as general criticisms of the government. Until the Zenger case, truth was an exceptional nullification argument since it was thought to aggravate a libel. Freedom of the press was an argument that went beyond truth or intent, involving theoretical concepts regarding the value of the press for society. This argument, first proposed obliquely in Tutchin's trial of 1704, became increasingly more prominent in the latter half of the eighteenth century as Enlightenment ideals became widespread. Freedom of the press was closely intertwined with freedom of speech, which specified that individuals could speak freely provided they did not falsify or maliciously defame. Defenses evoked this argument even if they did not evoke one for truth or intent; that is, a defense tacitly admitting libel could nonetheless

Fig. 1 Defense Arguments in State Libel Jury Trials, 1699–1792



attempt to convince a jury that a guilty verdict would have a pernicious effect on the ability of the press to act on the public's behalf.[17]

Defense Strategies—Comparative Numbers and Outcomes A chi-square goodness-of-fit test indicates no significant difference between the proportion of nullification arguments (thirty-five) and that of standard and other arguments (twenty-seven) in the total number of libel cases:

$$\chi 2\ (1, n = 62) = 1.03, p = \text{n.s.}$$

Hence, defense counsels did not favor a broad understanding of freedom of the press in state libel trials. They appear to have used standard and nullification arguments in nearly equal measure.

A chi-square test for independence, with Yates' Continuity Correction, indicates, however, a significant relationship between defense arguments and trial outcomes. Defense counsels who relied only on nullification arguments (sixteen) were more likely than defense counsels who used standard arguments alone or with nullification arguments (nineteen), to win acquittal for their clients. At the $p < .05$ level,

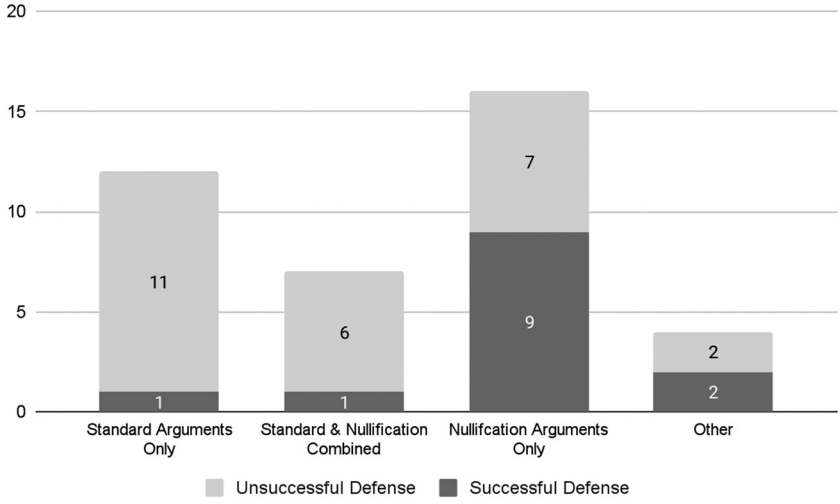
$$\chi 2\ (1, n = 35) = 6.438, p = .011.$$

Hence, a broad understanding of press freedom could anticipate more success in libel cases than a narrow understanding of it.

Figure 2 shows the breakdown of defense arguments. Sixteen encouraged jury nullification exclusively—employing truth, intent, or freedom of the press arguments—openly admitting or not contesting that the defendants had printed the material in question; in nine of them, the defendants were found not guilty or were acquitted in some way. In seven trials, the defense counsels took a mix-and-match approach, combining jury-nullification arguments with standard arguments. They contended that the defendants did not write the material in question or did not target the person in question, but that if they had done so, the result would not have been libel because it would have been true or not malicious. Six of these seven defendants were found guilty. One of them, John Tutchin (1704), was acquitted, though on a technicality (see discussion). In twelve other trials, the defense mounted standard arguments alone,

17 Larry D. Eldridge, "Before Zenger: Truth and Seditious Speech in Colonial America, 1607–1700," *American Journal of Legal History*, XXXIX (1995), 337–358; Bird, *Revolution in Freedoms*, 107–193.

Fig. 2 Results of State Libel Jury Trials, 1699–1792, by Defense Arguments Employed



NOTE The top division of each bar represents convictions, the bottom division some form of acquittal.

arguing from publication eight times and from target four times. In only one of these trials, *R v. Elizabeth Nutt* (1728), did it earn acquittal. The jury thought the prosecution to have been overly harsh. Nutt, the owner of a pamphlet shop, had been bedridden when the alleged libel was sold and therefore had no part in it.[18]

18 Of the sixteen trials in which the defense solely used jury-nullification arguments seven were found guilty: *R v. William Fuller* (1702), *R v. John Checkley* (1724), *R v. John Williams* (1764), *R v. John Wilkes* (1764–1770a), *R v. Henry Sampson Woodfall* (1774a), *R v. John Horne Tooke* (1777), *R v. James Augustus Hicky* (1781c). Nine were found not guilty/acquitted: *R v. John Peter Zenger* (1735), *R v. William Owen* (1752), *R v. Henry Sampson Woodfall* (1770), *R v. John Miller* (1770), *R v. James Augustus Hicky* (1781a), *R v. William Davies Shipley* (1783–1784), *R v. John Stockdale* (1789), *R v. Edward Topham* (1790–1791), and *Commonwealth v. Edmund Freeman* (1791). Of the seven trials in which the defense mixed standard and nullification arguments six were found guilty: *R v. James Dundas* (1712), *R v. John Clarke* (1729), *R v. Richard Francklin* (1731), *R v. John Almon* (1770), *R v. Lord George Gordon* (1787a), and *R v. Robert Bostock* (1790).

The eight trials in which the defense used publication arguments were *R v. Elizabeth Nutt* (1728), *R v. Robert Knell* (1729), *R v. John Wilkes* (1764–1770b), *R v. Henry Sampson Woodfall* (1774b), *R v. John Williams* (1774), *R v. Henry Baldwin* (1776), *R v. Henry Bate* (1782b), and *R v. Thomas Wilkins* (1787) (Wilkins also argued that he did not live in the location indicated in the plaint). The four trials in which the defense used target arguments were *R v. John Matthews* (1719), *R v. Edgar* (1738), *R v. Jenour* (1741), and *R v. Lord George Gordon* (1787b) (Matthews also argued that the prosecution used the incorrect statute in the indictment). For the Nutt acquittal, see 94 *English Reports* 208.

The defense's arguments in twenty-nine of the trials are unknown. Only three of them ended in acquittal. In four further trials, the defense's arguments are difficult to categorize. In *R v. Samuel Mulford* (1714), the defense pleaded that the court did not have jurisdiction to hear the trial. Mulford was found guilty. In *R v. Edmund Curll* (1727), *R v. Chevalier D'Eon* (1764), and *R v. Henry Bate* (1782a), the defendants did not offer any evidence in their favor. Curll and D'Eon were found guilty and Bate was acquitted.[19]

Crown Judges' Directives and Outcomes A chi-square goodness-of-fit test indicates a significant difference between the proportion of judges directing juries to consider publication only—thus treating Holt's opinions as settled precedent (twenty-two)—and the proportion also mentioning questions of publication and intent (four):

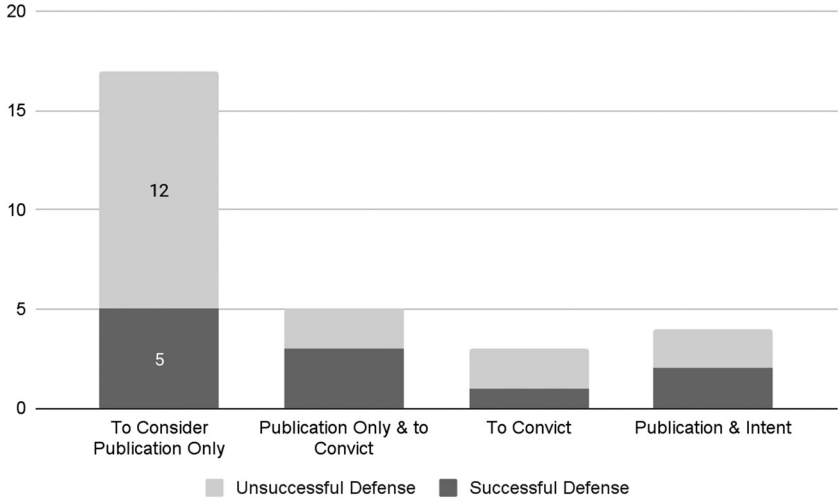
$$\chi 2\ (1, n = 26) = 2.462, p < .001.$$

The results suggest that Crown judges were significantly more likely to direct juries to consider publication only than to consider intent. In other words, judges overwhelmingly presented Holt's opinions as established precedent to juries (see Figure 3).

The data appear to be insufficient, however, to determine the extent to which Crown judges' interpretations of libel precedent influenced trial outcomes, although in aggregate, judges' directions do not seem to have been related to juries' verdicts. In twenty-two cases, including five in which juries were also directed to convict, judges directed juries to consider only whether the printer published the alleged libel and who its target was, not its intent. Eight of these cases resulted in acquittal. In three cases, judges directed the jury to convict, but no record remains of whether a judge directed a jury to consider intent. In only four other cases—*R v. John Matthews* (1719), *R v. Henry Sampson Woodfall* (1774b), *R v. John Stockdale* (1789), and *Commonwealth v. Freeman* (1791)—did a judge indicate that a jury had the power to determine intent. In thirty-nine cases, no record of the judges' directives remains. The data suggest that Crown judges did indeed

19 *R v. Samuel Mulford* (1714), Nelson, "Seditious Libel," 166; *R v. Edmund Curll* (1727), *State Trials*, XVII, 160 and 93 *English Reports* 849; *R v. Chevalier D'Eon* (1764), 97 *English Reports* 955; *R v. Henry Bate* (1782a), *Mansfield Manuscripts*, II, 855.

Fig. 3 Judges' Directions to Juries (Where Recorded) in State Libel Jury Trials, 1699–1792



NOTE The top division of each bar indicates conviction and the bottom acquittal.

attempt to proscribe the role of juries but that judges' directives and case outcomes bear little connection (Figure 3).[20]

DISCUSSION The evidence suggests that nullification arguments—especially nullification arguments alone—were linked to acquittals at a rate significantly higher than were standard arguments. Defense arguments that did not contest publication appear to have

20 Of the twenty-two cases in which the judge directed the jury to consider publication and target, fourteen defendants were found guilty: *R v. William Fuller* (1702), *R v. John Clarke* (1729), *R v. Richard Francklin* (1731), *R v. John Williams* (1764), *R v. John Almon* (1770), *R v. Henry Sampson Woodfall* (1774a), *R v. John Williams* (1774), *R v. John Wilkie* (1776), *R v. John Horne Tooke* (1777), *R v. Lord George Gordon* (1787a), *R v. Thomas Wilkins* (1787), *R v. Lord George Gordon* (1787b), *R v. Philip Withers* (1790), and *R v. Robert Bostock* (1790). Eight were acquitted: *R v. John Tutchin* (1704), *R v. John Peter Zenger* (1735), *R v. William Owen* (1752), *R v. Henry Sampson Woodfall* (1770), *R v. John Miller* (1770), *R v. James Augustus Hicky* (1781a), *R v. William Davies Shipley* (1783–1784), and *R v. Edward Topham* (1790–1791).

Of the three defendants of which the judge directed the jury to convict, (with no record of the judge's directions on intent), *R v. Edgar* (1738) and *R v. James Augustus Hicky* (1781c) were found guilty, and *R v. Woodfall* (1740) was acquitted. Of the four defendants of which the judge directed the jury to consider their intent, two were found guilty—*R v. John Matthews* (1719) and *R v. Henry Sampson Woodfall* (1774b)—and two were acquitted—*R v. John Stockdale* (1789) and *Commonwealth v. Freeman* (1791).

encouraged juries to consider a broad interpretation of press freedoms. As the century progressed, appealing to a jury's sense of personal liberty became a primary way to defeat libel prosecutions. Although defenses based on truth and intent began almost immediately after Holt's rulings, as seen in Fuller's and Tutchin's trials of 1702 and 1704, the first explicit appeals to a broad view of press liberty occurred in the trials of Richard Francklin in 1731 and of Zenger in 1735. It became more established in the "Junius" trials of 1770 (see below). This article echoes the work of other scholars who find that reference to press freedoms became increasingly common as the century progressed.[21]

The frequency of jury nullification in libel trials is notable considering its infrequency in other types of trials. Juries generally reinforced upper-class power; 75 percent of adult males were too poor to qualify as jurors. Juries were also generally favorable to the prosecution. In the 1770s, future United States President John Adams estimated that only in "one out of a thousand cases would the jury be at a loss about the law," indicating that juries were usually well aware of the legal issues. As Green wrote, "the seditious libel trials of the end of the eighteenth century constitute an important chapter in the history of freedom of the press and the growth of democratic government."[22]

The findings herein also reveal that judges tended heavily toward Holt's opinion that only the publication and the target of an alleged libel were relevant to jury deliberations, and that any determination of malicious intent belonged exclusively to judges. Judges' directives also appear to have had little bearing on juries' decisions. Defendants were acquitted in nearly half the trials in which a judge advised a jury to consider publication only or to convict. In only four trials during this ninety-year period did a judge instruct the jury to consider a printer's intent. In two of those trials, the jury voted to acquit and in the other two to convict. These data add further evidence to Bird's argument that a

21 Bird, *Revolution in Freedoms*.

22 Douglas C. Hay, "The Class Composition of the Palladium Of Liberty: Trial Jurors in the Eighteenth Century," in James S. Cockburn and Thomas A. Green (eds.), *Twelve Good Men and True: The Criminal Trial Jury in England, 1200–1800* (Princeton, 1988), 305–357; Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (New York, 2010), 34; Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (Chicago, 1985), 153; Hostettler, *Criminal Jury*, 318.

broad conception of press freedom was popular in eighteenth-century British society and that judges and juries indeed disagreed about it.

Notwithstanding any unique circumstances surrounding each of the trials surveyed, a general trend is evident. Cases in which defenses used nullification arguments won acquittals more often than did those that featured standard arguments. The use of nullification in these trials follows a pattern of juries nullifying the law when they considered punishment unfair or disproportionate to the crime. Jury nullification was a significant factor under the British Bloody Code of the eighteenth century, which dictated harsh penalties for minor offenses; many juries did not want to send individuals to their deaths for minor property crimes.[23]

The very wording of verdicts, as well as discussions between judges and juries about it, affords a glimpse into the rationale behind juries' decisions. Judges often repeatedly queried juries when they returned verdicts along the lines of "guilty of publishing only." For example, despite assurances from Chief Justice Mansfield in *R v. Henry Sampson Woodfall* (1770) "that if there was indeed nothing criminal in Junius's letter, [the jury's] verdict of guilty would do no harm," the jury repeatedly stated that it found Woodfall guilty *only* of printing and publishing his newspaper. Although willing to acknowledge the fact of publication, the jury did not want to leave the determination of seditious intent to the bench. Likewise, in the long conversation between Justice Buller and the jury in the trial record of *R v. William Davies Shipley* (1783/4), the jury strongly resisted attempts to interpret their verdict of "guilty of publishing only" as a more comprehensive guilty verdict.[24]

Defenses that used standard arguments of publication and target were more often forced to contest facts rather than ideas. In many of the cases, prosecutors attempted to demonstrate first, through witness testimony, that a defendant printed, published, or sold the alleged libel before bringing other evidence to bear. Establishing intent, however, was murkier; it involved ascertaining a printer's state of mind. Whenever defenses contested publication,

23 Conrad, *Jury Nullification*, 5; Peter King and Richard Ward, "Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery," *Past & Present*, 228 (2015), 159–205.

24 *State Trials*, XX, 902, 921; XXI, 950–955.

they had to show that defendants did not know anything about the content of the allegedly libelous material, despite publishing, printing, or selling it. Juries tended to be unsympathetic with defenses that relied on that argument. Juries repeatedly convicted printers who denied knowledge of publication or who argued they did not target the individuals alleged. As noted earlier, the case of *R v. Elizabeth Nutt* (1728) was one of the rare successes of a contested publication, Nutt being bedridden and uninvolved with the business at the time.[25]

Juries were also not generally sympathetic to combinations of standard and nullification arguments, most likely because they found it awkward to deny knowledge of an alleged libel and to deny its malicious or seditious intent in the same breath. For instance, even though Lord George Gordon (1787) argued that the prosecution had no evidence that he wrote an alleged libel nor that he had any malicious or seditious intent, the jury found him guilty. Likewise, in the "Junius" trials (1770), John Almon, who contested publishing and having any knowledge of it, as well as having any ill intent, was found guilty. Henry Sampson Woodfall and John Miller, however, who used only the nullification argument, were acquitted, even though all three of them published or sold the same material.[26]

25 For examples of witness testimony for the prosecution, see *R v. William Fuller* (1702), *State Trials*, XIV, 533; *R v. John Tutchin* (1704); *R v. Richard Francklin* (1731), *State Trials*, XVII, 631–632; *R v. William Owen* 1752, *State Trials*, XVIII, 1222; *R v. John Wilkes*; *R v. John Almon* (1770), *State Trials*, XX, 829; *R v. John Miller* (1770), *State Trials*, XX, 878–879; *R v. Henry Sampson Woodfall* (1770), *State Trials*, XX, 898; *R v. William Davies Shipley* (1783–1784), *State Trials*, XXI, 891–892; *R v. Thomas Wilkins* (1787), *State Trials*, XXII, 211; *R v. Lord George Gordon* (1787a) 187; *R v. Lord George Gordon* (1787b) 226; *R v. John Stockdale* (1789), *State Trials*, XX, 252; for the precedent regarding publication explicitly noted, *R v. Dodd* (1724), 93 *English Reports* 136; for denied knowledge of publication, *R v. James Dundas* (1712), *R v. Robert Knell* (1728), *R v. Richard Francklin* (1731), *R v. John Wilkes* (1764–1770b), *R v. Almon* (1770), *R v. Henry Sampson Woodfall* (1774b), *R v. John Williams* (1774), *R v. Henry Baldwin* (1776), *R v. Henry Bate* (1782b), *R v. Lord George Gordon* (1787a), *R v. Thomas Wilkins* (1787); for denied knowledge of target, *R v. John Matthews* (1719). *R v. John Clarke* (1729), *R v. Edgar* (1738), *R v. Jenour* (1741), *R v. Lord George Gordon* (1787b), *R v. Robert Bostock* (1790).

26 For Gordon, see *State Trials*, XXII, 198, 208; for Almon, *State Trials*, XX, 832–833, 838. Almon's was one of the few cases to record a jury's questions to the judge. The jury asked whether the master of a shop was liable for a servant selling a pamphlet without his or her knowledge. Judge Mansfield replied that evidence of a sale, even without the master's knowledge, was sufficient to convict the master of libel. Despite Mansfield's instructions for the jury to find only matters of fact, Miller's defense openly admitted the printing of the Junius letters, arguing that the jury must be convinced of "sedition in the intention" of his printing (*State Trials*, XX, 985). Woodfall's case is discussed later.

The alleged offenses in many cases involved charges of seditious libel of government. In 1724, John Checkley was tried for promoting Anglicanism over the Puritanism adopted by the Massachusetts Colony. He claimed to have "no Malice in [his] Heart, nor designed anything against the Government." The jury, apparently swayed by his arguments, attempted to return a special verdict, guilty if Checkley's pamphlet "be a false and scandalous Libel" and not guilty if it be "not a false and scandalous Libel." The judge, one of the complainants against Checkley, pronounced him guilty upon receiving this verdict.[27]

In the nine cases when defendants successfully employed a nullification strategy, six were about seditious libel, such as Zenger's (1735). William Owen (1752), who wrote a pamphlet criticizing abuse of power by members of Parliament (1725), was acquitted despite the judge's directions to find him guilty. When pressed on their decision, a juror replied, "That is our verdict, my lord, and we abide by it." John Stockdale published a pamphlet criticizing the House of Commons' impeachment of former Governor General of Bengal Warren Hastings (1789). Stockdale's defense told the jury that "the liberty of the press would be an empty sound" if he were to be convicted. Edward Topham was accused of printing that Earl Cowper had committed "unmanly vices and debaucheries" (1790–1791). Finally, Edmund Freeman was prosecuted for accusing a Massachusetts state senator of drunkenness and of causing his wife's death (1791). Freeman's case hung on whether the defense could convince the jury that Freeman intended to write that the state senator did not literally murder his wife but figuratively "murdered [her] by his cruelty." The jury agreed with the defense's interpretation and found Freeman not guilty.[28]

27 Edward Farwell Slafter, *John Checkley; or, The Evolution of Religious Tolerance in Massachusetts Bay. Including Mr. Checkley's Controversial Writings; His Letters and Other Papers* (Boston, 1897), II, 12, 72, 57, 74.

28 Seditious libel: *R v. John Peter Zenger* (1735), *R v. William Owen* (1752), *R v. Henry Sampson Woodfall* (1770), *R v. John Miller* (1770), *R v. William Davies Shipley* (1783–1784), *R v. John Stockdale* (1789). *State Trials*, XVIII, 1228–1229; XXII, 281; 100 *English Reports* 931–932. Harrison Gray Otis, defense lawyer for Freeman, told the jury, "If you are not convinced that it means to say Mr. Gardiner [the state senator] did with malice aforethought murder his late wife, you must acquit the defendant," *Independent Chronicle* (Boston, Mass.), 10 Mar. 1791, 1. For a fairly full account of the Freeman trial, see the *Independent Chronicle* (Boston, Mass.), 24 Feb. to 24 Mar. 1791, printed serially.

Beyond the cases above, the findings are consistent with the claim that Holt standardized judges' directions for most of the eighteenth century. Notably, in three trials, juries returned a verdict in some form similar to "guilty of publishing only," a direct sign that juries were cognizant of printers' arguments for nullification. In *R v. John Tutchin* (1704), the jury returned a verdict of "Guilty of composing and publishing, except the writing." After much discussion between defense counsel and court, the court declared a guilty verdict. However, Tutchin was later acquitted due to a technical error in the prosecution's legal plaint. As noted earlier, in Woodfall's Junius-letter trial, the defense conceded printing but argued intent and freedom of the press. The jury returned a verdict of "guilty of printing and publishing only." After conversation between judges and advocates about the meaning of the verdict, and whether the word *only* negated the court's ability to impose judgment, Chief Justice Mansfield declared a mistrial and called for a new jury, but Woodfall was never retried.[29]

In *R v. William Davies Shipley* (1783/4), better known as the case of the Dean of Asaph, the defendant stood accused of publishing a pamphlet that advocated reform of the British electoral system. The jury at first returned a verdict of "guilty of publishing only." After intense pressure from Justice Buller in favor of a blanket guilty verdict, however, the verdict changed to "guilty of publishing, but whether a Libel or not the Jury do not find," a clear refusal to allow the judge to determine intent. Nonetheless, Buller declared a guilty verdict, but Shipley's defense counsel appealed the decision to the Court of King's Bench on the grounds that Buller had misdirected the jury. The Court of King's Bench acquitted Shipley on a technicality, an error in the indictment. Shipley's lawyer sent records of the trial to Fox, who eventually introduced his bill to reform the libel law, thus ending the period of jury nullification by effectively allowing juries to consider intent.[30]

Juries appear to have undergone some initial confusion about the new law. In *R v. Alexander Whyte* (1793), the jury returned a

29 *State Trials*, XX, 921. Woodfall's case was the third of the four "Junius" trials. In the similar trial *R v. Woodfall* (1774b), the jury returned a verdict of guilty of publishing the paper but not a libel. This time Mansfield took the verdict to mean guilty (99 *English Reports* 915).

30 *State Trials*, XXI, 950–955; Hostettler, *Criminal Jury*, 92.

verdict of "not guilty of publishing," which the judge interpreted to mean not guilty. In *R v. Walter Berry and James Robertson* (1793), the jury returned a verdict of "printed & published" for one defendant and "published only" for the other. The court interpreted both verdicts to mean guilty. In the case of *R v. Daniel Isaac Eaton* (1793), the jury appeared to have been totally unaware of the new Act, returning the verdict "guilty of publishing, but not with a criminal intention." When the court's stenographer refused to record the verdict as not guilty, the court temporarily sent the printer back to jail. Eaton's second trial resulted in a nearly identical verdict, and he was not retried.[31]

Although it was a victory for advocates of freedom of the press, Fox's Libel Act may have made it easier to obtain convictions since juries may no longer have felt that freedom of the press was at stake in each trial. The King's Bench rolls indicate an average of two seditious libel prosecutions a year from 1702 to 1789, many of which probably did not reach a jury, but there were a full forty-eight "informations" and indictments at the King's Bench in the decade after Fox's Libel Act. Although some of them might have come from prosecutors reacting to the threats from the French Revolution in 1789, the data indeed indicate an increased rate of seditious libel trials after the Act appeared. Howell's *State Trials* recorded at least eleven seditious-libel jury trials within two years of the Act's passage, a rate far higher than that witnessed during the preceding century. According to Lobban, the Act also empowered judges to give their opinions in cases based on context. Since juries could now determine intent, judges increasingly felt free to pronounce their opinion on the nature of the alleged libels. This practice served as a device to influence juries.[32]

31 *State Trials*, XXII, 1249–1250; XXIII, 92; XXII, 780, 823.

32 Hostettler, *Criminal Jury*, 92; Bird, *Revolution in Freedoms*, 198; Philip Harling, "The Law of Libel and the Limits of Repression, 1790–1832," *Historical Journal*, XLIV (2001), 109; Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820," *Oxford Journal of Legal Studies*, X (1990), 309, 321; *R v. Patrick William Duffin and Thomas Lloyd* (1792), *State Trials*, XXII, 317; *R v. Thomas Paine* (1792), *State Trials*, XXII, 357; *R v. Daniel Isaac Eaton* (1793), *State Trials*, XXII, 753; *R v. Daniel Isaac Eaton* (1793), *State Trials*, XXII, 785; *R v. James Perry, John Lambert, and James Gray* (1793), *State Trials*, XXII, 953; *R v. Daniel Holt* (1793), *State Trials*, XXII, 1189; *R v. Daniel Holt* (1793); *R v. Alexander Whyte* (1793), *State Trials*, XXII, 1237; *R v. Archibald Hamilton Rowan* (1793–1794), *State Trials*, XXII, 1033; *R v. James Thomson Callender, Walter Berry, and James Robertson* (1793), *State Trials*, XXIII, 79; *R v. Daniel Isaac Eaton* (1794), *State Trials*, XXIII, 1013.

LIMITATIONS IN THE DATA Records of many state trials may not have survived. Some trials may be absent from Howell's *State Trials* since the editors sourced material from publicly available accounts such as reprints in booklets or contemporary newspapers. The reliance on public accounts may bias the sample toward more controversial trials in which juries returned surprising verdicts. This limitation, however, is mitigated by the large number of cases available in the *English Reports* and the completeness of Hyde's *Notebooks*. But records for the lower courts are often unavailable or inaccessible, and other state libel trials in court archives through the United Kingdom and United States are beyond the scope of this study.

Furthermore, the great change in ideals and philosophies involving fundamental rights such as life, liberty, and the right to property that occurred during the course of the eighteenth century are unavoidably compressed in a study that incorporates trials from the entire century. Important differences in what constituted libel no doubt existed throughout this period, as a general tolerance for printed expression increased. Nonetheless, the data indicate a surprising consistency in defenses' legal arguments despite societal and intellectual progress.

The categorization of defenses' legal arguments involves simplification. Nuance can be sacrificed when legal arguments are reduced to overarching types without regard to all the circumstances relevant to each trial. Furthermore, case outcomes were not dependent merely on arguments. Although cases in which defenses employed nullification arguments saw a better rate of acquittal than did those employing the standard argument, this relationship was not necessarily causal. Records of jury deliberations or the rationale behind verdicts were generally unrecorded; trial transcriptions often described a judge's summation followed by the jury's verdict, leaving the precise arguments that juries found most persuasive difficult to ascertain. For a nullification defense to be successful, a jury had to be convinced of its power to judge law as well as fact. Other circumstances, such as printers' reputations or judges' proclivities, could also affect outcomes.[33]

33 For examples of trial records recording a jury's verdict immediately following a judge's summation (without record of the jury asking questions of judges), see *R v. William Fuller* (1702), *State Trials*, XIV, 536; *R v. Richard Francklin* (1731), *State Trials*, XVII, 676; *R v. John Matthews* (1719), *State Trials*, XV, 1394: *R v. John Peter Zenger* (1735), *State Trials*, XVII, 723; *R v. William Owen* (1752), *State Trials*, XVIII, 1228–1229; *R v. Henry Sampson Woodfall* (1770),

This study expands the literature by proposing a new way of looking at early protections of freedom of the press in courtrooms. The data suggest that printers appealed to jurors' sense of justice to argue for acquittals that contravened the acceptable evidence. In response to such defenses, jurors often rebelled against their restricted role to nullify the law, convinced of the injustice of convicting printers without considering intent. The success of these legal arguments adds to a growing body of literature suggesting that support for the press was widespread. This study maintains that printers in eighteenth-century anglophone society employed jury nullification in courtrooms as a prime and comparatively successful legal defense.

State Trials, XX, 921; *R v. John Miller* (1770), *State* Trials, XX, 896; *R v. John Horne Tooke* (1777), *State Trials*, XX, 764; *R v. Lord George Gordon* (1787a), *State Trials*, XX, 209; *R v. Lord George Gordon* (1787b), *State Trials*, XX, 231; *R v. Thomas Wilkins* (1787), *State Trials*, XXII, 213; *R v. John Stockdale* (1789), *State Trials*, XXII, 293. An exception is *R v. John Almon* (1777), *State Trials*, XX, 838, in which the jury is recorded asking Mansfield questions.