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Hewitt, Martin

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## The Press and the Law

Martin Hewitt, University of Huddersfield

'A newspaper proprietor lately remarked to me that all the profits of an honest journal were destined to find their way into the pockets of the lawyers'<sup>1</sup>

Nothing more fundamentally defined the identity of the British press in the nineteenth century than its 'freedom'. In contrast to the press of continental Europe,<sup>2</sup> it was free from direct state censorship. On the other hand, unlike America, where liberty of expression was constitutionally enshrined, the formal legal sanction of British press freedom was meagre, merely, in the words of Lord Chief Justice Mansfield, 'consist[ing] in printing without any previous licence, subject to the consequences of the law'.<sup>3</sup>

The 'consequences of the law', as nineteenth century proprietors, printers, editors, journalists, and newsagents were all too aware, were legion. Although legal guides for the press naturally focused on the laws relating to copyright and libel, the reality was that newspapers needed to accommodate themselves to all sorts of legal requirements. Employing staff, publishing advertisements, using printing machinery,<sup>4</sup> all created legal liabilities, and the idiosyncrasies of Victorian legislation left many traps for the careless or the ignorant, such as conviction for advertising a reward for the return of stolen property, made potentially illegal by the 1861 Larceny Act. William Lucy, later editor of the *Daily News*, characteristically recalled carefully studying 'a handy little volume of the "Law of Partnership"' before entering into his first editorial responsibilities.<sup>5</sup> Given the number of insolvencies, perhaps bankruptcy law and its courts were the most significant legal processes for the nineteenth century press.

The law was also, of course, a staple of nineteenth century newsprint, only eclipsed by politics in the number of column inches it generated. Legal obligations to publish and announce created a valuable revenue, threats to which were fiercely resisted. A paper like the *Times*, which saw the quality of its law reports as integral to its reputation, might maintain a substantial cadre of expert reporters. But for the most part, reporting the law courts was the unglamorous end of Victorian journalism, part of the 'bitter sorrow' of a journalistic apprenticeship, or the home of penny-a-liners scavenging for a profitable murder.<sup>6</sup> While the metropolitan dailies provided detailed coverage of the London courts, provincial papers devoted considerable space to magistrates', coroners' and assize courts. Through their 'Answers to Correspondents' columns, working class papers acted as legal advisors to their readers.<sup>7</sup> Beneath this was a sub-stratum of the press, most enduringly the *Illustrated Police News* (1864-1938), providing lurid details of criminal life drawn from the police courts.<sup>8</sup> Although the evolution was not straightforward, from the 1850s the new cheap papers increasingly imported the styles of popular sensation journalism into the mainstream press.<sup>9</sup> Murders were already generating prurient attention in the 1820s and 1830s, when the press still competed with broadsides. In the

early 1840s, the *Illustrated London News* was initially conceived as entirely a record of crime.<sup>10</sup> A good murder trial could triple or quadruple sales, and even persuade weekly papers to publish daily. The 'Ardlamont Mystery' trial in Edinburgh in 1893 attracted twenty feature writers, fifteen artists and over seventy reporters.

In this context, it is perhaps not surprising that socially and culturally the connections between press and law were strong, especially in London, where in and around Fleet Street, newspapers jostled for space with the inns of court,<sup>11</sup> the rooms of journalists and barristers existing cheek by jowl.<sup>12</sup> Neophyte lawyers frequently supplemented their fees with journalistic work, just as many of the literary journalists of the London press initially trained for the law. In his youth, Frederick Knight Hunt, founder of the *Medical Times* and later editor of the *Daily News*, worked in the printing office of the *Morning Herald* at night, and as a barrister's clerk during the day.<sup>13</sup> The law also provided its fair share of prominent journalists, editors, and proprietors, perhaps most notably Edward William Cox, proprietor of *The Field* and *The Queen*, founder of *Exchange and Mart*, and the *Law Times*, a barrister who rose to be Deputy Assistant Judge at Middlesex sessions while establishing himself as one the century's most vigorous newspaper entrepreneurs.

Despite these connections, relations between the law and the press were fractious through much of the century. The suspicion long persisted that the judiciary had a jaundiced view of the press. In the mid-1840s moves to ban barristers in the Oxford and Western Circuits from reporting for newspapers created a fierce controversy about legal prejudice against journalism, especially newspaper journalism.<sup>14</sup> But judging by the autobiographical writings of William Jerdan, editor of the *Literary Gazette*, press prejudice against the law could be equally virulent.<sup>15</sup> There was intermittent debate as to whether newspaper editors or proprietors were fit persons for the magistracy; in 1869 the Provincial Newspaper Society protested when the nomination of F.W. Cutbush of the *South Eastern Gazette* was vetoed.<sup>16</sup> Although the status of journalism steadily improved as the century progressed, notwithstanding the emergence of the 'higher journalism' undergraduates at Oxford in the 1880s were still directed to the bar and warned off journalism as an 'impossible profession' 'fatal to good manners and honest thought'.<sup>17</sup>

## Repression

The first third of the century produced an especially hostile environment for the press. As William St Clair has suggested, '[d]uring the Romantic period and later, the British state mounted the last sustained attempt in the country's history to control the minds of citizens by controlling their access to print'.<sup>18</sup> Lord Sidmouth, Home Secretary, 1812-22, described the press as the 'most malignant and formidable enemy to the constitution'.<sup>19</sup> Newspaper proprietors, printers and newsvendors were subjected both to new legislation and the weight of common law. The 1799 Seditious Societies Act made the registration of all presses and printing types compulsory, required the printer's name on all printed matter, and the retention of a file of all printing for inspection. Extensive use was made of the three categories of 'disorderly libel', under which newspapers were subject to state prosecution for printing material deemed seditious, blasphemous or obscene. Judicial pronouncements propagated a broad compass for disorderly libels: the press could point out to the government its errors, but to appeal to the passions of the lower orders was sedition, and 'prosecuting societies' like the Society for the Suppression of Vice (1802-) searched vigilantly for any

sign of licentiousness.<sup>20</sup> Efforts were made to try to drive newspapers beyond the purchasing power of the poor. The newspaper stamp was increased from the 1d of 1776 to 4d by 1815. Excise duties were imposed on newspaper advertisements and on paper. The proliferation of radical journals, such as Cobbett's *Twopenny Trash* and Wooler's *Black Dwarf* after 1815 prompted further legislation, including the Blasphemous and Seditious Libels Act and the Newspaper Stamp Duties Act (1819) which required proprietors to find sureties against fines for libel, forced publications appearing more frequently than monthly to be stamped as newspapers, and according to Philip Harling had a 'devastating effect on the radical press'.<sup>21</sup>

During these years press prosecutions were endemic, and not just for the radical press: in 1813 Leigh and John Hunt, editor and printer of the *Examiner*, were convicted for publishing a 'scandalous and defamatory' libel on the Prince Regent.<sup>22</sup> During 1817-20 it is possible to identify as many as 175 politically-inspired libel prosecutions.<sup>23</sup> Defendants were denied information about the nature of the charges they faced. Judges were biased, juries often deliberately packed. But this was only the heavy artillery. Legal pressure operated pervasively through 'informations'. Technically these were merely expedited prosecutions instituted by the Attorney General. But because they often required the posting of substantial sureties, allowed months of imprisonment without trial, and were open-ended, they could be left hanging over journalists for years.<sup>24</sup> By later standards, sentences were savage: Daniel Lovell, proprietor and editor of the *Statesman*, spent more than four years in Newgate prison 1812-16, because having served his initial 18 month sentence, he was unable to find the securities for good behaviour required for his release.

Paradoxically, radical editors used the constraints of the libel laws to constitute spaces of opposition, both textual and physical. As Kevin Gilmartin comments, 'trials for seditious and blasphemous libel became a key forum for radical assembly and verbal expression'; they were 'intensely combative and dialectical, spilling from the courtroom to the press and back again'.<sup>25</sup> Fox's Libel Act of 1792 made it the responsibility of juries to determine both the fact of publication and whether it amounted to sedition: thereafter libel trials were, as Harling has noted, 'a perilous gamble for the government'.<sup>26</sup> Editors and journalists used the latitude given them in court to draw out the absurdities and prejudices of 'judge-made law' and persuade jurors, notwithstanding direct judicial instruction, to find in their favour.<sup>27</sup> When Richard Carlile was prosecuted for selling Paine's *Age of Reason* he was not only able to sell all his stock of the book, but also increased the circulation of his *Republican* by 5,000 to 15,000. Prison did not always deter or restrain: several of Carlile's shopmen spent two years in Newgate publishing the anti-Christian *Newgate Monthly Magazine*.<sup>28</sup> Equally it is clear that successive bouts of imprisonment could blunt oppositional journalism. T.J. Evans, editor of the *Manchester Observer*, imprisoned for 18 months in 1820, resumed his journalistic career, but in the markedly more respectable and moderate guise of parliamentary reporter with the *British Press*.<sup>29</sup>

This assault on the press gradually ebbed in the 1820s and 1830s; not because the state sought to relax its grip, or because of any legislative change, but rather because direct assault came to be seen as counter-productive.<sup>30</sup> Aled Jones suggests that two landmark cases, the failure of the Duke of Wellington to prosecute the *Morning Chronicle* in 1829, and the acquittal in 1831 of William Cobbett in a case brought by government ministers, heralded the abandonment of any widespread application of the libel laws for political purposes.<sup>31</sup> At the same time, the press was gradually obtaining some limited legal recognition of its rights to publish. In 1840 newspapers formally obtained the right to report Parliamentary debates. By a series of legal judgements the press also

acquired qualified privilege to report on proceedings in the law courts, initially in the London Courts of Justice, but by mid-century extending to local magistrates' courts on the same terms.<sup>32</sup> Nonetheless, press liberty remained a matter of toleration not right, of 'popular sympathy rather than ... legislative enactment' as the *Morning Star* put it in 1860.<sup>33</sup>

### Political Prosecutions in the final two thirds of the century

As the government abandoned repression, state prosecution theoretically became something that marked the subjugation of the foreign press. Even so, the overhaul of the libel laws in 1843 left prohibitions of 'disorderly libel' essentially untouched, and indeed at times seditious laws were not only used but reinforced. Political prosecutions waned, but they did not cease entirely.<sup>34</sup> Chartist editors including Bronterre O'Brien and Feargus O'Connor in the 1840s, and Irish nationalist editors including John Mitchell, editor of the *United Irishman* in 1848, were imprisoned or transported for seditious speeches or articles. In the late 1880s Irish newspaper proprietors were imprisoned under the Coercion Act merely for reporting meetings of the suppressed National League, and shopkeepers for selling the *United Irishman*.<sup>35</sup> *Reynolds's Weekly News* observed in 1866 that 'in Ireland the press is under a more crushing and remorseless censorship than that which prevails in France'.<sup>36</sup>

In Britain obscenity was of more enduring significance than sedition. Prior to the 1868 'Hicklin ruling', which broadened the definition of obscenity to that which 'has the tendency to deprave and corrupt', obscenity had been governed by the common law of obscene libel, given statutory authority and enhanced police powers but not fundamentally altered by the 1857 Obscene Publications Act. In proposing the 1857 Act Lord Campbell had called attention to 'periodical papers of the most licentious and disgusting description'.<sup>37</sup> In fact the law was more usually applied to pornographic pamphlets and novels of dubious morality than to the press. Even in the early decades of the century, when the links between radicalism and pornography had been particularly strong, although prosecutions and imprisonments occurred, a figure like Henry Vizetelly, editor of the *Satirist* (183?-??), 'a ferocious anti-Tory scandal rag' which supposedly earned him substantial blackmail fees, was as likely to be horsewhipped as prosecuted.<sup>38</sup>

There were occasional prosecutions. The London publisher William Strange was convicted in the mid-1850s for selling two penny magazines, *Women of London* and *Paul Pry*, and in 1870 Charles Grieves endured a year's hard labour for publishing an illustration of bare-legged dancing girls on the cover of his weekly, *The Ferret*.<sup>39</sup> But at the same time from the 1840s the risqué narratives characteristic of the penny fiction papers spread to popular journalism which, especially after the creation of the Divorce Court in 1857, dwelt increasingly on what the *Saturday Review* called 'a whole class of cases the discussion of which, though not necessarily obscene', were 'always hovering on the verges of the prurient'.<sup>40</sup> The Yelverton bigamy trials of 1857, whose influence on the sensation fiction of the 1860s has been widely acknowledged, was only one of a series of similar *causes celebre*.<sup>41</sup> This sort of journalism was increasingly central to attempts to construct mass reading audiences in the final third of the century.<sup>42</sup> In the 1880s lobbying of the Home Office to take action against vulgar, vile and pernicious periodicals prompted informal pressure on the press to self-censor coverage of divorce cases and criminal trials.<sup>43</sup> In 1879 Adolphus Rosenberg, editor of *Town Talk*, was sentenced to 18 months in prison for reporting that the actress Lillie Langtry had had

an affair with Prince Albert.<sup>44</sup> In normal circumstances, however, there was little legal restraint on coverage of this sort. Significantly, the imprisonment of W.T. Stead, editor of the *Pall Mall Gazette* in the notorious 'Maiden Tribute of Modern Babylon' case of 1885, with its lurid accounts of rape and abduction, was for child abduction not obscenity.

In the case of blasphemy too, a common law offence constituted in the sixteenth and seventeenth centuries, reinforced by statute in the 1830s, but imprecise as to the boundaries of acceptable criticism of religion, was generally applied, if at all, to books rather than periodicals, and as in the prosecution of Henry Hetherington, champion of the unstamped press, largely touched on the press only indirectly. Although prosecutions were rare, as Joss Marsh has suggested, blasphemy laws provided weapons which could be used as surrogates for more general hostility to the press. From this perspective the prosecution of G.W. Foote, editor of the *Freethinker*, who was sentenced in March 1883 to a year in prison, reflected intensified anxieties at the 'new tabloid press, and the expansion and dumbing down of the journalistic public sphere'.<sup>45</sup>

### **The 'Liberalisation' of press control**

As the significance of political libel ebbed from the 1820s, the burden of state attempts to control the press shifted to the fiscal exactions which became known as 'the taxes on knowledge', the advertising duty, the paper excise, and in particular the newspaper stamp duty, which emerged from the relaxations of state pressure unscathed. The constraints were not merely financial. The necessity to print on stamped paper involved presses in considerable labour; it was not unknown for the lack of stamped paper to involve the cancellation of an entire edition.<sup>46</sup> Before 1848 when the loophole was closed, a number of titles were printed in Jersey and the Isle of Man to circumvent stamp legislation.

In the early 1830s government attempts to suppress those radical papers, such as Cobbett's *Political Register*, which had survived the enforcement of the legislation of 1819 turned primarily to the stamp regulations, initiating what became known as the 'war of the unstamped'. The Stamp Office warned and then prosecuted editors of unstamped newspapers. Printers were tracked down and their presses confiscated. Stocks of unstamped papers were seized. Patricia Hollis notes that between 1830 and 1836 at least 1130 cases of selling unstamped papers were considered by the London magistrates, and by 1836 almost 800 people had been imprisoned.<sup>47</sup> None of this prevented the most successful of the unstamped achieving large sales: by 1836 the combined sale of the *Poor Man's Guardian* and the *Weekly Police Gazette* exceeded that of the *Times*. Faced with threats from the owners of the stamped press of evasion of the duty, the 1836 Newspaper Stamp Act cut the stamp from 4d to 1d while at the same time toughening the police's powers to confiscate printing presses, and increasing the securities required by newspaper proprietors.

The settlement of 1830s was a carefully calculated compromise. The rug of public sympathy was pulled out from under the promoters of the unstamped press. The advertising duty, although reduced from 3/6 to 1/6, encouraged substantial weekly publication, rather than smaller more frequent issues, because this retained maximum currency for expensive advertisements. This and the effectively enforced penny stamp helped shore up the established press, the *Times* in London, and the leading county weeklies in the provinces, and for twenty years entrenched a newspaper

culture which promoted public reading in clubs, pubs and newsrooms, rather than the purchase of personal copies for private reading.

It was only in the 1850s that effective resistance was renewed by the Association for the Promotion of the Repeal of the Taxes on Knowledge. The newspaper interest was far from united. Many of the established papers welcomed the penny stamp as a protection against unfettered competition, and argued that the right to free and unlimited postage which it furnished was more than sufficient recompense. Opponents contended that the stamp, by preventing the publication of penny papers, effectively stymied the development of a popular daily press, and handed a dominant position to *The Times*. Ultimately, a carefully orchestrated demonstration of the inconsistencies and absurdities of the regulations encouraged the abandonment of the advertising duty in 1853, the removal of the compulsory newspaper stamp in 1855, and finally the abolition of the paper duties in 1861. As the established papers had feared several years of frantic instability ensued, especially in the provinces. By the later 1860s there had been a clear transformation of the press: new metropolitan rivals to *The Times* like the *Daily Telegraph*, a significant cadre of provincial dailies like the *Manchester Guardian*, the proliferation of local titles, and a comprehensive cheapening of prices which greatly increased sales and encouraged new modes of private reading.

### Registration

Briefly in the mid-1850s it had appeared that the removal of the compulsory stamp would be accompanied by the abandonment of the requirements for registration and sureties. Since the eighteenth century registration had been fundamental to the operation of legal pressure on the press, providing the means to identify those responsible for what newspapers published. The forms of registration, which for even a minor change of title, publishing arrangement or proprietorship, could involve co-ordinating as many as eighteen different parties, were generally irritating rather than onerous, but were yet another obstacle to prospective publishers.<sup>48</sup> In the run up to 1855 large sections of the existing press, successfully resisted calls for this repeal.<sup>49</sup>

In reality the registration laws were never efficiently enforced. More often than not, where action was taken, it was prompted by local rivalries. In 1865 it was suggested that there were 361 unregistered papers nationally, more than a quarter of the total.<sup>50</sup> After 1855 there were intermittent and uneven attempts to enforce the rules. Although there were only a handful of actual prosecutions, because papers eventually complied, the new penny press was especially resentful of what the *Luton Times*, called 'this absurd system' with its 'unnecessary harassment of newspaper proprietors'.<sup>51</sup>

Matters were brought to a head by attempts to enforce the registration of the *National Reformer*, a secularist paper edited by Charles Bradlaugh. Not least because in his case the necessity of finding securities against blasphemy struck at the very core of the paper's identity and purpose, Bradlaugh defied the Revenue to prosecute. Faced with the uncomfortable prospect of creating a press martyr, in 1869 the government dropped the case and speedily passed the Newspapers, Printers and Reading Rooms Act which abandoned both register and sureties.

In practice, the break was only temporary. The desire for cheap newspaper postage brought partial reinstatement in 1870 when the Post Office Act required the registration of newspapers intended for transmission through the post. Over time successive Postmasters-General constructed an elaborate series of rules which were rather arbitrarily enforced.<sup>52</sup> And almost as soon as registration was abolished there were second thoughts; the Law Society expressed anxiety that it would be more difficult to enforce the libel laws if newspapers proprietors were not officially recorded.<sup>53</sup> An 1876 bill requiring registration was successfully opposed, but many provincial proprietors continued to advocate registration and sureties as a defence against irresponsibility,<sup>54</sup> and more formal registration requirements for England and Wales and Ireland were reimposed by the Newspaper Libel and Registration Act (1881), which transferred responsibility to the registrar of joint stock companies. Once again the law operated unevenly. It was acknowledged in 1893 that the official *Labour Gazette* was not registered, giving rise to some dry comments about ministers feeling themselves above the law.<sup>55</sup>

## Libel

Acceptance of the reimposition of registration reflected renewed anxieties about the law of libel, a reminder that after the removal of fiscal constraints in the mid-century, even though political trials were largely a thing of the past, the law of libel remained by far the most important legal entanglement of the newspaper press.

Lucky indeed was the Victorian editor or newspaper proprietor who survived a career without being dragged into at least one libel case. Joseph Soames, solicitor to the *Times*, noted in 1889 that over the previous seven years he had assisted in over 100 newspaper defences against libel actions.<sup>56</sup> The practice of extracting meant that a single libel could be quickly republished widely, drawing multiple titles into the maw of legal action. In one notorious case of the 1880s, Joseph Chicken Colledge, a minor diplomatic official in the Crimea, successfully sued the *Globe*, the Central News agency, and over 30 provincial papers, being awarded in total nearly £5000 and costs.<sup>57</sup> Even where fines were negligible, costs could be substantial. A libel case in 1857 cost the editor of the *Durham Advertiser* £400, although damages were assessed at only 1 farthing.<sup>58</sup> Given the precarious finances of many nineteenth century papers, such losses could easily be fatal. And the court cases were only the tip of the iceberg. The history of the engagement of the press with the laws of libel is largely hidden, resting in the daily practices of self-policing and literary restraint operated by journalists and editors. As Sir John Robinson recalled in 1904, newspaper coverage was produced with a keen regard to the dangers of libel.<sup>59</sup>

The avoidance of potential libels was one of the crucial tasks of the sub-editor. The task was not easy, because libel remained a legal minefield. Advice on libel was a staple of the trade press and the guides to newspaper law. The inadequacies of the law were widely accepted, but the sanctity Victorians awarded personal reputation meant solutions were elusive. Libel law remained in essence common law, constituted by the shifting sands of precedent, uncertain and unstable. There was no fixed definition. Except in Scotland, libel could be either a criminal or a civil offence, with different legal procedures, definitions, and defences. The 1843 Libel Act allowed a defence of truth in civil cases, but not in criminal ones unless a public interest could be proved. Liability extended almost indiscriminately across proprietors, printers, editors, even agents and newsvendors. Nor was there



any consistent understanding of what might be appropriate damages where libels were proved: this was the province of the jury, and was constrained only by the power of the appeal courts to set aside obviously unreasonable awards. The tendency of the courts to award prosecution costs in all cases of conviction, even where the damages awarded indicated that the offence was merely technical, left the press open not only to the adventurer, hoping to extort a compromise, but also all sorts of shady practices, such as attempts to place libellous items with the deliberate intent of then threatening prosecution.<sup>60</sup>

Above all, the press remained bitterly resentful of the fact that they could find themselves liable to conviction merely for accurately reporting the proceedings of properly constituted public meetings or public bodies. Advocates for the press urged without success the argument that a newspaper was not merely a private commercial speculation but 'a trustee for the public, the self-appointed guardian of its worthiest interests', as the *Sydney Empire* put it in 1863.<sup>61</sup> Offset against this ideal, however, must be set the tendency of nineteenth century journalism to indulge in often reckless vituperation of political opponents, only to be nonplussed when a summons for libel ensued. Some late century pioneers of society journalism like Henry Labouchere, the owner of *Truth*, actively courted the notoriety of the libel courts.<sup>62</sup> Indeed William Hunt, editor of the *Eastern Morning News*, acknowledged that his conviction for libel in 1866 'did the paper good', his costs were reimbursed by public subscription, and public sympathy was engendered.<sup>63</sup>

For all this, almost as soon as the newspaper industry had seen off the advertising and stamp duties, the attention of bodies like the Newspaper Society turned to reform of the libel laws. A House of Lords Select Committee investigated the privilege of reports in 1857, and a Commons Select Committee in 1879-80 examined the libel laws and the press more broadly. Here again newspaper opinion was not unanimous; from the conservative standpoint the libel laws helped ensure that the press was 'more free from scurrility, scandal and slander of private character than any Press in the world'.<sup>64</sup> Bills in 1858, 1865, 1867 and 1878 attempted variously to limit the press's liability for prosecution costs where the damages levied were less than 20/-, to define appropriate restitution for libels published without malice or gross negligence, and above all to establish the principle of a press privilege to report in full public meetings without liability for libel.

Eventually, in 1881 the Newspaper Libel and Registration Act appeared to offer privilege to any report of a public meeting convened for a legal purpose if it was fair, published without malice and for the public benefit. Unfortunately uncertainties remained, and prosecutions continued.<sup>65</sup> A Libel Law Reform Committee in which Henry Whorlow, Secretary of the Newspaper Society, was prominent pressed for further reform. A further Libel Act of 1888 required the consolidation of libel proceedings, in the hope of avoiding repeats of the Colledge affair, and transferred responsibility for proving malice to the plaintiff. But the Act did not extend privilege to any sort of commentary, even headlines, and did not remove liability for costs in the case of conviction, even where damages were purely nominal, and newspapers continued to need to prove their reporting was in the public good. During the 1890s, the Newspaper Society unsuccessfully promoted an almost annual libel bill which allowed Judges to require plaintiffs to give security for costs.<sup>66</sup> Unfortunately, the increasing sensationalism of the press served only to reinforce legal suspicion: papers, it was observed 'publish libellous statements ... because they find that it pays: many of their readers prefer to read and believe the worst of everybody, and the newspaper proprietors cannot complain if juries remember this in assessing damages'.<sup>67</sup>

## Contempt of Court

By then, press attention was also being drawn to 'contempt of court' proceedings. Set loose by precedents such as the celebrated Tichborne Claimant trials of 1868-74, and thereafter fuelled by the rise of 'sensation journalism', contempt of court was a particularly broad and ill-defined misdemeanour dependent wholly on the decisions of each court and presiding judge as to procedure, punishment and even scope. Three broad types of 'contempt' can be distinguished: government-inspired proceedings designed to suppress criticism of legal institutions; attempts by individual judges to maintain their dignity and that of their courts; and motions by which one party sought to invoke contempt in order to further a private action.

As with libel, invocation of the law was the exception. But given the extent to which legal proceedings formed the raw material of journalism, the jeopardy of the press was potentially enormous. After 1830 instances of the first sort were confined to colonial contexts, deployed in defence of the imperial state (as in the cases of Alfred Moseley of the *Nassau Guardian* and Charles McLeod of the Grenada-based *Federalist*).<sup>68</sup> Instances of the second sort although also relatively infrequent did, when they flared up, illuminate the vulnerability of editors to arbitrary action. The case in 1851 of M.J. Whitty, who was pursued by a county court judge who took exception to an advertising placard for his paper the *Liverpool Journal*, and eventually imprisoned him in default of payment of fines for various 'offences' including contempt of court and resisting arrest, shows the wide prerogatives judges could assume.

From the later 1860s it was cases arising out of private actions which rapidly proliferated. Financial journalism seems to have been especially prone to entanglements of this sort, but in the final decades of the century contempt cast its net fairly indiscriminately. In most instances editors found that abject contrition was enough to assuage the courts. Fines were usually token, although punishments could be substantial. In 1882 Edmund Dwyer, editor of the *Freeman's Journal*, was sentenced to three months and a £500 fine for reporting that the jury in a murder trial had been drunk the night before the verdict.<sup>69</sup> The broad discretion contempt procedures allowed made it the natural instrument for attempts in the later 1890s to provide for the prohibition of the publication of indecent evidence in the newspapers. Journalists were lukewarm, but press interests were vocal in their opposition. '[T]he whole of the jurisdiction claimed and exercised by the Judges is utterly inconsistent with the freedom of the Press, and with the public interest in knowledge of the truth', trumpeted the *Daily News* in 1892.<sup>70</sup>

For a long time there was little appetite to protect the press. The judiciary was more concerned that the newspapers should not, as Vice-Chancellor James expressed it in 1869, put themselves 'in the judgement seat' before the hearing of a case.<sup>71</sup> Even so, by the 1890s the prevalence of contempt cases, and indications that in some circumstances legal proceedings were being commenced with the ulterior motive of gagging newspapers, prompted the judiciary to differentiate between a technical offence and one where there was a clear tendency to prejudice a fair trial.<sup>72</sup> In 1896 in dismissing a case against the *Huntingdonshire Post*, Lord Chief Justice Russell regretted the growing frequency of applications for contempt: the power of committal might in some instances be necessary, he conceded, but should only be exercised in extreme cases.<sup>73</sup>

## Copyright and the Press

The 1890s also saw a renewed attention to questions of newspaper copyright. The limitations of nineteenth century copyright protection in respect of literature more generally are well-known.<sup>74</sup> The position of the press was even more complex and uncertain. The key nineteenth century statute, the 1842 Copyright Act, made no mention of newspapers at all, although it was generally accepted that newspapers could be considered a 'book' under the terms of the act.<sup>75</sup> But this only helped in respect of commentary because the vesting of rights in the literary rendition derived from and reinforced the principle that there could be no copyright in information itself, and thus none in news *per se*. Similarly, the clauses with which it dealt with transfer of copyright in serial works had little relevance for the press, where the established custom was that copyright in contributions continued to be the property of the author unless newspapers made specific indication of the contrary.<sup>76</sup>

Even copyright in the titles of newspapers was uncertain. Although legal commentaries suggested that a right analogous to a trademark protection, which prevented deliberately misleading titles, had been established by various legal precedents in the decades after 1842,<sup>77</sup> the ending of registration in 1869 rekindled anxieties. Proprietors were assured that copyright in title could be enforced by registration at Stationers Hall.<sup>78</sup>

More significant was the licence the absence of copyright in news afforded to the wholesale practice of cut and paste by which large swathes of newspaper copy were got up for much of the century. Few nineteenth century newspapers could have survived long without the facility for unrestricted borrowings from their contemporaries, acknowledged and unacknowledged. Although the extent of this appropriation was an occasional grouse of the leading London dailies, particularly the *Times*, which incurred significant expenses in newsgathering and yet saw its material copied within hours by the evening papers,<sup>79</sup> the press generally had little interest in championing copyright in news.

This said, at the end of the century the appearance of newspapers composed almost entirely of extracts once again prompted calls for protection, led by the colonial press.<sup>80</sup> A number of Australian states recognised the costs of acquiring telegraphic news by granting 48 hours copyright in it. In Britain, in conjunction with the Society of Authors, and a Copyright Association, some newspapers continued to press for amendment of the law. An abortive bill of 1891 proposed that a specific copyright reservation might be applied to parts of a newspaper, and in 1892 in a case against the *St James' Gazette*, the *Times* argued that news was as much a manufactured article as was the form of words in which it was expressed.<sup>81</sup> The evidence to the Select Committee of 1898-99 showed the difficulty of balancing copyright in newsgathering against established borrowing practices. Ultimately the Newspaper Society came out largely against any further tightening of the law, while the London press and the Institute of Journalists were more inclined to be in favour. In 1900 a proposal of an 18 hour copyright did not pass into law, but in a separate case the House of Lords judged that it was possible to assert copyright in reports of public speeches.<sup>82</sup>

## Conclusion

The search for copyright in news serves as a reminder that the law could protect as well as constrain, just as the resulting tensions between proprietors and journalists remind us that at no point in the century was there a monolithic 'press' interest, any more than there was a one-dimensional relationship between newspapers and the law. As David Saunders has argued in relation to law and literature, to conceive of the press and law in entirely oppositional and negative terms is to miss the mutually constitutive nature of their relationship.<sup>83</sup> The nineteenth century press enjoyed protections and freedoms denied to many of its continental and colonial counterparts, albeit via customary toleration rather than specific safeguards. At the same time the legal system resisted the claims of the press to public good exclusions; pressmen and women were as liable as any other citizen, more so, since they were implicated in the process of dissemination. The press might have complained, at times vehemently, at the uncertainty of its legal position, but this uncertainty was probably more beneficial than otherwise. The twentieth century was to bring greater clarity, but also more organised pressures for censorship: of indecent material in peacetime, and of reporting more generally in wartime.<sup>84</sup> As Lord Chief Justice Mansfield had declared in 1784, 'To be free, [was] to live under a government by law'.

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## Further Reading

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- <sup>1</sup> John B. Hopkins, 'Liberty and Libel', *Gentleman's Magazine* 9 (August 1872), 185-95, 185. My thanks to Michael Lobban for his suggestions.
- <sup>2</sup> R.J. Goldstein, *Political Censorship of the Arts and the Press in Nineteenth Century Europe* (1989).
- <sup>3</sup> Quoted in C. Kent, 'The Editor and the Law', in Joel Wiener, ed., *Innovators and Preachers. The role of the editor in Victorian England* (1985), 99-119, 100.
- <sup>4</sup> See Arthur Powell's *The Law specially affecting printers, publishers and newspaper proprietors* (1887).
- <sup>5</sup> H.W. Lucy, *Sixty Years in the Wilderness* (1911), 42-43.
- <sup>6</sup> 'Advice to a Young Journalist, by An Old Hand', *Bookman*, (January 1892), 140-2.
- <sup>7</sup> Thomas Catling recalls that Jonas Levy, founder of *Lloyds*, trained as a barrister and wrote the Answers to Correspondents for over fifty years, *My Life's Pilgrimage* (1911), 228-29.
- <sup>8</sup> See Linda Stratmann, *Cruel Deeds and Dreadful Calamities: the Illustrated Police News 1864-1938* (2011).
- <sup>9</sup> Thomas Boyle, *Black Swine in the Sewers of Hampstead. Beneath the Surface of Victorian Sensationalism* (1989), *passim*.
- <sup>10</sup> R.D. Altick, *Victorian Studies in Scarlet* (1970), 60, for this and subsequent material.
- <sup>11</sup> E. Beresford Chancellor, *The Annals of Fleet Street* (1912).
- <sup>12</sup> *Briefs and Papers. Sketches of the Bar and the Press* (1872), 6.
- <sup>13</sup> J.L. Hunt, 'Dr Frederick Knight Hunt (1814-54) revisited: medical man and journalist', *Journal of Medical Biography* 14.3 (August 2006), 129-35.
- <sup>14</sup> J.-M. Schramm, 'The Anatomy of a Barrister's Tongue: Rhetoric, Satire and the Victorian Bar in England', *Victorian Literature and Culture*, 32.2, (2004), 295-97.
- <sup>15</sup> *The Autobiography of William Jerdan, with his Literary, Political and Social Reminiscences* (4 vols, 1852).
- <sup>16</sup> *Huddersfield Chronicle*, 2 October 1869.
- <sup>17</sup> J.A. Spender, *Life, Journalism and Politics* (1927), 22, quoting Benjamin Jowett.
- <sup>18</sup> W. St Clair, *The Reading Nation in the Romantic Period* (2004), 309.
- <sup>19</sup> Quoted in R.J. Goldstein, 'A land of relative freedom: censorship of the press and the arts in the nineteenth century (1815-1914)', in Paul Hyland and Neil Sammells, *Writing and Censorship in Britain* (1992), 125-40, 129.
- <sup>20</sup> Judgement of Mr Justice Best, quoted W.H. Wickwar, *The Struggle for the Freedom of the Press* (1928), 118-19.
- <sup>21</sup> Philip Harling, 'The Law of Libel and the Limits of Repression, 1790-1832', *Historical Journal* (2001), 107-34, which informs much of the following material (quote at 131).
- <sup>22</sup> For details of prosecutions see *Return of Individuals Prosecuted for political libel and seditious conduct... British Parliamentary Papers*, (1821), 379.
- <sup>23</sup> See Wickwar, *Struggle*, 97-114; Donald Thomas, 'Press prosecutions of the eighteenth and nineteenth centuries: the evidence of King's Bench indictments', *The Library* 32 (1977), 315-32, 327-28.
- <sup>24</sup> Harling, 'Limits of Repression', 113.
- <sup>25</sup> Kevin Gilmartin, *Print Politics. The Press and Radical Opposition in Early Nineteenth Century England* (1996), 115.
- <sup>26</sup> Harling, 'Limits of Repression', 110.
- <sup>27</sup> See A. Prentice, *Historical Sketches and Personal Recollections of Manchester* (1851), 386-391.
- <sup>28</sup> Harling, 'Limits of Repression', 119.
- <sup>29</sup> Iain McCalman, *Radical Underworld: Prophets, Revolutionaries and Pornographers in London, 1795-1840* (1993), 183-84.
- <sup>30</sup> For the background, and replacement of libel prosecutions with those for unlawful assembly, see M.J. Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the changing face of political crime, c.1770-1820', *Oxford Journal of Legal Studies*, 10.2 (1990), 307-52.
- <sup>31</sup> Aled Jones, *Powers of the Press. Newspapers, Power and the Public in Nineteenth Century England* (1996), 13.
- <sup>32</sup> Kent, 'Editor and the Law', 109.
- <sup>33</sup> Quoted *Belfast News*, 15 December 1860.
- <sup>34</sup> Various instances detailed in Wickwar, *Struggle*, especially in the early 1820s, inc 221-38.
- <sup>35</sup> J.J. Clancy, *Mr Balfour as a Lover of Truth* (1888), 4-5.
- <sup>36</sup> *Reynolds's Weekly News*, 12 January 1866.

- <sup>37</sup> Quoted in Katherine Mullin, 'Poison More Deadly than Prussic Acid: Defining Obscenity after the 1857 Obscene Publications Act (1850-1885)', in David Bradshaw and Rachel Potter, eds, *Prudes on the Prowl: Fiction and Obscenity in England, 1850 to the Present Day* (2013), 13.
- <sup>38</sup> McCalman, *Radical Underworld*, 219-37, quote at 225.
- <sup>39</sup> Donald Thomas, *Freedom's Frontier. Censorship in Modern Britain* (2008), 44.
- <sup>40</sup> Allison Pease, *Modernism, Mass Culture and the Aesthetics of Obscenity* (2000).; 'A Month in the Divorce Court', *Saturday Review*, 8 January 1859, 36.
- <sup>41</sup> Lauren Harmsen Kiehna, 'Sensation and the Fourth Estate: *The Times* and the Yelverton Bigamy Trials', *Victorian Periodicals Review*, 47.1 (Spring 2014); Richard D. Altick, *Deadly Encounters. Two Victorian Sensations* (1986).
- <sup>42</sup> J. Walkowitz, *City of Dreadful Delight. The Narrative of Sexual Danger in Late Victorian London* (1992).
- <sup>43</sup> Joss Marsh, *Word Crimes: Blasphemy, Culture and Literature in Nineteenth Century England* (1998), 208-10; John B. Hopkins, 'The Liberty of the Press', *Tinsley's Magazine* 40 (1887), 120-35.
- <sup>44</sup> Allison Lee, 'A Secret Censorship', A.D. Pionke and D.T. Millstein, eds, *Victorian Secrecy* (2010), 184.
- <sup>45</sup> Marsh, *Word Crimes*, 155.
- <sup>46</sup> For this and following paragraphs see my *The Dawn of the Cheap Press* (2014).
- <sup>47</sup> P. Hollis, *The Pauper Press* (1970).
- <sup>48</sup> See complaints of William Pressey of the *Luton Weekly Recorder*, 22 November [1858] in IR56/45, National Archives (NA), and discussion in Hewitt, *Dawn of the Cheap Press*, chapter 8.
- <sup>49</sup> 'Newspaper Reform', reprinted *Dundee Courier*, 18 April 1855.
- <sup>50</sup> J. Fisher to the Board of Inland Revenue, 8 September 1866 [copy], IR 56/41, NA.
- <sup>51</sup> *Luton Times*, 23 May 1857.
- <sup>52</sup> J. Fisher and J.A. Strahan, *The Law of the Press. A Digest of the Law Specially Affecting Newspapers* (1891), 12.
- <sup>53</sup> *Law Times*, 20 August 1870.
- <sup>54</sup> See evidence of Flux, solicitor and proprietor of the *Wilts Standard* to the *House of Commons Select Committee on Libel* (1879).
- <sup>55</sup> 'Notes from Fleet Street', *Newcastle Weekly Courant*, 27 May 1893.
- <sup>56</sup> *Pall Mall Gazette*, 9 May 1889.
- <sup>57</sup> William Hunt, *Then and Now: or Fifty Years of Newspaper Work* (1887), 191-2.
- <sup>58</sup> 'Libel Law Reform', *Macmillan's Magazine*, 47 (April 1883), 439.
- <sup>59</sup> F.M. Thomas, *Fifty Years of Fleet Street* (1904), 40-41.
- <sup>60</sup> See case of Oliver J Prince, newspaper correspondent, against the *Maidstone and Kentish Journal*, *Lancaster Evening Post*, 16 January 1890.
- <sup>61</sup> For example Sir E.R. Russell at the Institute of Journalists, *Morning Post*, 31 August 1899.
- <sup>62</sup> Kent, 'Editor and the Law', 116-17; A.L. Thorold, *Life of Henry Labouchere* (1913), 496-503.
- <sup>63</sup> Hunt, *Then and Now*, 104-108.
- <sup>64</sup> 'The Press and the Law of Libel', *Saturday Review*, 30 May 1857, 494, 493-4.
- <sup>65</sup> 'Libel by Public Meeting', *Saturday Review*, 18 December 1888.
- <sup>66</sup> See Whorlow letter to *Times*, 19 February 1894, and *Times* 14 June 1894.
- <sup>67</sup> Lord Justice Farwell, quoted in Paul Mitchell, *The Making of the Modern Law of Defamation* (2005), 119, see 117-20.
- <sup>68</sup> For the Mosley episode see Martin J. Wiener, *An Empire on Trial: Race, Murder and Justice under British Rule, 1870-1935* (2009).
- <sup>69</sup> *Western Daily Press*, 17 August 1882.
- <sup>70</sup> *Daily News*, 26 November 1892.
- <sup>71</sup> *Economist*, quoted *Sheffield Independent*, 12 October 1869; see 'Contempt of Court', *Pall Mall Gazette*, 3 May 1875.
- <sup>72</sup> J. Oswald, *Contempt of Court* (2<sup>nd</sup> ed, 1895), 64. For sympathetic judicial view see comments of Justice Kerckwith, {High Court, Chancery} *The Times*, 20 March 1897.
- <sup>73</sup> Noted in *Pall Mall Gazette*, 15 April 1896.
- <sup>74</sup> Catherine Seville, *The Internationalisation of the Copyright Law: books, buccaneers and the black flag in the nineteenth century* (2006).
- <sup>75</sup> Fisher and Strahan, *Law of the Press*, 11; Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (2010), 206, provides evidence of contradictory judicial interpretations.

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<sup>76</sup> As Sidney Low put it, 'A copyright which can only be safeguarded by special agreements and assignments applicable to every news paragraph is hardly worth having', 'Newspaper Copyright', *National Review*, 13, (July 1892), 648-655.

<sup>77</sup> For details see 'Notes on Copyright in Titles of Magazines and Other Periodicals', *St James' Magazine* 4 (July 1880), 72-73.

<sup>78</sup> See comments of A.S. Ayrton, *Western Mail*, 19 August 1869.

<sup>79</sup> Evidence of Alexander Dobie, solicitor to the *Times*, to *Select Committee of the House of Lords on the Law of Libel and Defamation* (1843), Q747-769.

<sup>80</sup> South Australia and West Australia Acts of 1872, Tasmania 1884, Cape of Good Hope 1890 (124 hours), Natal 1895, see letter *Times*, 11 July 1899, 8.

<sup>81</sup> *Walter vs Steinkopff*, reported *Times Law Reports* 3 June 1892; discussed Alexander, *Copyright Law*, 248-50.

<sup>82</sup> *Manchester Guardian*, 7 August 1900.

<sup>83</sup> David Saunders, 'Copyright, Obscenity and Literary History', *English Literary History* 57.2 (Summer 1990), 431-44, 441.

<sup>84</sup> A. Jones, *Press, Politics and Society: a history of journalism in Wales* (1993), 49; P. Towle, 'The debate on wartime censorship in Britain, 1902-14', in Brian Bond and Ian Roy, eds, *War and Society* (1975), 103-116.