Contempt by Scandalizing the Court: A Political History on the First Hundred Years

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CONTEMPT BY SCANDALIZING
THE COURT: A POLITICAL HISTORY
OF THE FIRST HUNDRED YEARS*

BY DOUGLAS HAY**

If an alarming Practice has been once brought to light, and inquired into, and not
condemned, although clearly unwarrantable; it will look to posterity as if, upon
examination, it were found to be legal, or, at most, but dubious.

"Candor" (1764)1


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errors are mine.

1A Letter from Candor, to the Public Advertiser, 2nd ed. (London: Almon, 1764) at 27-28
[hereinafter Candor]. See infra, text at note 74.

2An Epistle to Dr. Thompson (London: W. Owen, [1756?]), as quoted by William Bingley,
in The North Briton, No. 75 (12 November 1768) and in The Extraordinary Case of William
Bingley, Bookseller (London: [Bingley], 1770; reprinted New York: Garland, 1974) at 43.
Figure 1

The protagonists in the courts in the 1760s: John Wilkes versus Chief Justice Lord Mansfield (and friend). The other supporting figures probably are Chief Justice Charles Pratt, Lord Temple, and Lord Halifax. (From Arms and Slavery, printed with a letter of John Wilkes to his electorate 18 June 1768. Guildhall Library, London: Broadsides 29.3.)
I. INTRODUCTION

The power to punish contempts of court by strangers—those not parties to the proceedings nor present in court—without jury trial was established in 1765 by the celebrated case of *R. v. Almon*. It is also the leading case on the contempt of scandalizing the court, an offence which throughout its history has arisen when free comment about judges has become too free for the taste of the bench. Scandalizing the court does not concern interference with pending legal proceedings through prior publication, which is also punishable summarily, on the same precedent. Rather, it involves attacking the dignity or impartiality of the court after the fact, or in connection with no particular case at all. Usually the offender has been a journalist, although sometimes it has been a lawyer or even a cabinet minister. *Almon’s Case* is characteristic: Almon published in 1764 a pamphlet whose anonymous author accused the Lord Chief Justice, Lord Mansfield, of acting officiously and arbitrarily. It questioned his honesty, impartiality, and respect for precedent and suggested he was politically biased. The history of the offence before, during, and after this critical case shows it to be closely allied to major constitutional arguments about the free expression of political opinion, including criticisms of the judiciary, and attempts to suppress that free expression. The doctrine was also contentious.

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3 *R v. Almon* (1765) in *Notes of Opinions and Judgments Delivered in Different Courts, by the Right Honourable Sir John Erardley Wilmot* (London: Hansard, 1802) [hereinafter *Wilmot*] at 243. The actual expression appears to have been used first by Lord Chancellor Hardwicke in *Roach v. Garven* (1742), 2 Atk, 469, 26 E.R., 683 (H.C.Ch) [also cited as *The St. James Evening Post Case*, hereinafter cited to Atk.].

4 *Almon* is still cited for "the basic principle" that the doctrine is necessary to maintain faith in the administration of justice: see Gordon Borrie and Nigel Lowe, *The Law of Contempt* (London: Butterworths, 1973) at 152; C.I.Miller, *Contempt of Court* (London: Paul Elek, 1976) at 182.

5 *A Letter Concerning Libels, Warrants, the Seizure of Papers, and Sureties for the Peace or Behaviour...*, 3rd ed. (London: Almon, 1765). On the various editions, and the evidence that this was the edition for which Almon was first attached, see infra, notes 88, 89, 93, 101, 107, 110. The most recent account of Almon himself is Deborah D. Rogers, *Bookseller as Rogue: John Almon and the Politics of Eighteenth-Century Publishing* (New York: Peter Lang, c.1986).
because many of the constitutional protections of jury trial were (and are) denied the accused.\textsuperscript{6}

For reasons that will be discussed, judgment was never delivered in \textit{R. v. Almon} itself, but the opinion prepared by Justice Wilmot of King's Bench nonetheless is the foundation of the modern doctrine of contempt for scandalizing the court.\textsuperscript{7} Wilmot's brother judges apparently would have agreed to his judgment. They shared his opinion that the summary contempt power against strangers out of court, including those who scandalized the court, was coeval with the foundations of the common law. In 1768 a number of printers and publishers suffered attachments and punishment for offending the judges. One particularly obstreperous offender, William Bingley, was jailed for two years because he refused to answer interrogatories in what he called "Lord Mansfield's High Commission Court of Star Chamber."\textsuperscript{8} While Bingley was still in King's Bench Prison, the first edition of volume 4 of the \textit{Commentaries on the Laws of England}, by Wilmot's friend Blackstone, endorsed the doctrine; its future seemed assured.\textsuperscript{9}

But was \textit{Almon} good law? Over eighty years ago, Arthur E. Hughes emphasized that Wilmot was speaking \textit{obiter}. A few years later, Sir John Fox argued persuasively that Wilmot had cited not a single clear precedent, that leading jurists disputed the doctrine at the time, that no cases in which it was applied to strangers could be

\textsuperscript{6} The use of attachments and interrogatories in proceedings for contempt of court entailed an officer of the court addressing questions to the accused, who was obliged to answer on oath. There was no jury. If the answers were unsatisfactory to the judges, punishment followed (by fine and imprisonment or other means), until the contempt had been purged by the transgressor either apologizing to the court or serving the sentence. The procedure is described by Bingley (\textit{infra}, note 137), and by Sir John Fox (see \textit{infra}, note 10 at Chapter 6).

\textsuperscript{7} The leading modern case relies on \textit{Almon} for "the history, purpose, and extent" of the power: \textit{R. v. Gray} (1900), 2 \textit{QB} 36 at 40-41. The only other precedent cited in \textit{Gray} is \textit{Roach v. Garvan} (\textit{supra}, note 3; \textit{infra}, text at note 22).

\textsuperscript{8} John Wilmot, \textit{Memoirs of the Life of the Right Honourable Sir John Eardley Wilmot...}, 2nd ed. (London: Nichols, 1811) at 79-80. Star Chamber, abolished in 1641, was a by-word for judicial oppression in the eighteenth century. Mansfield was Chief Justice of King's Bench 1756-88. On Bingley, see \textit{infra} text at notes 115-142 and illustration.

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found dated earlier than 1721, and that no reported English case cited Wilmot's opinion favourably until 1821. It was only in the later nineteenth century that the English bench embraced the doctrine and through occasional reaffirmation entrenched it in the common law. Since then, it has been resurrected from time to time by outraged judges or equally concerned Attorneys General in England and the Commonwealth.

On the face of it, this is a curious chronology. Twentieth-century judges have repeatedly defended the summary contempt power, usually by citing Almon, as a most ancient and indispensable prop to the dignity of justice and the authority of the courts. Yet, the power is found to have originated recently (in historical terms) and to have been justified originally by rhetoric rather than precedent. Even more striking is the fact that this new and apparently indispensable power fell into desuetude for more than a century after Almon's Case: it appears that no one suffered under it from the time of Bingley's release from prison in 1770, his contempt still unpurged, until 1873.

In considering this history I do not re-examine many of Fox's principal findings. Rather, I give an account of some of the

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11 Fox, supra, note 10 at 114. Certainly there appear to be no reported cases, and this is probably an offence with a high incidence of reporting. It is possible, of course, that unreported cases occurred: see note 156 infra. Strictly speaking, Bingley was gaolled for the contempt of not answering the interrogatories that would have been used to establish his contempt of scandalizing the court, but other printers and vendors were punished after interrogatories in the same year.

12 Fox argues that in early times such contempts were tried by juries, that until the seventeenth century the penalty was fines or imprisonment but not both, and that the power does not appear to have been used against strangers to the proceedings before 1721: supra, note 10 at 116-17. To expand Fox's account of the eighteenth and nineteenth century authorities requires extensive work in the manuscript records of King's Bench and some other courts, in other archival materials, and in the contemporary press. The manuscript sources appear to substantiate his argument: I review them in a forthcoming article.
political, legal, and social circumstances surrounding the eighteenth-century cases. Their context explains why the summary power to punish contempts by strangers, and particularly scandalous reflections on the probity of the judiciary, should emerge in the eighteenth century only to disappear for a hundred years. Since its reappearance there has been considerably less freedom, in England and Canada, for the press to comment on the political implications of judicial decisions than there was in the England of George III.13 Why that should be the case can best be approached through an examination of the fates of Almon, Bingley, and Lord Mansfield.

II. BEFORE ALMON'S CASE

To understand the history of scandalizing the court in the eighteenth century, it is necessary to keep in mind some functional and political inter-relationships of the law of that period respecting jury powers, criminal libel, and contempt. Judges have always felt a strong need to protect the dignity of their courts and of themselves as the embodiment of the majesty and learning of the law. Many of them have wanted strong coercive weapons to deal with hostile criticism from outside their courtrooms, whether the criticism is of a particular decision, or in general terms. In the eighteenth century, the general law of seditious libel came to be the principal means of controlling the publication of criticism of those in authority, whether ministers of the Crown, or judges. From the late seventeenth century, governments had successively used licensing

13 Although lacking in precedent, Almon's Case eventually became one itself. Later articles will deal with the nineteenth and twentieth-century political history of scandalizing the court in England, the United States, and Canada. In the first two jurisdictions the doctrine hardly exists any longer, but in Canada it has particularly flourished. The reason for this is a subject of some interest. (For an outline see Jacob S. Ziegel, "Some Aspects of the Law of Contempt of Court in Canada, England, and the United States" (1959-60) 6 McGill L.J. 229.) Summary punishment for scandalizing the court, and indeed the offence itself, has a peculiar history. It is ill-suited to a democracy and there is something distinctive and disturbing about the courts, or the political culture, or both, of the times and the countries where it has been much used. For a recent comment on Canada see Robert Martin, "Criticising the Judges" (1982) 28 McGill L.J. 1; on Australia see M.R. Chesterman, Public Criticism of Judges, Research Paper No. 5, Reference on Contempt of Court, Australia Law Reform Commission (1984), and H. Burmester, "Scandalizing the Judges" (1985) 15 Melbourne University L.J. 313.
of printers, then (after licensing ended) prosecutions for treason, and then (after the Treason Act of 1696), a new doctrine of seditious libel. The new doctrine had been constructed largely by Chief Justice Holt out of a certain amount of precedent and a lot of policy argument. The merit of seditious libel, in the eyes of authority, was that it effected and confirmed the removal of several issues from juries.\footnote{14} Juries nonetheless still presented problems for the Crown. Bushell's Case (1670) made possible the independence of jurors from dictation from the bench. Trials of ordinary felons may not have been much affected, but the possibility of acquittals through jury nullification was a problem to both Tory and Whig governments mounting political prosecutions.\footnote{15} The intense party conflict of the early eighteenth century, and particularly the acquittal of one opposition pamphleteer in 1729, made it important to the government to be able to perfect jury packing.\footnote{16} As important as jury packing (or prevention of packing by the opposition) was, another common expedient was also used enthusiastically by Attorneys General for almost two hundred years. They prosecuted seditious libels not on indictment but by means of a distinctive criminal information, filed by themselves ex officio in the Court of King’s Bench. The ex officio information had several advantages over an indictment: speed, horrendous cost to the defendant, and flexibility. Proceedings could be begun against a printer or author and then suspended indefinitely. Perhaps most important, the

\footnote{14} The most recent account stresses the innovations made in the law at this time: Philip Hamburger, "The Development of the Law of Seditious Libel and the Control of the Press" (1985) 37 Stan. L. Rev. 661.


criminal information avoided one problem of prosecutions on indictment: there was no grand jury that first had to find the charge to be fit for trial.\textsuperscript{17} Grand juries with particular political sympathies (whether Tory-Jacobite or Whig) could kill a political prosecution before it began, if the government had to rely on an indictment.\textsuperscript{18}

Opposition speakers condemned both jury packing and such \textit{ex officio} informations. Jury packing in political trials was unsuccessfully attacked through legislation.\textsuperscript{19} \textit{Ex officio} informations were condemned as unconstitutional — an offspring of Star Chamber that had wormed its way into the Court of King's Bench. The judges found them to be sound in law nonetheless. But some judges and Attorneys General were also attracted to an extension of the power of contempt. The early eighteenth-century history is still unclear, but it appears that they began experimenting with summary attachment for contempts, including general criticisms of the court by strangers, in the 1720s, perhaps because party controversy about political prosecutions was virulent at that time.

During a ten-year period in a series of cases, all of which involved Attorney General Sir Robert Raymond (later Lord Chief Justice) and Attorney General Sir Philip Yorke (later Lord Chancellor Hardwicke), the jury was dispensed with.\textsuperscript{20} Lord Raymond declared in 1731 that "it was beyond all question, that attachments [and interrogatories] have been granted in these cases..." He cited only one case, of 1723, prosecuted by himself as Attorney General.\textsuperscript{21} In a Chancery case in the 1740s, Lord Hardwicke again

\textsuperscript{17} Moreover, the trial jury could always be a "special" one, of higher status. For examples of the eighteenth-century ambivalence towards petty juries, depending upon whether they were in agreement with the bench, see \textit{ibid.} at 305-08; for special juries, 318-19, 353.


\textsuperscript{19} \textit{Supra}, note 16.

\textsuperscript{20} I am currently doing research on the reported and unreported contempt cases of this period, but the statements in the text rely on Fox, \textit{supra}, note 10 at 111-14.

declared with only the most vague kind of authority the broad right of courts of equity to punish scandals against them. Although they were clearly obiter, his words became authoritative in courts of equity.22

The reasons for this apparently unprecedented development are still obscure. The general context is undoubtedly the very rapid increase in the periodical press at this time, first in London, then in the provinces, and the intensity of political controversy the press sustained. Chief Justice Holt had already responded to the Crown's loss of other powers (licensing, treason prosecutions) by making new law in seditious libel cases. Raymond and Hardwicke apparently found it appropriate to be similarly innovative in those cases in which the courts or individual judges were themselves the subjects of criticism. The undoubted advantages of attachments for contempt over all other forms of proceeding were the elimination of those unpredictable juries, both grand and petty, and the speed with which the court could proceed. Nor were Hardwicke or Raymond the men to shrink from such an access of judicial power in the name of the authority of the law. They were the authors and users of the Waltham Black Act (9 George I, c.22), the most penal capital statute of the eighteenth century, and were parties to its wide, rather than narrow, construction. They were also involved in the principal prosecutions of Jacobites and suspected Jacobites, political prosecutions of great severity and public controversy. Their development of a new and useful form of contempt is consistent with their central role in the political repression effected by the Walpolian Whig regime, including its contempt of restraints on the use of the criminal law against its opponents.23

From 1731 there was apparently no attachment for scandalizing the court for a period of some thirty years, during which a Whig ascendancy was established and sustained.24 By the 1760s the

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22 Roach v. Garvan, supra, note 3 at 471. See Fox, supra, note 10 at 22, 102-06, 117, and Hughes, supra, note 10 at 296.


24 Fox discusses the use of attachments in the 18th and 19th centuries, supra, note 10 at 22-26 and 106-14.
doctrine might thus be considered one of recent origin, already abandoned, and thus unlikely to be law. When the doctrine was brought to life by the extraordinary events surrounding John Wilkes, his publisher Almon, and his enthusiastic follower William Bingley, its constitutionality finally became a central issue.

III. WILKES AND THE JUDGES: 1763-1768

In the 1760s there was an eruption of published political controversy of a quantity and incandescence not seen since the first decades of the century. George III, coming as a young and determined monarch to the throne in 1760, soon installed his Scottish tutor and favourite, Lord Bute, as his chief minister. The great Whig families who had dominated English politics for decades found themselves in opposition. When Bute's conventional use of a bought press confirmed his power, the Whigs hired pamphleteers and publishers in turn. The bitterness of party controversy might itself have caused the legal limits of published comment to be tested; the fact that John Wilkes and his followers became involved ensured it.25

The process in *R. v. Almon* was originally headed *R. v. Wilkes*, for the original contempt proceedings concerned comments on the state prosecution of John Wilkes. Wilkes, the most able writer of the opposition publicists, was supported financially and tactically by Lord Temple, one of the richest of the Whig peers. Almon was Wilkes' friend as well as his publisher. In an age when only one-sixth of adult males had the vote, Wilkes and his followers took an advanced view of popular politics, and of freedom of political expression at a time when even Whig magnates who were devotees of "the people" against the Crown considered publication of parliamentary debates to be a dangerous breach of parliamentary privilege. Many historians credit Wilkes with the most significant

attacks on oligarchic and aristocratic power in the decade when such power was at its height.\textsuperscript{26}

Wilkes thus became a critical figure in the process by which Parliament became accustomed, through the press, to the idea that it had to answer to some of the nation between elections. He and his followers, a number of whom were leading solicitors and barristers, exploited the courts as well as the hustings and the press in attracting support and attacking governments. Although a Member of Parliament, Wilkes was arrested and sent to the Tower in 1763 on a general search warrant when his periodical \textit{The North Briton} reflected on the King in its forty-fifth issue.\textsuperscript{27} He and many printers and publishers successfully sued and established that such warrants had no basis in law. He was expelled by Parliament for his writings and his outlawry and was triumphantly re-elected, to the chagrin of most members. Most important, he and other "Wilkites" helped establish, through effrontery and litigation, the effective freedom to publish critical comments on governments, and by 1771 the legal right to publish even Parliamentary debates. In their own time it appeared that the Wilkites were equally successful in establishing a \textit{de facto} right to criticize judges, but as the curious subsequent history of \textit{Almon's Case} shows, this was not a lasting achievement.


\textsuperscript{27} The principal offending passages argued that "...every friend of his country must lament that a prince...can be brought to give the sanction of his sacred name to the most odious measures, and to the most unjustifiable, public declarations, from a throne ever renowned for truth, honour, and unsullied virtue...." The prerogative should not be used with "blind favour and partiality....The people too have their prerogatives, and...Freedom is the English subject's Prerogative." On the significance of the journal see George Nobbe, \textit{North Briton: A Study in Political Propaganda} (New York: Columbia University Press, 1939; reprinted New York: AMS Press, 1966).
By January 1765, when contempt proceedings were begun against John Almon, Wilkes had, for approximately two years, been at the centre of some of the most celebrated constitutional cases in English history. He was arrested along with many others associated with the *North Briton* in April 1763 on the general warrant from the Secretaries of State (although the step had been considered since at least February). Wilkes was freed in May on habeas corpus to enormous popular applause. He began his lawsuit against the Secretaries of State and led the campaign of Wilkite lawyers and publicists by which other printers and publishers recovered damages from the government and its agents. In December 1763 a jury awarded Wilkes himself £3000 against one of the Secretaries of State. In all, the general warrants issue probably cost the government some £100,000 in the courts, an immense sum at this period.28 The following year printers and publishers were successful in further actions: in the most famous case, *Entick v. Carrington*, Chief Justice Pratt of Common Pleas authoritatively denied that governments could use general warrants to go on fishing expeditions in private papers.29

By this time, however, Wilkes and a number of his supporters had suffered setbacks at the hands of both Parliament and the courts. In December 1763 the *North Briton* no.45 had been burned by the common hangman at the order of Parliament. In January 1764 Wilkes, who had taken refuge in France, had been expelled from Parliament after being found in contempt for not attending at the demand of the Commons. In February, immediately after the government barely outvoted the opposition on the issue of general warrants, Wilkes was convicted *in absentia* for seditious and blasphemous libel before Lord Mansfield in King's Bench. When

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28 In terms of modern purchasing power, many millions of dollars.

29 19 State Trials 1044. The phrase in fact occurs in Candor, supra, note 1 at 31: "It is a fishing for evidence, to the disquiet of all men, and to the violation of every private right; and it is the most odious and infamous act, of the worst sort of inquisitions, by the worst sort of men, in the most enslaved countries: It is, in short, putting a man to the torture, and forcing him to give evidence against himself." On this pamphlet, attributed in whole or part to Pratt, see infra.
Wilkes refused to return to England for sentence, he was outlawed.\textsuperscript{30} The trial was contentious for several reasons. Mansfield agreed in Chambers to a Crown request to amend the wording of the criminal information against Wilkes; there were allegations of false notices of adjournment to assist in packing the jury; and the jurors had pamphlets against Wilkes in their hands during the trial itself (although the defence similarly supplied them with reading material).\textsuperscript{31}

A few months later, in July, two publishers of the \textit{North Briton}, Williams and Kearsley, were convicted on a seditious libel charge before Mansfield by compliant juries. There were to be verdicts for Wilkites in the coming months in general warrants lawsuits, but the criminal convictions of Williams and Kearsley had, by the summer of 1764, intimidated the press. Almon wrote to Temple that

> the violence and partiality of the Chief Justice in those causes was not only astonishing, but is shocking to think of.... The carrying this favourite point of convicting the \textit{North Briton} in the City, has struck such a panic into the printers, etc., that I am afraid I now stand alone in the resolution to publish with spirit.\textsuperscript{32}

It was at this critical juncture that Almon published the first of two pamphlets condemning Lord Mansfield's conduct in the \textit{North Briton} cases; the second of these pamphlets was the occasion of Almon's attachment for contempt. But to understand the significance and the outcome of \textit{Almon's Case} we must look at the bench of the 1760s. For it was not simply because he presided in King's Bench, where the Attorney General prosecuted political offenders, that the Lord Chief Justice was the judge vilified by the anonymous author of the pamphlets. It was also because beside the overt political conflicts associated with Wilkes' spectacular trajectory through English public

\textsuperscript{30} The sedition charge related to the \textit{North Briton} article already quoted \textit{supra}, note 27. The blasphemy charge concerned \textit{The Essay on Woman}, his rather boring obscene parody of Pope, twelve copies of which he had been privately printing; the government obtained a copy for purposes of prosecution through bribery of his printers.


life there ran a corresponding politics of the judiciary. The protagonists were Mansfield, and the Chief Justice of Common Pleas, Charles Pratt, who later became Lord Chancellor Camden.

Pratt now has the lesser (although a respectable) professional reputation, in part because he sat only from 1762 to 1766 in Common Pleas and from 1766 to January 1770 as Lord Chancellor. In his own time he was as much esteemed by the profession, and infinitely more popular with the public, than the Chief Justice of King’s Bench. The younger son of a deceased Lord Chief Justice, Pratt had languished on circuit for many years without a brief, but once recognized showed great abilities. His promotions he owed to William Pitt, an old school friend, and he undoubtedly advised Pitt often on legal and political issues. As a judge and peer Pratt was strongly identified with the more advanced Whigs in Parliament. He became a political symbol: a statesman suspicious of the executive, of Jacobites, and of arbitrary measures; a model (to his admirers) of a judge who upheld the principles of judicial independence, strong juries, and punctilious adherence to the strict forms of the common law.

Those principles had not always been in the forefront of the minds of Whig ministers during their hegemony in the first half of

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33 Mansfield’s reputation loomed unnaturally large in the later eighteenth century not only because he sat for so long and shaped the modern law in so many important ways, but also because he epitomized the increasing conservatism (and wealth) of the bench in a period of reaction to democratic claims: C.H.S. Fifoot, *Lord Mansfield* (Oxford: Clarendon Press, 1936) at 50; Daniel Duman, *The Judicial Bench in England 1727-1875: the Reshaping of a Professional Elite* (London: Royal Historical Society, 1982). The judicial praise of him (and judges are usually generous to fellow judges) became deafening. Even after the Chief Justice’s death, Lord Kenyon and his brothers left a defendant languishing in jail because he had dared defile the memory of Lord Mansfield. (See my forthcoming account of *R. v. Waddington*, infra, note 34) By the time of Eldon, Mansfield was being slighted by traditionalists who repeated the charges about his disrespect for common law (*infra*). Both Pratt and Mansfield, like most of the great eighteenth-century judicial politicians, have yet to receive adequate biographical treatment.

34 In 1772 Pratt was widely attacked for inconsistency in defending the use of the Royal Prerogative to prevent the export of grain by suspending the Corn Act, 11 George II c.32, calling it “but forty days’ tyranny at the outside.” It is an interesting exception to his more usual suspicion of the powers of the Crown. Interference with the free operation of markets in foodstuffs in order to ensure the diet of the poor was Tudor and Stuart (indeed, medieval) policy, probably one of the few Stuart policies of which Pratt approved. However, it was a policy explicitly repudiated by the majority of Parliamentarians in 1772, most of whom already had embraced the latest opinion on the subject, soon to be give classic form by one Adam Smith. See D. Hay, "The State and the Market: Lord Kenyon and Mr Waddington" (forthcoming).
the century. Such men had been responsible for the Riot Act, the Waltham Black Act, mass prosecutions after the Stuart invasion in 1745, and numerous prosecutions of the press on ex officio informations, as well as the new doctrine on contempt. But Pratt showed from the beginning of his legal career that he was guided by a belief that the executive should be controlled both by law and by the preservation of critical political comment.

As Attorney General between 1757 and 1761 Pratt exhibited only one ex officio information against an opposition writer. Perhaps the unanimity of wartime had ended much of the oppositionist politics that attracted such informations. But it seems clear that Pratt was also manifesting, by his reticence in using the most oppressive form of criminal prosecution, an attitude to constitutional liberties that was a deep aspect of his own character. While Attorney General, he also drafted a controversial bill to extend the Habeas Corpus Act to detentions in other than criminal cases, legislation which would have given relief to wrongfully impressed seamen and other unfortunates. When he became a judge, Pratt castigated judicial discretion. In his first term on the bench he argued that "Such discretion is contrary to the genius of the common law of England, and would be more fit for an Eastern monarchy than for this land of liberty." Most important, Pratt was the highest legal representative to criticize the powers that King's Bench had claimed for judges in dealing with cases of seditious libel. His stand was arguably the single most significant contribution to political liberties in the eighteenth century, one that became an article of faith with Wilkites and that was closely connected with the law of contempt.

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35 Supra, note 20.

36 On the case, R. v. Shebbeare, see infra, text at note 44. See also his treatment of Wilkie, infra, text at note 100.

37 The King opposed Pratt's bill as an attack on royal prerogative, and it was lost when Lord Mansfield, speaking eloquently against it in the Lords, helped to defeat the measure, with the assistance of Lord Chancellor Hardwicke. The substance of Pratt's reform was not enacted until 1816, under the regency, as 56 George III c.100. The controversy, too complicated to address here, was an issue in Almon's Case: infra, text at note 115. I deal with it elsewhere.

He first raised the issue in 1752, when as counsel for the
defence in a political case, *R. v. Owen*, he had argued that juries
had the competence to decide, by their general verdicts, the entire
issue in cases of libel.\(^3\) The bench did not agree. Lord Lee, the
Chief Justice, told the jurors that they were to determine only
whether the defendant was responsible for publication and whether
the thinly disguised names in the publication meant whom they
clearly did. Under these instructions, whether it was a libel would
subsequently be decided by the court, and neither that point nor
intent were issues to be considered by the jury. This was the law on
libel which was central to published political debate in England for
most of the eighteenth century. It had been crystallized out of
restoration materials by Lord Holt between 1696 and 1706, and
summarized by Lord Raymond in 1731.\(^4\) But it was an intensely
contested doctrine, and Pratt, in this case and throughout his career,
urged its unconstitutionality.

*Owen* was in fact the first case since Raymond's 1731 judgment
to test in court the range of issues open to the jury.\(^5\) Pratt's
rhetoric was typical of what he was to say on many later occasions:

The Attorney-General tells a free people that, happen what will, they shall never
complain. But, gentlemen, you will not surrender your rights, and abandon your duty.
The fatal blow to English liberty will not be inflicted by an English jury.\(^6\)

Also prophetic was the response from his audience when the jury
brought in a verdict of not guilty: a great shout of exultation in the
court. When the Chief Justice tried to demand a special verdict as
to publishing alone, and the foreman defied him, there was a shout
"much louder than before", and the Court broke up.\(^7\) Pratt held to
his position in 1758 when, as Pitt's newly-appointed Attorney
General, he prosecuted John Shebbeare on an *ex officio* information.

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\(^3\) *R. v. Owen* (1752), 18 *State Trials* 1203 at 1227.


\(^5\) *Green*, *supra*, note 15 at 322.

\(^6\) Lord Campell, *infra*, note 63 at 359.

\(^7\) 18 *State Trials* 1203 at 1228-9.
He emphasized his view of the law by addressing himself to the jury rather than the bench. Pratt stated yet again, this time before Lord Mansfield, now Chief Justice, that the criminality of the alleged libel was a question of fact for the jury alone. In the 1760s Pratt (later Lord Camden) was the most senior leading lawyer to hold this opinion, and probably the only judge. It was emphatically not the opinion of Mansfield.

Their argument revolved around the significance of the decision of a divided court in the Seven Bishop’s Case of 1688, the last great Stuart state trial. Mansfield, like his predecessors, relied on the statement of the law by the majority. Those who took Camden’s position, however, considered that the majority were tools of James II. They preferred the dissent of Justice Powell to the effect that "as he saw no falsehood or malice in it, that it was no libel." The majority had held otherwise; "but their opinion has ever since been held infamous, and his [Powell’s] in the utmost veneration, and will send down his name with honour to posterity, as long as history lasts." Powell had been removed from the bench by the angry king. Because of the division in the court, however, the whole issue of libel had, in any case, been left to the jury.

Camden’s position on the issue of libel was one aspect of his general position: that in cases of profound constitutional importance, particularly concerning the liberty of the citizen to criticize government and thereby keep it in check, precedents in favour of an accused person had to be scrupulously observed. Hence his strictures on broad judicial discretion. But precedents favourable to government that had issued from the mouths of the Stuart bench


45 For convenience he is called hereafter Lord Camden.


47 An Enquiry, infra, text at note 85 at 12.
were to be despised.48 Underlying both arguments was Camden's larger proposition: that in all such cases the final judge had to be the people, constituted as a fairly chosen jury, not judges appointed on the advice of ministers of the Crown.

Mansfield was the proponent of a different reading of the law of libel: that Hanoverian judges, unlike Stuart judges, enjoyed security of tenure and thus did not need to be kept in check by the scrutiny of a jury. And judicial discretion, he emphasized in one of the most sensitive of the Wilkite trials, was discretion bounded by law.49 For Camden, such an answer begged the question. When Camden was made Chief Justice of Common Pleas in 1762, England thus had two Chief Justices with diametrically opposed views on what was to be a burning legal and political issue in the crisis over Wilkes, and indeed in English political life for the next forty years. When Pratt was made Lord Camden in 1765, the differences between the Chief Justices began to be aired in the House of Lords as well as in their courtrooms.

Camden's interpretation of the law of libel had practical significance: if recognized, it would remove from the hands of the judges one of their most powerful instruments for punishing seditious libels, particularly when juries were recalcitrant. Its political significance lay in the fact that Mansfield was accused by his critics of being not simply dependent on the King's government, but part of it. Mansfield had been Solicitor General and then Attorney General from 1742 to 1756, and leader of the House of Commons, the protegé of Newcastle and Hardwicke.50 Chief Justice of King's Bench from 1756, he was also in the Cabinet from 1757 to 1765. This was the same Cabinet which ordered the Attorney General to

48 Supra, text at note 38. In Entick v. Carrington (supra, note 29), Camden dismissed the government's use of general warrants as "a power claimed by no other magistrate whatever (Scroggs, C.J., always excepted)...usage of these warrants since the Revolution...[is] contrary to law." See also infra, text at note 153, for Camden's challenge to Mansfield to discuss the historical period from which his precedents came.

49 R. v. Wilkes (1770) 4 Burr. 2527 at 2539, 98 E.R. 327 at 334 (K.B.) [hereinafter cited to Burr.].

50 Fifoot, supra, note 33 at 36-39.
Scandalizing the Court

prosecute libellous journalists in his court. Mansfield was known to endorse wholly the government’s attack on Wilkes, not least because, both before and after leaving the Cabinet in 1765, he spoke to that effect in debates in the House of Lords. Of his colleagues’ criminal proceedings against Wilkes he publicly claimed to have no knowledge. However, this argument was less than convincing because, as Attorney General, he had professed ignorance of Cabinet decisions to which he had clearly been privy.

The issues raised by Wilkes brought the divergent interpretations of libel law by Camden and Mansfield fully to public view. It was to be a public issue between the two for decades. Camden lived long enough to help enact something similar to his interpretation of the law in the form of Fox’s Libel Act of 1792 (32 George III c.60). Mansfield, who as Solicitor General helped prosecute Owen, did not live to see that enactment, but he was the most eloquent opponent, throughout his judicial career, of the doctrine the Act contained. Moreover, from the 1750s to the 1780s Mansfield opposed Camden on many other legal issues with political implications: the proposed extension of habeas corpus, legislation for the unruly American colonies, the denial of a legislature in the new colony of Quebec. Some of these differences flowed from his personal connections and background, and his enemies. Pitt, who was the close friend of Camden, was a constant opponent of Mansfield. However, it was Camden’s role in the cases involving Wilkes that gave Mansfield a more immediate and personal reason for intensely disliking the Chief in Common Pleas.

51 Mansfield’s presence in the Cabinet room was not unprecedented: Hardwicke, when Chief Justice, sat there briefly, and Mansfield was used as a precedent for Lord Ellenborough between February 1806 and March 1807. The implications for the administration of justice were unclear, but potentially serious: the convention that the English Attorney General does not take cabinet instructions about prosecutions is a twentieth-century innovation. See J.L.I. Edwards, The Law Officers of the Crown (London: Sweet and Maxwell, 1964) Chapters 10, 11. As already noted, even after leaving the cabinet, in 1765, Mansfield continued to speak in the House of Lords on such burning issues as taxing America and John Wilkes (Fifoot, supra, note 33 at 40).

52 R. v. Wilkes, supra, note 49 at 2562.

53 See supra, text accompanying note 39.

54 Supra, note 37; Walpole, Correspondence (supra, note 32) vol.41 at 304 note 10.
Wilkes soon recognized Mansfield as a serious and most useful enemy. First, Mansfield was a Scot, and like most successful Scots in London, he probably endured the contempt of Englishmen more easily in the knowledge that much of the contempt arose from envy. But in the early 1760s the position of Scots in England was even less comfortable than usual, because the Wilkite hatred directed at the King's Scottish favourite, Bute, exploited the national prejudice. In the ensuing press war, Mansfield came to share some of the minister's opprobrium on that ground alone. The fact that Mansfield's family was Jacobite was a convenient way to suggest that the government was using a Chief Justice to erect a tyranny similar to that of the Stuarts. Secondly, Mansfield was head of the court in which informations ex officio, including those against libels, were prosecuted, and anything he did that might appear to aid the prosecution resulted in criticism. The fact that he strongly upheld a doctrine on libels that his fellow Chief Justice in Common Pleas strongly denounced made him doubly suspect. Finally, opposition writers stressed the fact that Mansfield was unequivocally identified with the administration.

Mansfield's reverence for order, obedience, deference, and sexual rectitude all caused him to despise Wilkes and what he represented. This opinion was exacerbated by the fact that Wilkes was becoming a hero to a great many humbler citizens, especially those of London and Middlesex. When Wilkes was finally sentenced in 1768 for his seditious and blasphemous libels of 1763, Mansfield passed a heavy sentence, given the offences and the circumstances: a fine of £1000, sureties of £2000 for seven years, and twenty-two months of imprisonment. But the Lord Chief Justice considered it a moderate punishment for such a "Scoundrel", and complained privately that "it was impossible for him to condemn ...[Wilkes] to the Pillory, because the Attorney-General did not demand it." The

55 Fifoot, supra, note 33 at 33-34.
56 Ibid. at 38; and see infra at note 77.
57 Wilkes, a rake, had written a pornographic parody of Pope. See supra, note 30.
58 Rea, supra, note 25 at 154. Rea notes Mansfield's immense political ignorance of the likely consequences of pillorying Wilkes at that time.
irregularities at the trial enraged and shocked many of Wilkes’ supporters.\textsuperscript{59}

But one did not have to be a Wilkite in 1765 to harbour reservations about Mansfield as a judge. Many lawyers muttered about the new Chief Justice and his attitude toward the common law. A century before the \textit{Judicature Acts}, Mansfield’s apparent willingness to attempt to do substantial justice in King’s Bench aroused deep concern. He was not deferential to precedents he considered objectionable:

His technique was inexhaustible. An inconvenient decision would appear on examination to be based on a fallacy, to emerge as an isolated exception to a major, if unperceived, current of judicial opinion, to be the product of an obsolete environment, even, if need be, the misconception of a careless or ignorant reporter.\textsuperscript{60}

His critics feared that broad principles in the hands of an activist judge, particularly one trained in the civil law, could lead to that very discretion which Camden so pointedly deplored from his own bench.\textsuperscript{61} By the early 1760s the constitutional implications of this discretion were serious cause for concern. If the protection of English liberty depended on scrupulous regard for the forms and precedents of the common law, a political judge, who was himself in the government, might be tempted to tamper with forms and to ignore precedents, to achieve his ends. Mansfield was accused of doing this in private law; but the most serious concern and the most outspoken criticism arose when he was believed to be doing it in criminal law.\textsuperscript{62}

Camden had by this date become closely associated with Wilkite victories in the courts. According to Lord Campbell, when

\textsuperscript{59} \textit{Supra}, text at note 31.

\textsuperscript{60} Fifoot, \textit{supra}, note 33 at 78.

\textsuperscript{61} \textit{Supra}, text at note 38.

\textsuperscript{62} Fifoot, \textit{supra}, note 33 at 170-97, 226ff. describes in some detail the anxiety, partly based on professional territoriality and vested interest, that grew about Mansfield’s experiments in private law, and was expressed in part in Fearne’s \textit{Essay on Contingent Remainders} (1772). Fifoot makes a brief reference to Junius, but fails to acknowledge the importance of the constitutional fears of the 1760s in forming Mansfield’s contemporary reputation. In this respect the Candor pamphlets were central, and anticipated Junius’ better-known sarcasm by five years (\textit{infra}, text at note 148).
Camden was made a judge in 1762, he was appointed to Common Pleas in the expectation that his popular sympathies would not be a danger there.\textsuperscript{63} It was the less important of the two principal common law courts, one in which state trials were unlikely to take place. If that was the intention, it was a miscalculation, for Wilkes and his followers, who turned to the Court of Common Pleas early in their struggles against the government, gave full exercise to Camden’s political opinions. Camden did not particularly like Wilkes, but he recognized the political principles he pursued in litigation.\textsuperscript{64} It was Camden who initially issued habeas corpus for Wilkes in early May 1763 (an unusual process in Common Pleas) and freed him a few days later, to enormous popular acclaim. Camden presided over the first general warrants case in July, when he blasted the government’s claims and told the Attorney General, “I find you don’t care to trust either me or the jury.”\textsuperscript{65} He confirmed the large damages against the King’s Messengers in November. In December Camden presided over several other successful lawsuits against the government, including Wilkes’ own successful lawsuit against the Secretaries of State, and he maintained verdicts in several of these cases in May 1764. In July, he gave the definitive judgment against general warrants in \textit{Entick v. Carrington}.\textsuperscript{66}

Camden’s sympathies were abundantly clear. Aroused by the issue of general warrants, his language was often pungent: “the jury saw before them a magistrate exercising arbitrary power over all the King’s subjects — violating Magna Carta, attempting to destroy the liberty of the kingdom”;\textsuperscript{67} “To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made on the liberty

\textsuperscript{63} John Lord Cambell, \textit{Lives of the Lord Chancellors}, 5th ed., vol.6 (London: John Murray, 1868) at 366; a belief referred to in Candor, supra, note 1 at 41.

\textsuperscript{64} Rea, \textit{supra}, note 25 at 156.

\textsuperscript{65} \textit{Ibid.}, at 61.

\textsuperscript{66} \textit{Supra}, note 29.

\textsuperscript{67} \textit{Huckle v. Money}, 2 Wils. K.B. 206 at 207; 95 ER 768 at 769.
of the subject"_. "If jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say, I shall always consider it a rod of iron for the chastisement of the people of Great Britain." He was apparently convinced, as were many other Whigs, that the events of the mid-1760s marked a dangerous move away from the Revolution principles of 1688 toward arbitrary government, away from the paramountcy of law to that of executive convenience.

Camden's interpretation of the law, and his manner of doing so, aroused the concern of some old Whigs with connections to the government, or of more authoritarian bent. Lord Hardwicke had been alarmed at the freedom Camden gave his juries and complained that he made them "judges of law as well as of fact, which, if it comes to be established, will have extraordinary consequences." But it was Mansfield who had become a bitter political enemy, especially after _Wilkes v. Wood_ and _Leach v. Money_ had humiliated his colleagues in the government. He declared that "no man had ever behaved so shamefully as Lord Chief Justice Pratt had done ... for that he had denied to His Majesty that justice which every petty justice of the peace would have granted to a highwayman." Mansfield's anger on behalf of the Crown had a personal side also. While he was suffering popular opprobrium for his part in the criminal prosecutions of the printers of the _North Briton_, Camden was a hero in London and much of the rest of the country. The Mayor and Corporation presented the Chief Justice of Common Pleas with the freedom of the City of London in a gold box. They commissioned his portrait by Reynolds, which was hung, with a flattering inscription, in the Guildhall. Gold boxes and freedoms also

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68 _Ibid._

69 A magazine account of Pratt's speech in _Wilkes v. Wood_, not given in the report in _State Trials_: see Walpole, _Correspondence_ (supra, note 32) vol. 41 at 91 note 8.

70 _Supra_, note 25 at 61. Hardwicke also ardently wished the Lord Chancellorship for his son, the Attorney General, Philip Yorke. Camden was the other principal candidate, favoured by Pitt.

71 _Ibid._ at 68-69.

72 _Supra_, text at note 32.
came from Exeter and Norwich, and formal thanks from the citizens of Dublin and Bath. Busts and prints were on sale throughout the country. Tourists flocked to his court.\textsuperscript{73}

It was in this context that opposition writers explicitly praised Camden for his integrity, mildness, and respect for constitutional principle: this in contrast to the opportunist, oppressive, foreign and ministerial creature they saw in Mansfield, a judge who pushed discretion beyond conscionable limits. The harshest critic of Mansfield was Almon's anonymous author, who wrote under the name "Candor" and "Father of Candor". He accused Mansfield of oppressing Wilkes by ignoring or misreading English law. That charge prompted Mansfield and his colleagues in the cabinet to reach for the summary powers of contempt.

\section*{III. SCANDALIZING MANSFIELD: THE "CANDOR" PAMPHLETS}

\textit{A Letter from Candor to the Public Advertiser}, which appeared in September 1764, was a masterpiece of sustained irony purporting to defend Mansfield and the administration.\textsuperscript{74} In fact it condemned \textit{ex officio} informations and the government's use of them. The pamphlet also condemned the proceedings of King's Bench on Wilkes' habeas corpus application, Mansfield's position on the issue of jury rights over libels, and his intimate connections with the government.\textsuperscript{75} But the attack, couched as praise, was also very personal. Candor compared Mansfield to "that great and famous

\textsuperscript{73} Campbell, \textit{supra}, note 63, vol.6 at 372; Walpole, \textit{Correspondence} (\textit{supra}, note 32), vol.38, at 333; Henry S. Eeles, \textit{Lord Chancellor Camden and His Family} (London: Philip Allan, 1934) at 75-77.

\textsuperscript{74} See \textit{supra}, note 1. Irony was a common expedient in face of the threat of prosecutions for seditious libel. Green, \textit{supra}, note 15 at 325, mistakenly interprets the pamphlet as a pro-administration tract, as does Leonard W. Levy, \textit{Legacy of Suppression: Freedom of Speech and Press in Early American History} (Cambridge, Mass.: Harvard University Press, 1964) at 148-49; Levy, \textit{Emergence of a Free Press} (New York: Oxford University Press, 1985) at 147-8. See Rea, \textit{supra}, note 25 at 110-11, and Notes and Queries, 2nd ser., no.111 at 121 (February 13, 1858), (and the pamphlets), for the compelling evidence for the identity of Candor and The Father of Candor, or at least their common purpose. See also infra, note 143.

\textsuperscript{75} Candor, \textit{supra}, note 1 at 34, 40-41, 44.
Judge," Jeffreys, showing that he was relying in part on Jeffreys' judgments for his doctrine with respect to libel. He also lauded the Chief Justice as a man whose smooth "accomplishments of Art and Eloquence" cleverly concealed a policy identical to that of the more plain-spoken Stuart judge. Jeffreys was a name that had for Whigs of however conservative a hue, and indeed for most Tories, its modern connotation of monstrous and unlawful judicial oppression. To point the comparison to Stuart tyranny, Candor made a sly reference to Mansfield's Jacobite upbringing. Above all, Candor condemned Mansfield as an equity lawyer with civil law background, a judge who felt unconstrained by the forms and precedents of the common law courts. Candor congratulated the Chief Justice of King's Bench as an innovator "who has so much to his reputation already very greatly shortened and altered the usual proceedings in all causes and trials."78

The charge of refusing to follow precedent was important at this juncture, because it was what Mansfield was accused of doing in the case of Wilkes.79 Mansfield's equity, sneered Candor in irony,

surprisingly softens the Rigor of the old Common Law, and accommodates it more to the humour and turn of the age. In short, he perceives how little regard the old adjudications deserve from a change in the times. He is besides so peculiarly acute, refined, and logical, in his distinctions between cases of Law, which, to ordinary men, seem to be the same, and to be cases in point; and, in trials by Jury, he is so able in separating or assembling (as the cause may require) the different parts of the testimony, and in passing over or slurring one fact as immaterial, and enforcing another as material; that he never fails of carrying, to every auditor at the time, the appearance of right or

76 Ibid. at 8. Almon later compared Mansfield to "Tresylian, Keyling, Scroggs, Jefferys, and some others": Almon, Biographical, Literary, and Political Anecdotes of Several of the Most Eminent Persons of the Present Age (London: London & Seeley, 1797) vol.1 at 229.

77 Candor, supra, note 1 at 11. One of Mansfield's older brothers was created the Earl of Dunbar by the Old Pretender in exile. Mansfield himself was educated at Westminster School under the Jacobite Atterbury on the advice of his brother: Fifoot, supra, note 33 at 27.

78 Candor, supra, note 1 at 7. This passage could be represented merely as praise of Mansfield's undoubtedly useful innovations in the daily administration of cases in King's Bench: Fifoot, supra, note 33 at chapter 3.

79 See supra, text at note 31, and infra, text at note 130.
And his memory, suggested Candor, was so marvellous that Mansfield recapitulated evidence from it alone, "without having much recourse to his notes, or to the usual dull way of rehearsing it word for word"; nor did he have to "stick to the letter of old precedents in points of Law" or leave juries to their own conclusions.  

Candor’s barbed general verdict on the Chief Justice was that he served the convenient purposes of the government: "But, as the end of all Law is substantial Justice, if That be obtained, in spite of old rules or old cases, Is it not so much the better for the subject? especially if it be compassed in less time, and in a more summary way."81 The author professed to look forward to the abolition of juries in all trials, criminal as well as civil: 

All important Crown-Prosecutions would then be conducted in the best manner, according to the will of the Chief Justice of England, who is frequently a Peer himself, and of great weight with the Ministry; is always a Privy Counsellor, sometimes of the Cabinet, and intituled to the ear of his Majesty, and of course infinitely above all prejudice, and every thing else that is low and vulgar. Under such direction, no man would be found guilty, or lose his life, from error or ignorance. And the Lawyers held it for a maxim, that the King is interested in the life and health of all his subjects.83

In such passages contemporaries recognized not only Mansfield, but also implicit comparisons to Tudor and Stuart tyranny, to Star Chamber, to summary convictions before magistrates and excise commissioners — all derogations of the rights of jurors. The author may also have meant it as a pre-emptive warning to Mansfield not to try to use the summary power of contempt against the printer or

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80 Candor, supra, note 1 at 10-11. Compare Fifoot, supra, test at note 60.

81 Ibid. at 25. In another passage on the same page, Candor made clear that he thought Mansfield was following "foolish or iniquitous precedents".

82 Ibid. at 10-11.

83 Ibid. at 43-44.
The Chief Justice did not, in fact, deign to notice the pamphlet publicly.

A month later Almon published the even more powerful sequel, *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.* According to the best historian of the subject, it was the most convincing case for a free press that the public had yet seen. It was a triumph of legal argument and political propaganda. The pamphlet ran through three editions within three months, two more in 1765, and was reprinted with additions in 1771. Horace Walpole, who praised its doctrines, also declared it "the only tract that ever made me understand law." In January 1765 he wrote a friend, "Though bulky, it is already at its third edition — nor can all the Court lawyers, Court scribblers, or Court liars, hitherto frame an answer to it. They nibble at its heels, but cannot fix a tooth in it." As he wrote, the Law Officers of the Crown were preparing an attachment for contempt.

Purporting to be written by a lawyer, the pamphlet was an extended discussion of King's Bench informations, the scope and security of habeas corpus, and the doctrine on libels and on general warrants. The argument was supported by extensive references to case law, statute, and history. The author vigorously opposed the notion that everything that could be found in cases under the later Stuarts was still acceptable, and at the same time warned against the

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84 Apparently last used in a common law court in 1731 (see Fox, *supra*, note 10 at 114), the summary way of proceeding by attachment for contempt against a scandalizer of the court had been raised as a possibility, and rejected, by Common Pleas in 1764 (see *infra*, text at note 94).

85 *Rea, supra*, note 25 at 111.


87 Walpole, *Correspondence, supra*, note 32, vol. 22 at 274-75.

88 This third edition of 1765 (*supra*, note 5) was later said to be the one attached: [John Almon], *Memoirs of a Late Eminent Bookseller* (London: Almon, 1790) at 22 [hereinafter *Memoirs*]. However, the issue of which editions were the subject of the two separate attachments in *Almon's Case* is confused by the editorial additions in Wilmot (*infra*, notes 101, 110) and perhaps by Almon. There were some significant differences between the editions, doubtless on legal advice. See *infra*, notes 89, 93, 96.
dangers of innovations on the common law. In some respects, therefore, Mansfield’s anonymous enemy accepted his view of precedent: that there were principles of the common law that the cases only illustrated. But the pamphleteer vigorously argued other points against the Chief Justice: like Candor, he emphasized that ancient precedents subordinating the executive to law should never be questioned. And he also warned that judicial innovation in details comprehensible only to lawyers was a sure way for governments to escape control: judges uncontrolled by juries and public opinion were not always to be trusted.

Above all the pamphleteer explicitly castigated "fashionable doctrines" that enabled governments to obtain convictions by "the dexterity of a Judge." He emphasized the paramount importance of juries by warning against the danger of such judges, who, although now appointed for life, might still yield to "ambition, the desire of promoting their children, or, if they have no children, of providing for their nephews...." There was a more general danger (perhaps particularly acute for a judge who sat in the Cabinet room): "The mere desire of obliging one’s friends, which is incident to humanity, will insensibly warp the very best mens minds, and be apt to give an improper bias to their judgment." Far more pointed, because they referred to cases in which Mansfield had acted or to common complaints about him, were passages invoking an hypothetical Chief Justice. The pamphleteer’s Chief Justice helped a minister to assist a foreign ambassador in silencing a critic; expressed his willingness to extend unconstitutionally a contentious English statute to Scotland; looked into briefs and talked to attorneys about their cases before they came before the court "and by that means... frequently... [came] into the court with a bias upon his mind"; informed

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89 An Enquiry Into the Doctrine, Lately Propagated Concerning Libels, Warrants, and the Seizure of Papers (London: Almon, 1764), at 3, 8, 14. (This is the first edition; subsequent ones bore the title given in note 5, supra). Mansfield had no children; his nephew, Lord Stormont, was his designated heir. The emphases here and below are mine: these passages were deleted from some later editions. Also deleted were passages stating that the author was a lawyer (at 2, 16); that an Attorney General’s insistence on securities in cases of alleged libel was "new and unprecedented" doctrine (at 19); and certain others.

90 Ibid. at 14.

91 Ibid. at 125ff.
government ministers of a sentence he intended to pass before he did so; "by way of introducing an arbitrary government in the plantations" held that English settlers in America lost the benefit of the common law, "with a view to the introducing a spirit of arbitrary and discretionary determination in courts of law, under a specious pretence of equity, ... from the seat of justice declare[d] he desired to hear of no case that was determined above 50 years ago." He amended informations in his court and practised unwarranted innovations in the rules governing habeas corpus, to the detriment of criminal defendants. Most damning, he was a judge who "by unnecessary givings out from the Bench, endeavour[ed] to blast the repute of Juries with mankind, by pronouncing that the trial by jury would be the very worst of all, were it not for the controlling power of judges."

The Father of Candor believed he could draw up a "strong set of articles" of impeachment based on all these actions:

For, what in a common man is a breach of the law, is also a breach of trust in a Judge, and where he obstructs justice and changes the law, it is treason at common law. It would, indeed, be very unhappy for the subjects of this country, if there were a man to whom any one of these things were applicable: and the Lord have mercy upon the nation, if a time should ever come, when they shall all centre in one and the same man.

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92 Ibid. at 128. Probably a reference to Mansfield's emphatic opinion that the conquest of Quebec did not and should not sweep away French law there: Grenville supra, note 32, vol. 2 at 476-77; Walpole, Correspondence supra, note 32, vol. 41 at 312, at notes 12, 13.

93 This last point is from the 4th ed. of the Letter (1765), at 108; it does not appear in the first edition of 1764 (Enquiry, supra, note 89).

94 References to Mansfield's dealing with the release from custody, and subsequent prosecution, of Wilkes (supra, text at notes 31, 64).

95 Enquiry, supra, note 89 at 128; the words following "mankind" are from the 4th edition (supra, note 93) at 108; I have changed the tense throughout from the conditional.

96 Enquiry, supra, note 89 at 128. The insults to Scotland and to Scots were of course repeated: in the event of such tyranny, the author would even be prepared to flee with a certain noble Law-Lord "to ultima Thule, which, by the shiver with which he spoke it, I guess must be Scotland, the very northern scrag, or bleakest barebone of the Island. A man would fly any where in such case" (at 130; moved to 30 in the 4th edition, where it did not accompany any other passages referable to Mansfield).
And the Father of Candor showed some of his son's gift for irony in affirming that it was essential to prevent the debasement of judges lest reverence for them and the laws should perish.97

Mansfield probably blamed Camden in large measure for the words of both Candor and his Father, and not only because the pamphlets expressed Camden's views with respect to libels, general warrants, ex officio informations, and judicial discretion.98 For contemporaries believed that Camden was in fact involved in the writing of one or both of the Candor pamphlets. Many attributed the second one to John Dunning, who was Almon's counsel, with the assistance of Lord Camden. Almon at various times later said that Camden was "supposed" to have written it, to have given "much assistance" to the author. Some historians have suggested that it was a joint production of Camden and his half-brother (or nephew), a former master in chancery.99 Thus, when King's Bench reached for the summary power of contempt against a stranger's reflection on the court in Almon's Case, the stranger was widely believed to be, and possibly was, the other Chief Justice of England. Mansfield

97 Ibid. at 131.

98 Candor quoted Camden replying to a citation of Mansfield's strictures on juries, as saying "Why do you cite such cases before me, I have been bred up in other principles, and am now too old to change them." And he reported that Camden, as Attorney General Pratt, directly addressed Mansfield in Shebbeare's trial to the effect, "your Lordship well knows...the Jury, in matter of libel, are Judges of the Law as well as the Fact...", emphasizing that Mansfield did not contradict him (Candor, supra, note 1 at 40-41). The Father of Candor also explicitly contrasted Camden's scrupulously fair prosecution of Shebbeare to the prosecution of Wilkes, whom he asserted committed a much less serious libel (Enquiry, supra, note 89 at 34). Camden's views on judicial discretion (supra, text at note 38) were hailed by his admirers: See Case, infra, note 120 at 33; Another Letter, infra, note 143 at 33. Compare also note 29 (supra) with text at note 68.

99 The assertion that Lord Camden was involved was widespread in the eighteenth and early nineteenth centuries. It was used by the defence in a libel trial of 1806: R. v. Hart and White, 30 State Trials 1274. Greaves, another former Master in Chancery, is also suggested as a joint author. Other candidates have been Lord Temple, and Sir Philip Francis. Rea thinks either Dunning or Camden could have written it, and Almon noted "It certainly contained the whole of his Lordship's doctrine concerning libels." Burke, writing in 1770, thought it possible that Camden also was the author. See Another Letter, infra, note 143; Notes and Queries, 2nd series no.113 at 161 (February 27, 1858), no.116 at 241 (March 20, 1858); Rea, supra, note 25 at 113; Fox, supra, note 10 at 6; Herman Merivale and Joseph Parkes, eds., Memoirs of Sir Philip Francis (London: Longmans, Green, 1867) at 721f; Almon, Anecdotes, supra, note 76, vol. 1 at 225, 244; Edmund Burke in T.W. Copeland et al, ed., Correspondence (Cambridge University Press, 1958-1978) vol.2 at 161, letter of 23 September 1770.
and his brother Wilmot likely considered Camden to be, at the very least, an unindicted co-conspirator.

V. AVENGING MANSFIELD: R. v. ALMON (1765)

Camden, not surprisingly, apparently had little regard for the new doctrine of scandalizing the court. When a pro-administration printer published an accusation that Camden's own court had been "precipitate", "inconsiderate", "injudicious", and "erroneous" in releasing Wilkes on habeas corpus, he was made to show cause why there should not be an attachment against him, but the rule was never made absolute by Camden. Almon's counsel later stressed the point. 100

The proceedings against Almon in 1765 began with rule nisi on January 23rd for a writ of attachment. The writ was for the passage in Father of Candor's Enquiry that castigated Mansfield's possibly critical alteration of a word in one of the original informations against Wilkes. 101 The case came up for argument before Justices Wilmot, Yates, and Aston on May 1st. 102

Almon's counsel, Glynn and Dunning, urged the unconstitutionality of attachments for constructive contempts of this kind. Such use of attachments was "a thing never heard of". Moreover, judges, especially those who were peers, had other legitimate means of defence against criticism. Almon's counsel cited

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100 Case of Wilkie (1764), [John Rayner], Digest of the Law Concerning Libels (London: Owen, 1770), 137. See Memoirs, supra, note 88 at 26; 33 Gentleman's Magazine 533, 534; Rea, supra, note 25 at 101-02. Fox suggests that there is some evidence of a longer tradition of reluctance to use the power by Common Pleas: supra, note 10 at 13-14, 88-89.

101 Rea, supra, note 25 at 81. Except where noted, the following account of the case, and the arguments of defence counsel, is from A Collection of Scarce and Interesting Tracts, vol. 1 (London: Debrett, 1788) at 260ff [hereinafter Collection]. The same material is reprinted in Memoirs, supra, note 88 at 18ff. The passage attached originally was the second paragraph of p.107 of the third edition (supra, note 5), which in the Crown's copy is marked with a double line in the margin: see the manuscript case papers in Public Record Office, KB 1/16/2, Easter 5 George M, no.2. The dating of stages in the case is from that source and KB 21/39, Hilary to Trinity, 1765. (Some dates in Almon and other printed sources are inaccurate.) Other information on the case is found in KB 3.

102 The delay was due to absences and illnesses on the bench. Mansfield absented himself when the case was argued.
Coke, and they referred to Camden's refusal in Common Pleas to attach his critic the year before. They denied that Mansfield was portrayed by Candor. But mainly they urged that through an attachment the court would exercise the powers of party, judge, witnesses and jury. Informations, "which went a great way," were nothing compared to the powers now claimed by the court through attachments. The doctrine would indeed wholly eliminate the jury, a danger of great import, for

... the method of trial by a jury is the inherent, the native, the peculiar privilege and glory of Englishmen;...this mode of process was originally founded on the best and the most solid principles, and ...the wisdom of it had been approved by a long succession of ages;...whenever it should be deemed expedient to alter it, and to adopt any other mode of proceeding, the legislature, as it is the most proper judge of this expediency, so it would be the only proper authority to enforce the subjects' obedience.

They also pressed very strongly on the court a more limited point: since Mansfield's alteration of the information against Wilkes had been done (before counsel) in chambers, and never made a rule of court, the pamphlet's attack on Mansfield for doing so could not be a contempt of court.104

The case was reserved to the following term. The final outcome was bathos, and of a sort that must have been intensely embarrassing to Mansfield and to Wilmot, the puisne judge who was conducting the proceedings. For Almon went unpunished, and Wilmot's opinion was unpublished for 37 years, partly because of an altercation over precisely the issue that was one of Father of Candor's main points: the dangers of a court amending criminal charges in ways favourable to the prosecution.

The original proceedings for contempt had been termed The King against Wilkes. They concerned only the paragraph of the pamphlet in which Father of Candor accused Mansfield of arbitrarily, in chambers, altering the wording of the criminal information against Wilkes. The judges apparently were divided on the merits of the subsequent argument of Almon's counsel that what was done in chambers could not be the subject of an attachment for contempt. As a result the prosecution seemed bound to fail. But since the

103 Memoirs, supra, note 88 at 24.

104 Letter from Almon to Earl Temple, 15 June 1765, Grenville, supra, note 32 at 47-9, which is, with Collection, supra, note 101 at 269, the source for the text at notes 104-06.
pamphlet afforded other grounds for proceeding, the judges attempted to enlarge the charges at once by simple amendment of the process. On June 14, with no preliminaries, Justice Wilmot suddenly asked Glynn and Dunning for permission to amend the rule to read *The King against Almon*. Almon's counsel, who had heard rumours of the plan, were sure that Wilmot's motive was to make possible a judgement on the many other inflammatory passages in the pamphlet, now that the paragraph with respect to Wilkes was useless to the prosecution. They had not made a defence to such a broad charge in their arguments before the court, and they refused the request. Wilmot "coaxed and bullied them by turns" for nearly an hour: Dunning and Glynn continued to refuse. Justice Aston was laughing, as were "above 200 people, for the Court instantly filled after the affair began." Almon, reporting these scenes, thought Wilmot "seemed quite mad." One of the other two judges (Mansfield had hurriedly left the bench) thought the alteration could be made, although it was "not the practice of the court"; the other rather doubted it. After over three hours of fruitless appeals and threats from the bench, Almon was free of the original charge, and had escaped the immediate danger of a conviction through its amendment. The Crown, and the judges, had to start again.

The law officers brought another attachment four days later, citing much more extensive passages of the pamphlet by the Father of Candor: most of the passages unmistakably referred to Mansfield. Dunning thought the whole proceedings an outrage, but advised Almon to flee London to avoid being served with the new rule: the

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105 On the incident in Wilkes' trial, see supra, text at note 31. Wilmot had no doubts that criticisms of decisions in Chambers could be scandals on the court: *Wilmot, supra*, note 3 at 263. The request to amend the rule has been attributed to an error in the process by a number of writers, but the explanation in the text (a broadening of the charge) was the interpretation of Almon's counsel. The manuscript court records tend to avoid giving any heading to the subsequent second attachment, which suggests that the authorities were discovering (or rediscovering from the cases in the 1720s and 1730s) that attachments might be worth trying against critics who made general comments on the courts, rather than in connection with specific cases. See Public Record Office, K.B. 1/16/2, Easter 5 George III no. 2, affidavits of 19, 25 June 1765, and my forthcoming account of the early cases.

106 All quotations from the letter cited in supra, note 104.
publisher did so. His counsel moved the court for more time to consider the new charges, a request which was granted. And then the prosecution ground to a halt: a sudden change of ministry in July put in power men with whom Almon had influence, and the Attorney General was ordered to stop the proceedings.

It is not known exactly when Mr. Justice Wilmot wrote his celebrated undelivered opinion on scandalizing the court, but internal evidence shows that it was after the arguments on the first attachment; it was also written before full argument on the second one, for the obvious reason that the defence arguments on that attachment were never heard. Wilmot nonetheless based most of his case on the passages cited in that second attachment. Thus the opinion in Almon’s Case is less than an unreported or even undelivered judgement. It was written without the benefit of any arguments from defence counsel on the largest part of the charge. Perhaps that is why it has a rhetorical eloquence, interrupted by very few precedents, that has tempted generations of judges since to quote it with relish. Wilmot’s opinion is also interesting as a study in the judicial politics of the 1760s. It was a full-scale attack on Camden’s jurisprudence.

Wilmot chose to concentrate on two specific passages of the pamphlet: the one concerning Mansfield’s agreement to the prosecution’s request to amend in chambers the original informations against Wilkes and the one attacking Mansfield’s making a rule to show cause in Wilkes’ habeas corpus proceedings. Although Wilmot quotes the offending pamphlet as saying that Mansfield acted

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107 These passages were from Enquiry, supra, note 5 at 108-20, according to Almon to Earl Temple, [23 June 1765], (Grenville, supra, note 32, vol.2 at 65 incorrectly dated as July 1763; see ibid., vol.3 p.46, Almon to Temple, 15 June 1765), also the source for this paragraph of the text. However, the manuscript court records (supra, note 101) suggest that pp.108-10 of the fourth edition (1765) particularly interested those prosecuting the second attachment. These passages are cited supra, text to notes 91-96. Because Almon was in hiding, the court also made a rule nisi that serving any member of Almon’s household was as good as serving him personally; this too was denounced as an innovation by Almon’s counsel.

108 Memoirs, supra, note 88 at 31.

109 Hughes, supra, note 10 at 296 made the general point almost a century ago that Almon’s Case is worthless as an authority because only counsel for the Crown had been heard. More specifically, only 9 out of 28 pages of the opinion concern the charges on which full argument had been heard; 14 more deal solely with issues raised by the second attachment: Wilmot, supra, note 3.
"officiously, arbitrarily, and illegally" in changing the wording of Wilkes' charge, the actual passage uses the words *officiously* and *arbitrarily* in separate sentences. The word *illegally* does not appear at all.\textsuperscript{110} The gist of this criticism of Mansfield was that criminal prosecutions on informations should be as fair to the defendant as those on indictment. It was considered an important principle in prosecutions on indictment to afford the defendant every technical advantage, one of which was the inability of the prosecutor to amend defective charges.\textsuperscript{111}

Nowhere in the passages referred to by Wilmot is it suggested that it was an *intention* of the Court to thwart justice, nor that the court acted "corruptly, illegally, or oppressively," or "unjustly and impiously." Wilmot used those words as a paraphrase of the tenor of the libel: they appear nowhere in the pamphlet.\textsuperscript{112} More important, the entire passage with respect to showing cause in applications for habeas corpus describes the *possible* consequences of what Father of Candor held to be an innovation. Wilmot's defence of the rule to show cause in habeas corpus actually grants that it *is* an innovation, only eight years old, to afford some protection for men unlawfully conscripted into the navy under the wartime press law, while ensuring that no men pressed lawfully under the terms of the draconian statute could make successful applications for the writ.\textsuperscript{113} The Father of Candor had argued that in political cases such a rule to show cause could be much abused because an

\textsuperscript{110} Several paragraphs are given as a footnote in the published version of 1802: *Wilmot*, *supra*, note 3 at 248-49, who gives the source as pages 122-26 of the pamphlet. These page numbers do not correspond to the relevant passages in the copies of the pamphlets filed in court by the crown, *supra*, notes 101,107. The page references may have been supplied by Wilmot's editor (his son) from a later edition.

\textsuperscript{111} The right to amend criminal informations in the manner Mansfield had done was considered at length and upheld in 1770 by Mansfield (and his deferential brothers) in *R. v. Wilkes*, *supra*, note 49 at 2566. Mansfield explicitly denied the analogy between indictments and informations, on the grounds that the former were found by juries, and unamendable except by themselves, and the latter were declarations in the King's suit. The ruling strengthened arguments against *ex officio* informations, now shown to be even more oppressive than had been thought.

\textsuperscript{112} *Wilmot*, *supra*, note 3 at 268.

\textsuperscript{113} Ibid. at 259-62.
unlawfully pressed man would be gone before the remedy could be had. Wilmot ignored the point. But what was going on was not a legal argument so much as continuing judicial warfare. For Wilmot was really addressing Lord Camden. The Father of Candor’s argument about habeas corpus was the argument Camden, as Attorney General, had unsuccessfully tried to embody in legislation in 1758. Wilmot himself had written one of the most vehement opinions attacking Camden’s proposal at the time. And, as we have seen, the Father of Candor may, in fact, have been Camden himself.

Indeed, Wilmot’s real concern was less with legal argument than with celebration of the dignity of courts, or, more precisely, his court, and his Chief Justice. There is no doubt that the wit of Candor and his Father and the cogent criticisms collected in the pamphlets were uncomplimentary to Mansfield and to King’s Bench. Wilmot wrote of the necessity to "keep a blaze of Glory" around the courts, "to preserve their Lustre and Dignity" and "to deter people from attempting to render them contemptible in the eyes of the Public." It was unquestionable that it was the general tenor of the pamphlet that concerned him. Wilmot had been livid and distracted during the embarrassing proceedings in open court on the first attachment. He now gave full expression to his frustrations with scribblers who wrote about judges: untroubled by any arguments of counsel, he wrote his own partisan piece on the second attachment.

Because the prosecution was dropped, the opinion remained in Wilmot’s private papers until published by his son in 1802. The doctrine contained in it, however dubious it may be in light of its history, nonetheless appeared sound to the judges of King’s Bench in the 1760s. In several cases in 1768, principally R. v. Bingley, they used it.

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115 Wilmot, supra note 3, at 81; supra, text at notes 37, 99.

116 Wilmot, supra, note 3 at 258, 270.

117 Supra, note 8.
VI. HUNTING MANSFIELD: R. v. BINGLEY (1768-1770) AND JUNIUS

Bingley was a fearless, indeed reckless, Wilkite, the kind of imprudent self-dramatist and zealot who so often establishes a constitutional principle.\(^{118}\) He was the publisher of a continuation of the *North Briton* while Wilkes was in exile. In issue No. 50, 28 May 1768, Bingley printed an open letter attacking Lord Mansfield for his conduct toward Wilkes in the past. This was only ten days before Wilkes, now returned, was due to appear before Mansfield to answer his outlawry.\(^{119}\) The writer’s avowed purpose was to convince the Chief Justice to pass a moderate sentence on the popular hero and thereby earn the gratitude of the people, but he also accused Mansfield of acting the part of counsel for the prosecution in the earlier trials of Wilkes. And he added,

I, my lord, must take the liberty of acquainting you, that the humour of the people is at present such, that they will not patiently see the rigour of the law exercised against Mr Wilkes; much less the law stretched and wrested to make him feel the weight of ministerial vengeance.\(^{120}\)

These words appeared in one of the most tense months of the Wilkite agitation. There was still great anger in London against the

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\(^{118}\) A brief biographical note, "A Forgotten Journalist", appeared in *The Athenaeum* (20 May 1899) at 626. A bookseller and journalist, he was described as "a man of strong natural understanding, though not much assisted by literature...of the strictest integrity, but unfortunately possessed an habitual irritability of temper, which proved a perpetual discomfort." He was married, apparently happily, and had at least four children. He died in 1799 at the age of sixty-one.

\(^{119}\) Bingley’s case is outlined in Rea, *supra*, note 25 at 155-56, 164-65, 168, and the context in his chapter IX.

\(^{120}\) The *Case of William Bingley, Bookseller, who was Two Years Imprisoned by the Court of King’s-Bench, without Trial, Conviction, or Sentence...compiled by a Barrister of the Middle-Temple. To which is added an Appendix* (London: Printed for the Benefit of William Bingley, and sold by Davis, Woodfall, William, Woodgate, Tomlinson, Steel, 1773) at 6 [hereinafter *Case*]. This pamphlet, in which were reprinted Bingley’s inflammatory *North Briton* pieces and copies of affidavits, together with his interpretation of the proceedings and probably a brief for his counsel, was originally published under a slightly different title in 1770 (*supra*, note 2). I have used the 1773 edition (the copy in the Harvard Law School Library) because it contains all the material in the first edition, somewhat rearranged, and also gives some additional information about the proceedings on attachment.
Horse Guards and magistrates for the "St. George's Fields Massacre", a day-long riot on May 10th in which six or seven unarmed supporters of Wilkes were killed by troops.\textsuperscript{121} Courtrooms were sure to be packed with aroused spectators in the coming weeks in any case, even without the incendiarism of Bingley.

When Wilkes appeared before Mansfield a few days later, on 8 June, Horace Walpole reported that "The judges went down by nine in the morning, but the mob had done breakfast still sooner and was there before them, and as judges stuffed out with dignity and lambskins are not absolute sprites, they had much ado to glide through the crowd."\textsuperscript{122} Large numbers of troops were held in readiness near Westminster Hall, and Mansfield, presumably heartened by their presence, delivered one of his most famous speeches, in defiance of intimidation by mobs and by the press: "Whoever the writers are, they take the wrong way. I will do my duty unawed."\textsuperscript{123} Mansfield even declared that his own death at the violent hands of a mob inflamed by libels might shock the nation to its senses, and that he had composed his mind to die if necessary for the sake of his country. But he also noted in passing that some of his anonymous detractors in the press had already been brought before the court. Bingley, not Mansfield, would be the martyr.

If Mansfield or the Cabinet were looking for a clear opportunity to use the doctrine that had been so contested in Almon's case, Bingley obligingly provided it. His pamphlet, Walpole observed, was "outrageous enough to furnish the law with every handle it could want."\textsuperscript{124} The particular handle chosen was another attachment for contempt. Within a week of publication the Attorney General moved King's Bench for an attachment against Bingley and other printers and vendors of the article, and they had already appeared in court by the time Mansfield dealt with Wilkes' outlawry.

\textsuperscript{121} Rude, supra, note 26 at 49-56.

\textsuperscript{122} Walpole to Mann, 9 June 1768, Walpole, Correspondence, supra, note 22 vol.23 at 28-29.

\textsuperscript{123} R. v. Wilkes, supra, note 49 at 2562.

\textsuperscript{124} Supra, note 122.
Figure 2

William Bingley in prison for scandalizing Lord Manfield. From The Extraordinary Case of William Bingley, Bookseller (1770), frontispiece.
The others put up bail but not arguments; Bingley turned up in King’s Bench on 7 June determined to reiterate the constitutional claims already heard in Almon’s Case. An "eminent barrister" had told him that both the proceedings for attachment and the affidavit on which it was founded were flawed; that attachment for an alleged libel was "a damned illegal mode, and that it was a scandal to this country it should be exercised in the case before us." But he had advised Bingley to submit, or leave the country until the Wilkite crisis passed, and Bingley’s attorney had concurred. The printer scorned such timidity, and therefore on 7 June rose to oppose the Attorney General’s motion himself, brief in hand, "with faultering accents, peculiar to young pleaders." Bingley was determined to emulate Wilkes in making King’s Bench a platform for a discourse on constitutional law; the bench was determined he should not.

Mansfield refused to let Bingley read a prepared defence, warning him that it might be "more offensive than the paper itself." Justice Aston insisted that counsel first examine what was to be said, suspecting another libel, and denied the right of the defendant to address the court himself. Finally, Bingley’s attorney and barrister voluntarily stepped forward to tell the bench that Bingley's defence was indeed quite improper to be read. Mansfield then informed the other printers and vendors who had been attached that they could try to recover their costs in suits against Bingley himself, advice that Bingley construed as a judicial expedient which could have the effect of a virtually unlimited fine.

Proceedings were to continue two days later, but Bingley was not to be denied his starring role. He published in the interim the speech he had been prevented from delivering in court. In it he

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125 For what took place in court we are largely dependent on Bingley's account: Case, supra, note 120 at 24ff. On the attachments against other printers and sellers, see infra, note 132.

126 Case, Supra, note 120 at 25.

127 Ibid. at 26.

128 Ibid. at 27.

129 The rule nisi was enlarged to 9 June, apparently on the motion of the Attorney General: Case, supra, note 120 at 30. See also Public Record sources cited infra, note 132.
reiterated the charges against Mansfield of prejudicing Wilkes' trials, of doing so to protect the Secretary of State from Wilkes' lawsuits, and of deliberately delaying the reconsideration of Wilkes' outlawry. And he castigated Mansfield in terms now familiar:

He talks of precedents. My lords, the precedents are not similar they are not warranted by law; but were first introduced by a very bold and violent judge, whose authority it is not honourable to any other to follow. But this plea of precedent comes with a very bad grace from his lordship, who is well known to have set his face against precedents, when they did not serve his purpose, and to have repeatedly declared, whenever they have been urged, that he would make a new one. 130

The peroration was a refusal to answer any questions posed by interrogatories on attachment:

There can be no pretext for denying me a trial by jury. The way of attachment is a Star-Chamber process; to which I will not submit: it is unlawful; it is unprecedented in such a case.

My lords, I am an Englishman, and I demand, as my birth-right, a trial by jury. 131

This second publication was instantly answered with a second attachment for contempt. If Mansfield wanted to widen the doctrine of examining libellers on interrogatories, Bingley must have seemed heaven-sent. Bingley seems to have been no less grateful for Lord Mansfield: he found in the issue a chance to make his name as a defender of English liberty, and explicitly argued the danger of the precedent that Mansfield was trying to set. The bar clearly were putting all bets on the Chief Justice rather than the impecunious printer, and at least four other printers and vendors of the article put in bail to submit to interrogatories. 132

130 Ibid. at 32.
131 Ibid. at 38.
132 On this aspect of an attachment see infra, note 137. The other defendants were the booksellers Staples Stear, and Williams and Pridden, the first for publishing the North Britain Extraordinary No.4, the two others for selling it. Another, Brett, had sold Bingley's North Britain no. 50. Stear, Brett, Williams, and Pridden actually answered interrogatories. They all offered apologies in November, when Stears was sentenced to three months imprisonment, Williams fined 13s.6d., Pridden and Brett 6s.8d. Other vendors also proceeded against were C.Corbett, W.Nicoll, T.Bowen, and F.Jones. Public Advertiser, June 10; St. James Chronicle June 9-11, Nov 5-8; 38 Gentleman's Magazine 298; 37 London Magazine 607, 700; 11 Annual Register 122, 124, 188; 8 State Trials 60; Walpole, Correspondence, supra, note 32 vol.23 at 29 note 5; manuscript court records in the Public Record Office, KB 21/40, Trinity 8 George III, Michaelmas, Hilary and Easter 9 George III; KB 21/19 Hilary, Trinity 8 George III, Hilary 9 George III; KB 1/16/1 Michaelmas 5 George III; KB 1/17/2, Trinity 8 George III, Michaelmas
Bingley surrendered to the attachments on 11 June, and ostentatiously refused bail on the grounds of the illegality of attachments for contempt in cases such as his. In August, however, he was bailed at his request until 7 November, in the new term.\textsuperscript{133} This next appearance in King's Bench was better staged, if we are to believe Bingley's account. Bingley was asked to enter into recognizances to answer interrogatories; refused on constitutional grounds to do so; and again tried unsuccessfully to address the court with his (now more sophisticated) legal arguments against attachments and the dangerous precedent that was being set in his case.\textsuperscript{134} A smiling Mansfield told him he came too late: the options were to give bail to answer, "otherwise you must be committed; must he not \textit{Mr. Dunning}? O yes, \textit{my l'd}, to be sure, \textit{my l'd}, said the obsequious solicitor.}\textsuperscript{135} The bar was laughing as Bingley announced his determination to be imprisoned for life if necessary, until the smiles on the bench ended:

Mr Justice Aston...began to be exceedingly {	extit{enraged}}, and said, he would not sit on the bench to be {	extit{sported}} with, and also, that the mode of proceeding was according to the

\textsuperscript{9} George III; KB 1/17/1, Hilary 9 George III; TS 11/13/228.

\textsuperscript{133} \textit{Case}, supra, note 120 at 106.

\textsuperscript{134} Subsequently published in \textit{ibid}. at 45-76. Quoting Coke, Hale, Hawkins, Magna Carta, the \textit{Mirror}, and statutes and cases, he argued that his offence was not in the face of the court nor in obstruction of its process; that there was not a single ancient or indeed any precedent for a case such as his; that interrogatories in Star Chamber were founded on statute and were not justified at common law; that Lilburne's sentence following interrogation was subsequently reversed by the Lords as unconstitutional, unjust, and illegal. He cited six cases to show that libels on courts were tried on indictment or information, not by attachment. His main arguments were that the presumption of innocence required that he not be forced to accuse himself, and that interrogatories removed almost all the procedural advantages a defendant might claim, notably those associated with jury trial: "if I am committed for not answering, until I do answer, and should afterwards submit to answer, it will be a confession {	extit{extorted}} by {	extit{torture}}" (at 60). He also emphasized the advanced Whig doctrine that juries were judges of law as well as of fact. Many of these arguments had already appeared in print by the time Bingley published in 1773 (e.g. in Candor's "Postscript", \textit{infra}, text at note 143). It is likely that Bingley's arguments were considerably improved before he published them.

\textsuperscript{135} Dunning was now Solicitor General; he had, of course, been Almon's counsel in 1765. This jibe was balanced by Bingley's later thanks for Dunning's speech on his behalf in Parliament: \textit{infra}, text at note 139.
When Bingley again insisted on a jury trial as the birthright of an Englishman, Aston roared for the tipstaff until the man appeared and took Bingley off to prison once more.

It is difficult to discourage a martyr. Released in December on bail to appear the next term, Bingley made his third appearance at King's Bench in January 1769. He again refused to answer interrogatories, and was committed to King's Bench prison for contempt. From prison he published his sworn affidavit that he would not "at any time, WITHOUT TORTURE, answer to any interrogatory tending to accuse himself, or any other person..." involved in publishing his paper. Bingley petitioned Parliament, where Dunning, Almon's counsel in 1765, spoke against interrogatories, although most members apparently were prepared to agree that the custom was sound and that courts needed such powers. Among the public Bingley was beginning to enjoy a little attention of the variety showered on Wilkes: an anonymous gentleman presented him with a gift of plate for "endeavouring to support the constitutional right to trial by jury." Bingley also had hopes that his case, as well as his expenses, would be taken up by the Wilkite movement. But Wilkes wanted such funds for himself,

136 Case, supra, note 120 at 43 (emphasis in original). Aston's behaviour prompted Bingley to quote Whitehead (supra, at note 2).

137 P.R.O., K.B. 21/40, Hilary 1769; 11 Annual Register 196; 38 Gentleman's Magazine 586; 37 London Magazine 701; Public Advertiser 7 December 1768; 39 Gentleman's Magazine 53; 38 London Magazine 52. The procedure in contempt cases was explained to Mr Justice Yates (who said he was unfamiliar with the practice) during the bail hearing. The person attached was summoned in the vacation between terms before the Master of the Crown Office, who conducted and reported the result of the interrogatories in the term following, when the court proceeded to judgment if there was a confession, or discharged if the contempt was purged (Case, supra, note 120 at 79-80). Details of the procedure as it stood by 1828 are to be found in Gude, The Practice of the Crown Side of the Court of King's Bench, vol.1 (London: Sweet, Maxwell and Stevens & Sons, 1828) at 256-59.

138 Case, supra, note 120 at 93-96; 39 Gentleman's Magazine 108.

139 Case, supra, note 120 at 99; Rea, supra, note 25 at 164.

140 39 Gentleman's Magazine 161.
and Bingley remained in prison, where he kept publishing for two years.\footnote{141}

Finally, in May 1770, King's Bench agreed to the Attorney General's request for Bingley's discharge, although he had never purged the contempt, on the grounds that he had suffered as much as he might have if he had actually been found guilty of contempt in publishing his insults to Mansfield. Bingley's martyrdom was becoming an embarrassment: his case was mentioned in petitions from, among others, the corporations of London, Bristol, and Southwark.\footnote{142}

Although Bingley was imprisoned for the contempt of refusing interrogatories, the cause had been his previous attachment for scandalizing the court, and he had kept that issue before the public. Shortly after Bingley's release in 1770 Candor again appeared in print and attacked such attachments in an extended version of the arguments that had been used in \textit{Almon's Case}.\footnote{143} He had no admiration for Bingley's "libellous trash," but he deplored the doctrine by which Bingley had been imprisoned.

In measured, temperate words, with only touches of irony directed at Mansfield, Candor made the constitutional and legal case against the doctrine. Such a constructive contempt, he argued, made an accused person his own accuser; it allowed judges to usurp the roles of party, prosecutor, and jury. It could only be dangerous to

\footnote{141} He was unsuccessful in persuading Mansfield to allow him better prison accommodation, where he could carry on his business as a publisher more satisfactorily: \textit{Case}, supra, note 120 at 111-21; 39 \textit{Gentleman's Magazine} 316; 12 \textit{Annual Register} 107-98, 153; Public Record Office, TS 11/73/228. The argument over funding Bingley caused a major split in the Wilkite movement, from which it did not recover.

\footnote{142} P.R.O., K.B. 21/40, Easter 1770 \textit{Case}, supra, note 17 at 126-27; \textit{The Letters of Junius} (ed. John Cannon, Oxford: Clarendon Press, 1978) at 211. In May 1769 a petition of the freeholders of Middlesex had denounced the "Perpetual Imprisonment of an Englishman without Trial, Conviction, or Sentence, by...ATTACHMENT..." (Rea, supra, note 25 at 164). Candor later wrote that "the crown thought the matter might by and by occasion some serious complaint, and therefore he was let out, in the same contumacious state he had been put in, with all his sins about him, unanointed and unannealed." \textit{Another Letter, infra}, note 143 at 189 ("Postscript").

\footnote{143} \textit{Another letter to Mr Almon in Matter of Libel} (London: Almon, 1770) in the "Postscript" [hereinafter \textit{Another Letter}]. The style, view of the constitution, and knowledgeable but not over-technical discussion of legal doctrine are very similar to those of the earlier Candor pamphlets often attributed to Camden. The "Postscript" was reprinted by Bingley as a second appendix (with deletions of all critical references to Bingley himself) in his 1773 \textit{Case}, supra, note 120.
prevent the public "by that terror" from criticizing what was erroneous in the administration of public justice. Judges, concluded Candor, are not "above the inspection of their country."\(^{144}\) Interrogatories, if enforced in such a case, would establish an "English inquisition"; they contradicted "the whole system of our law."\(^{145}\) The only constitutional response to a libel such as Bingley's was a jury trial. Moreover, Candor declared that was the only possible legal response. Contempt was proper and necessary where an immediate interference with the administration of justice was the issue, but the common law did not support the use made of it against Almon and Bingley. There were no ancient precedents, and the earliest use of the doctrine that Candor could trace was a case in 1723: it was therefore clearly not law. A libel on a judge or a court was certainly properly punished:

> It is, if any thing be, the proper object of the information ex officio. In God's name, let the treatment of any judge, or of any judgement, with causeless banter, satire, scorn, reproach, or ignominy, and the libelling or calling of either needlessly in question, be scourged with this bitter rod of criminal vengeance. But the supposed offender, should not, nay cannot, be deprived of, or punished without, his trial by jury.\(^{146}\)

Such offences were neither immediate outrages nor the use of force: they could well wait for a jury trial. And he pointed out that in both Almon's Case and Bingley's Case the courts were drawn into "ridiculous dilemmas", as they could not silence a courageous opponent. Even the mob was well aware of the causes of the government's and bench's "disgraceful retreats," the result of "rash and inconsiderate salliers beyond the ramparts of the law..."\(^{147}\)

Bingley's appears to have been the last attachment for scandalizing an English court for the rest of the eighteenth century, and Fox attributes that fact in large measure to the disrepute his imprisonment and release brought upon the procedure. In spite of Almon and Bingley, or rather because of them, the contempt power of scandalizing the court was thus very nearly stillborn. By 1770

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\(^{144}\) Another Letter, at 173.

\(^{145}\) Ibid. at 178.

\(^{146}\) Ibid. at 171. The 1723 case was Wyatt (or Middleton); see supra, note 21.

\(^{147}\) Ibid. at 185-86.
Mansfield was being vilified with impunity, in even stronger language, in the London press. The anonymous polemicist "Junius", the most famous political pamphleteer of the eighteenth century, began his virulent attack on the Chief Justice in November 1770 with the words "Our language has no term of reproach, the mind has no idea of detestation, which has not already been happily applied to you, and exhausted."148 All the accusations made by Candor and the Father of Candor against Mansfield of demeaning the common law, subverting the constitution, acting as the partisan of the government, and indulging tyrannical Jacobitical tendencies were now repeated in stronger terms and in the most direct language. As Junius wrote privately to his printer before publication, "I don't think we run the least Risque. We have got the Rascal down. Let us strangle him if it be possible."149 And Junius particularly reproached Mansfield for his treatment of Bingley:

The sufferings and firmness of a Printer have roused the public attention. You knew and felt that your conduct would not bear a parliamentary inquiry, and you hoped to escape it by the meanest, the basest sacrifice of dignity and consistency, that ever was made by a great magistrate. Where was your firmness, where was that vindictive spirit, of which we have seen so many examples, when a man, so inconsiderable as Bingley, could force you to confess, in the face of this country, that, for two years together, you had illegally deprived an English subject of his liberty, and that he had triumphed over you at last? Yet I own, my lord, that your's is not an uncommon character. Women, and men like women, are timid, vindictive, and irresolute. Their passions counteract each other, and make the same creature, at one moment hateful, at another contemptible. I fancy, my Lord, some time will elapse before you venture to commit another Englishman for refusing to answer interrogatories.150

In most of the earlier prosecutions of Junius, which were some of the most famous of English state trials, London juries had refused to convict.151 Mansfield and the government were clearly not anxious to risk such an acquittal again: no criminal informations

148 The Letters of Junius (supra, note 142) at 206-17, Letter XLI, "To the Right Honourable Lord Mansfield, 14 November 1770." The identity of Junius is still unknown.

149 Ibid. at 365.

150 Ibid. at 210-11 (the opposition had been calling for a parliamentary inquiry into Mansfield's conduct in King's Bench at the time Bingley was released). There is a more flippant reference to Bingley in a Junius letter of March 1769: Ibid. at 51. In 1771 Junius was prepared to use Bingley to print a letter that Woodfall, his usual publisher, might consider too dangerous: Ibid. at 371.

151 For the context see Rea, supra, note 25 at 174-87.
were exhibited against the printers of this savage attack, in spite of the fact that it was published and republished by a great many printers.\textsuperscript{152} Moreover, Junius’ prediction was correct, and no attempt was made to proceed against the printers by attachment on the grounds of scandalizing the court. A political prudence on the part of the judges, if not a legal one, now began to reinforce the constitutional argument being developed by Candor, Bingley, Junius and others against this "English inquisition."

In a curious and famous episode in the House of Lords, it was perhaps Lord Mansfield himself who finally made the doctrine of scandalizing the court untenable for half a century. He was defending his position with respect to libels — that the identification of a libel was for the judge, as a matter of law — in a debate in December 1770, following several famous trials and acquittals of Junius’ printers and publishers for other libels. Lord Camden, still deeply opposed to the doctrine of attachments for contempt, surprised Mansfield with six sharp questions on libels, including a request for precedents, and the period of history from which they were taken. To the dismay of some government supporters, but perhaps wisely under the circumstances, Mansfield utterly refused to debate the questions. His choice of words, however, was unfortunate. Whether bitterly sarcastic or carelessly flippant, in his reply he borrowed the words of the unfortunate Bingley. The Chief Justice declared that he would "not answer interrogatives."\textsuperscript{153} It was hardly decent, thereafter, for him to demand that a defendant in King’s Bench should do so. Walpole expressed the view of many when he wrote to a friend a week later,

If we have nothing else to do after the holidays, we are to amuse ourselves with worrying Lord Mansfield, who between irregularities in his court, timidity and want of judgement, has lowered himself to be the object of hatred to many, and of contempt to everybody.\textsuperscript{154}

\textsuperscript{152} Ibid. at 190.

\textsuperscript{153} 16 Parliamentary History 1322.

\textsuperscript{154} Walpole, Correspondence, vol.23 supra,note 32 at 256.
And by 1773 Bingley, a free man but now a bankrupt, could republish with impunity all his earlier attacks on Mansfield, complete with colourful additions:

This much may be inferred, that lord Mansfield possesses all that vindictiveness of spirit, and malignancy of heart, peculiar to the generality of his countrymen. I cannot reconcile his lordship's conduct with my notions of law, justice, or humanity. But when we review the whole of this Jacobite lord's conduct, our wonder, in some measure, ceases...

The odium in which the doctrine of attachments and interrogatories for constructive contempts now stood was perhaps the principal reason there were no further attempts to use it in the eighteenth century. There were attacks on judges, and on their courts, but the summary power of contempt for scandal by strangers apparently was not used. Instead, defendants were tried as Candor and all the other critics had suggested they should be, on indictment or information, both involving jury trials.

VII. REDISCOVERING WILMOT: 1792-1821

For a time the nascent constitutional inhibition against using the summary power of contempt was strengthened by the arguments of some of the most prominent lawyers in England. Thus Erskine, celebrated for his defence of the liberties of free born Englishmen in many leading state trials, wrote an opinion in 1785 asserting that contempts punishable by attachment must be in direct violation or obstruction of some previous decision of the court which issues the attachment. He took the opportunity again in 1806, as Lord Chancellor, to raise doubts about the doctrine of constructive

155 Case, supra, note 120 at 122-23. Bingley reprinted Junius' letter to Mansfield as an appendix.

156 This statement is based on Fox's analysis and Bingley's remark later in the century that no such proceedings had been taken since his own release from prison: Fox (1920), supra, note 10; Bingley, "A Sketch of English Liberty" (broadsheet, 1793), republished in the 1974 reprint of Case (supra, note 2). I am currently engaged in research in King's Bench records that will give a complete inventory of attachments for contempt for scandalizing the court, and of prosecutions for libels on justice.

157 8 State Trials 83 at 84.
contempts for scandalizing the court. But there were by then some clear signs that Wilmot's undelivered judgment was being resurrected, and a preliminary examination suggests that this was for both general political and specifically legal reasons.

The legal reason was the significant change in the law of libel. For attacking a court was punishable, if not as a contempt, as seditious libel of justice, upon conviction on indictment or information. Juries were unreliable, as the prosecutions of Junius had shown in the 1770s: but as long as they could be packed, and as long as the judges reserved the identification of libels to themselves as a matter of law, some convictions could be had. However, in 1792 Fox's Jury Act passed into law under the approving eye of Camden. While not entirely an explicit repudiation of the doctrine, its purpose was clear: to force judges to assure juries that they could decide the entire issue as a general verdict.

It was no longer possible to be at all sure of what a jury would do. The acquittals of members of the London Corresponding Society in 1794 on charges of high treason showed that, in London at least, juries might ignore the bench on seditious libel charges as well. That bench was itself increasingly the subject of virulent criticism again; this time by Jacobins. And the period of the Napoleonic wars (1792-1815) was pre-eminently a crisis of legitimacy for the state as it was constituted: an unreformed and unrepresentative commons, a Chief Justice once more in the Cabinet, a bench richer than it had ever been from patronage appointments and the extraction of fees. The time had come to begin the process of resurrecting attachments, interrogatories, and summary conviction for scandalizing the court. There had been no argument or judgement in Bingley's case and apparently no report of the judgments against the other printers and vendors of his attacks on Mansfield. But by 1802, with the publication of Wilmot's opinion about Almon, there was something to work with.

The doctrine of scandalizing the court apparently began its re-legitimation in the case of Sir Francis Burdett, one of the most popular patrician advocates of Parliamentary reform in a period of virulent anti-democratic reaction in Parliament. In 1810 virtually the

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158 Ex parte Jones (1806), 13 Vesey Jr 237 at 238-39.
entire population of London was opposed to Parliament, and the army was suspected of disaffection, but any suggestion of the reform of Parliamentary representation was regarded, by Parliament, as near treason. Burdett, a moderate radical, had the temerity to criticize the House of Commons for committing to prison another London advocate of Parliamentary reform. Burdett's expressed view that their action was illegal led to his imprisonment in the Tower for a contempt of Parliament.

By this time the earlier generation that had opposed the doctrine of summary punishment for constructive contempts was disappearing: Erskine was retiring into private life, and Camden had died in 1794. The finding of Parliament that Burdett could be punished for breach of privilege was opposed almost solely by Sir Samuel Romilly. One of the most brilliant members of the bar, he had already embarked on his attempts to repeal the hundreds of capital statutes in force in England. Romilly recapitulated to a largely hostile House the arguments of the earlier generation: the House makes itself accuser, judge, and party; the accused is deprived of trial by his peers; the doctrine was a relic "from bad times" and "instances of extraordinary powers exerted and submitted to cannot in such a case make law."  

Significantly, Romilly argued that the proceeding for a breach of privilege was equally inappropriate, in the form of an attachment for contempt for scandalizing, in ordinary courts of law. In part this was because what precedents existed were being examined for their relevance to the Commons; in part, perhaps, because the courts themselves were thought to be resuscitating the doctrine. The House voted nonetheless for Burdett's committal; his house was broken into and he was taken to the Tower, to the outrage of popular opinion. Romilly noted, "The soldiers were grossly insulted and attacked...they fired upon the people, and several persons have been killed."  

In Burdett's subsequent lawsuit against the Speaker of the House, the

159 16 Parliamentary Debates (1st series) at 478-87.

Attorney General undoubtedly had such violence in mind when he argued,

If it were certainly known that a man might invent and publish libels upon Courts of Justice for any matters done by them which displeased him, and that he would be free from punishment till the tardy process of the law, (for so it may be called on such an occasion), in its ordinary course of proceeding by indictment, could reach him, men would be found daring enough to hazard the event of that distant day, and to offer to courts of Justice those insults, which in the present day there is difficulty enough to restrain, notwithstanding all the guards by which they are surrounded.\footnote{161}

Scandalizing the court still had an unimpressive pedigree. Parliament investigated as a result of Burdett's case, and found only a few doubtful precedents; for the issue of breach of privilege there was consequently heavy reliance on Wilmot's opinion in \textit{Almon}.\footnote{162} In times of civil unrest reminiscent of the 1760s, both governments and courts found Wilmot's outlook and language attractive. Justice Fletcher of the Irish Court of Common Pleas was an exception when in 1813 he had the temerity to question Wilmot's "vain and silly declamation", calling it

the hasty and warm ebullition of a mind fraught with arbitrary notions, irritated and excited by a severe attack upon his whole Court, especially upon his venerated and adored Chief Justice, and the very reverse of what it is called — a considered, digested, and ulterior opinion...[it is] a mere unconnected, unsupported \textit{dictum}.

Wilmot had been "led away by his passion", and in other judgments was far from infallible, added Fletcher.\footnote{163}

He was rebuked. His Chief Justice concluded for the majority with an opposed decision, and added:

Before I conclude, let me compose the hitherto undisturbed ashes of Lord Chief Justice Wilmot, of whose character and opinions much has been misconceived. On the present

\footnote{161}{Burdett v. Abbot (1811) 14 East 1 at 85-86, 104 ER 501 at 533 (K.B.). The case did not turn on \textit{Almon's Case}, which was not mentioned in the judgment, although it figured prominently in argument (\textit{infra}, text at note 164). The Attorney General misrepresented the difficulty of proceeding with a jury trial: a criminal information was (as Candor had pointed out, \textit{supra}, text at note 66) an immediate remedy, avoiding the delays of prosecution on indictment.}

\footnote{162}{Fox, \textit{supra}, note 10 at 23.}

\footnote{163}{Fletcher also argued that Mansfield indeed had made innovations in the law, and that the central issue was trial by jury, "the noblest bulwark of our Constitution." \textit{Taaffe v. Downes} (1813), reported in John Hatchell, \textit{A Report of the Arguments and Judgment Upon the Demurrer in the Case of Henry Edmund Taaffe, Esq. Against the Right Hon. Wm. Downes, Lord Chief Justice of the King's-Bench} (Dublin: Cooke, 1815) at 158-61.}
occasion, I cannot humiliate that great man’s memory, by entering into a laboured vindication of one of the purest judicial characters, that ever adorned Westminster Hall. There Wilmot has ever been considered ‘Clarum et venerabile nomen’, his opinions and judgments are there, as I hope they will be here, of high authority; and are treated with respect, whenever they are cited; as in the late case of Burdett v. Abbot, when the Attorney General resorts to his admirable argument, as he calls it, in The King v. Almon.\textsuperscript{164}

The Chief Justice did not examine Wilmot’s precedents. But then, Wilmot had cited none that established what he had claimed.\textsuperscript{165}

VIII. CONCLUSION

Through such judicial enthusiasms the common law doctrine of scandalizing the court had its origins. It was first judicially recognized in the passing remark of a puisne judge in 1821, in R. v. Clement.\textsuperscript{166} But it was only with R. v. Gray in 1900 that Wilmot’s shaky opinion, written in the crisis of the 1760s, was sanctified as a judgment by the English bench.\textsuperscript{167} The reasons have yet to be explored, but they appear to include the discrediting of informations ex officio, which fell into desuetude, and the disturbed politics of late Victorian England. But what does the first century of the doctrine’s history, to 1821, suggest? Perhaps that judges read the needs of the times; or that precedent is shaped by political exigency. Probably that scandalizing the court was conceived by two of the most repressive and reactionary lawyers of Walpolian England and given a false pedigree by a judge anxious to criticize another judge and to

\textsuperscript{164} Ibid., at 216-17, Norbury L.CJ. (emphasis in original). Norbury’s praise of Wilmot continues for another page.

\textsuperscript{165} Lord Norbury also incorrectly assumed that the need to change the heading of the process in Almon’s Case had arisen from a clerical error, and that defence counsel admitted that the Father of Candor’s words were a “gross” libel. Neither assumption, as we have seen, could have been farther from the truth. Norbury gained a reputation himself, as a hanging judge, for his zeal in dealing with disaffected Irish peasants.

\textsuperscript{166} 4 B. & Ald. 218 at 233 per Holroyd J. The Clement trial resulted from publication of the proceedings in the trial for high treason of Thistlewood and others who had plotted the assassination of the Cabinet in 1820.

\textsuperscript{167} Supra, note 7. There was convincing criticism of the opinion at the time: see Hughes and Fox, both supra, note 10; Fox at 111. The timing of this resurrection of scandalizing the court is also of interest: I shall treat it in another article dealing with the nineteenth century.
vindicate the political indifference of his Chief Justice, who sat in the Cabinet. What is certain is that scandalizing the court was a doctrine deeply opposed by three of the most prominent lawyers of the age who were committed to the free expression of political opinion: Lord Camden, Lord Erskine, and Sir Samuel Romilly.

For a time, well-reported legal and constitutional arguments and the heroics of a self-martyred printer discredited the doctrine of scandalizing the court and kept both the courts and the public aware that there was meagre if any judicial authority for what had been done to Bingley and others in the 1760s. For a time, too, the political organization of Wilkite politics and the ebullient celebration of a free press made it possible to criticize the politics of the judiciary in the most direct terms, rather than in the coded language of irony, allusion or innuendo that prevailed before and has often prevailed since. Yet the constructive contempt of scandalizing the court was not dead. The doctrine, as we have seen, began to be resurrected by judges during the massive conservative reaction of the English bench and government in the period of the French and Napoleonic wars. In a period when the slightest move toward representative democracy was repudiated as seditious, habeas corpus was repeatedly suspended, and trials for treason and seditious libel again became a crucial concern of the state, the professional reputation of a dead judge, and nothing more, began to act as the imprimatur for his doctrine in Almon.

The constructive contempt of scandalizing the court endures, in modified form, to the present. The later history of the offence is a complex one, as different parts of the common law world drew different conclusions about Almon's Case and those later judgments that cited it, and as different benches endorsed or abandoned it at different times. But some general conclusions are suggested by the history of the first hundred years of the offence. One is that judges persuaded by what they think are reasons of state in times of what they believe to be crisis may be too ready to assume broad and dubious powers. Another is that later judges ignorant of the history and political context of cases may finally confer legitimacy on powers that are not law, for similar reasons or simply because of the filial piety that is never absent from a system of precedent. Why the English bench did so with the doctrine of scandalizing the court may partly be explained by examining the politics of the judiciary in the
eighteenth century. By that I mean not only its evident commitment to certain political principles and hostility to others, but also its profound unwillingness to admit the right of a wider public to debate the legitimacy of its decisions.

Finally, the early history of scandalizing the court suggests that the limit of judicial authority and its degree of immunity from criticism are decided, in the end, neither by the bench nor by the law, but by the readiness of the public to claim the right to speak about its courts, and perhaps especially by the willingness of critics of the judges to risk imprisonment in their assertion of that claim.