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# **Representing the Adversary Criminal Trial: Lawyers in the Old Bailey Proceedings, 1770-1800\***

Robert B. Shoemaker

... the very extensive publication of all the trials indiscriminately, according to the present practice, is a product of great mischief, operating both as an instruction and an encouragement to thieves.<sup>1</sup>

## **i. Introduction**

Historians agree that the growing involvement of barristers in felony trials at the Old Bailey in the eighteenth century fundamentally changed the nature of the English criminal trial. By engaging in confrontational cross-examinations of witnesses and marginalising the roles of judges, juries, and defendants, a more recognizably modern, ‘adversarial’ trial emerged. What is less clear is precisely when this change occurred, and, given ambivalent attitudes towards lawyers, how it was represented to and received by the wider public. This chapter will examine how the printed reports of trials held at the Old Bailey, the Old Bailey Proceedings,<sup>2</sup> a quasi-official record of what went on in London’s most important criminal court, documented this change. How did the Proceedings report the interventions of men who, it was believed, frequently subverted the judicial process by securing acquittals for criminals who were thought to be guilty?

As both the primary means by which the London public was informed about criminal justice in this period, and the principal source of our knowledge about what went on in the Old Bailey courtroom, the Proceedings are an essential, but, owing to their selective reporting, deeply problematic source of information about the role of barristers in the courtroom. The Proceedings were an important part of the public sphere, consumed by a readership which included victims and defendants, both potential and actual. How they represented criminal justice was therefore a matter of significance to those responsible for law and order in London. Although privately published, the Proceedings were licensed and regulated by the City of London, which from 1775 intervened increasingly in their publication. At the centre of these regulatory efforts were questions about the messages that the Proceedings were intended to convey, and their intended audience. Focusing on the period from when lawyers first appeared in significant numbers at the Old Bailey, in the 1770s, to the end of the century, this chapter assesses how representations of counsel in the Proceedings changed in response both to changes in the criminal trial itself, and contested and changing ideas about the purpose of the Proceedings and the type of ‘public justice’ they were intended to represent. Simon Devereaux, who has written extensively on this subject, has demonstrated how the City’s regulation of the Proceedings was shaped by a combination of financial constraints, the demand for information used in pardoning and sentencing decisions, and changing conceptions of ‘public justice’.<sup>3</sup> This

chapter extends his analysis by focusing on the most ideologically charged aspect of the Proceedings, the reporting of counsel, particularly defence counsel.

For most of the eighteenth century, the Proceedings failed to report the interventions of counsel in any detail. As John Langbein first demonstrated, legal arguments, cross examinations, and judicial rulings were routinely omitted from trial reports, which instead concentrated on reporting the testimonies of victims, witnesses, and defendants. While such statements were often presented in what appear to be verbatim transcripts, in fact the Proceedings presented a highly selective account of courtroom events and virtually never provided complete transcripts of trials.<sup>4</sup> While Langbein stopped short of suggesting that this selective reporting had any ideological significance, Devereaux's analysis of the Proceedings in the last quarter of the century suggested that the City of London had particular and changing conceptions of 'public justice' which it wanted the Proceedings to convey to its readers. Research I carried out on the Proceedings in the first three quarters of the century came to a similar, but more radical conclusion. My examination of trial reporting demonstrated that the Proceedings prioritised the reporting of prosecution cases and trials which led to convictions, while paying less attention to cases for the defence and acquittals. I argued that this was done deliberately in order to render justice as unproblematic, portraying trials as simple confrontations between victims and the accused, in which the guilty more often than not received their just desserts, thereby reassuring those worried about rising crime that the guilty would be punished. While I could not find any explicit statements of intent and motivation behind these publishing decisions, it is likely, given contemporary attitudes to the legal profession, that it was believed that reports of trials without lawyers, particularly those for the defence, were more likely to be perceived as leading to fair and just outcomes.<sup>5</sup> Concern that lawyers, particularly 'Newgate solicitors', were deceitful and encouraged false testimony by witnesses (especially false alibis) was widespread in the eighteenth century.<sup>6</sup> As argued by the jurist William Hawkins, when justifying the legal prohibition on employing defense counsel in felony trials (except to raise points of law), 'it requires no matter of skill [for a defendant] to make a plain and honest defence'. In contrast, 'the truth... probably would not so well be discovered from the artificial defence of others speaking for them'.<sup>7</sup>

Over time, however, as lawyers began to appear in more trials, with their activities largely unreported, the Proceedings became increasingly inaccurate. How did they adjust to the changing landscape of the criminal trial? To answer this question, we need both to know when lawyers started to appear more frequently in the Old Bailey courtroom, and to find out how their interventions were reported in the Proceedings. But since the Proceedings constitute virtually our only source of information about the appearance of lawyers at the Old Bailey, and we know that their trial reports were highly selective, there is a danger of conflating changing patterns of actual courtroom behaviour with changing approaches to reporting, a danger to which all previous historians of lawyers at the Old

Bailey have to some degree succumbed.<sup>8</sup> In order to overcome this limitation, it is necessary both to read the Proceedings more critically, against the grain, looking for evidence concerning reporting strategies, and to consult the limited number of sources outside the Proceedings which document what happened at the Old Bailey, where these are available.

## ii. Counting Lawyers in the Proceedings

Previous studies have shown that prosecution lawyers first appeared at the Old Bailey in significant numbers in the 1730s, followed almost immediately by lawyers for the defence.<sup>9</sup> But research by John Beattie and Stephen Landsman, based on the Proceedings, suggest that the number of trials in which they appeared remained low until the 1780s. Their statistics indicate that defence lawyers never appeared in more than 7 per cent (according to Beattie) or 14 per cent (according to Landsman) of trials until 1782, when the proportion increased significantly, to 13 per cent (Beattie), or 26 per cent (Landsman).<sup>10</sup> (Figure 1) Subsequently, figures rose to 37 per cent (in 1795, Beattie) and 40 per cent (1797, Landsman). Landsman's higher figures result from the fact he inferred the presence of lawyers in the Proceedings more readily than Beattie, who chose only to include cases where counsel were named, and 'a few cases in which internal evidence makes it almost certain that lawyers took part in the trial'.<sup>11</sup> Landsman included more cases where it appears that lawyers took part, but none were named explicitly. Landsman also, however, apparently excluded some cases where lawyers were named, but the case was poorly reported. This explains why in some cases his percentages were lower than Beattie's (since they sampled different years, however, the figures are not strictly compatible), suggesting just how difficult it is to measure legal practice consistently in the Proceedings. The year in which both scholars identified a surge in legal representation, 1782, was also the year a new publisher (Edmund Hodgson, in September) took over the Proceedings, which suggests that the increase could at least partially have been due to changes in reporting.

### [Insert Figure 1 here: Portrait]

Figure 1: Percentage of trials involving defence counsel for sample years, as calculated by John Beattie and Stephen Landsman<sup>12</sup>

Landsman and Beattie performed their analysis before the Proceedings were made available in a digitised edition (2003-05), which is why they sampled.<sup>13</sup> Keyword searching in the online edition, using the terms 'counsel' (or council or council), 'cross examined' and 'cross examination', has its own pitfalls (it does not exclude the small number of false positives, such as when a defendant states 'I have no counsel'), but it provides a more comprehensive picture.<sup>14</sup> While the overall trend

echoes those previously identified, with a dramatic increase around 1780, Figure 2 reveals some previously unrecognised important patterns. The language used to describe counsel in the Proceedings varied over time, with the terms counsel (in various spellings) and ‘cross examined’ and ‘cross examination’, as means of describing lawyers and their courtroom activities, going into and out of fashion in different years. Whereas ‘cross examination’ was the most common method of demonstrating the presence of counsel up to 1782 (though not all trials in which this language was used involved lawyers),<sup>15</sup> from 1783-85 the term virtually disappears, and the word counsel is much more frequently used. From December 1795 this pattern is reversed, and the term ‘cross examined’ came in to vogue. Clearly, the ways in which counsel were reported in the Proceedings varied significantly over time.

**[Insert Figure 2 here: portrait]**

Figure 2: Trial accounts which include the keywords counsel (or council or council) and cross examined (or cross examination) in the Proceedings, 1770-1800 (counting by offence)

Source: OBP.

In addition to demonstrating that methods of reporting counsel in the Proceedings changed over time in a non-linear fashion, Figure 2 shows that the number of references to legal activity in the Proceedings increased dramatically from 1779, shortly before the surge in reports identified by Beattie and Landsman. The language of reporting in the years before 1779, moreover, suggests that counsel were present in significantly more trials in these years than was actually reported. Most references to counsel in these years are incidental or only refer to certain types of intervention, which suggests that much routine questioning of witnesses by counsel went unreported, possibly as deliberate policy. Several defendants in these years, for example, are reported as saying in their defence, ‘I leave it to my council’, but there is no other evidence in the trial report to suggest that the questions asked (which are listed) or any other statements came from counsel; it is likely that counsel were present in many other cases where defendants did not make this statement.<sup>16</sup> In the trial of Peter Ceppi the only way we are made aware of the presence of counsel is an incidental comment by a witness that ‘the prisoner then stood at about the distance that the counsel is from me (about two yards)’; there is no other evidence in the trial to suggest counsel were present.<sup>17</sup> While in some trials questioning by defence or prosecution counsel is explicitly mentioned (though counsel are never named), such reporting does not appear to have been routine, and many of these reports involved unusual interventions such as when they made observations or raised points of law. In the report of the trial of Joseph Sloper for the theft of a banknote from the mail in January 1772, for example, the only indication that Sloper employed counsel is that he told the court that ‘I leave my defence to my council [sic]’, followed by the report that ‘The council in behalf of the prisoner, argued some doubts

whether his offence came within the meaning of the statute, as he had not made any use of the bank note, nor opened the letter; it rather appearing that his view was meerly to defraud the post-office of the money paid for the postage of the letters'.<sup>18</sup> That counsel were present in the 1770s in more trials than the 5-10 per cent reported in the Proceedings is further suggested by the fact that prisoners at this time appear to have already come to expect that counsel were a normal feature of trials. When Andrew Nihil was tried for murder in April 1776, he told the court, 'As I am not provided with counsel, I beg, my lord, you will take my cause in hand'.<sup>19</sup>

### **iii. The City of London and the Representation of 'Public Justice'**

The increase in reporting of counsel in the late 1770s can be attributed to changes in the policies of the City of London. While the City had licensed the publication of the Proceedings since 1679, there is little evidence that the City authorities took more than occasional interest in their content.<sup>20</sup> But in 1775 responsibility for oversight was switched from the Lord Mayor to the City Lands Committee, whose first decision was to require the Recorder of London to review each issue of the Proceedings for accuracy.<sup>21</sup> These changes were prompted by the former radical, now ex-Lord Mayor, John Wilkes, whose counsel, John Glynn, was Recorder from 1772 to 1779. Wilkes, who had used the law effectively in pursuit of his radical agenda for more than a decade,<sup>22</sup> complained bitterly at this time of inadequate reporting in the Proceedings.<sup>23</sup> By making their reports more accurate, he hoped to make justice more accessible, and more accountable to the public, a different message from that previously sent out with their selective reporting. Pursuing the same agenda, he had previously tried to eliminate the fees charged for spectators attending trials at the Old Bailey, but this led to overcrowding and had to be abandoned. In 1774, a reconstruction of the courthouse under George Dance (who also designed the forbidding façade of the new Newgate prison) had purposely made the courthouse more inaccessible to the public, in order to provide better security for prisoners, prevent communication between prisoners and the public, and prevent a sudden influx of spectators into the courtroom. It is possible that Wilkes's new initiative to ensure the reporting in the Proceedings was both thorough and impartial was meant to compensate for these restrictions on public access.<sup>24</sup> As a consequence, public knowledge of what went on in the courtroom would become dependent on the press.

While these 1775 decisions appear to have had little immediate impact on the content of the Proceedings, that changed three years later. In November 1778, the City imposed new requirements on the publisher to ensure accurate reporting. The Proceedings were now expected to provide a 'true, fair, and perfect narrative of the whole evidence upon the trial of every prisoner whether he or she shall be convicted or acquitted, together with the arguments of council, and the opinion of the judge upon every interesting trial'.<sup>25</sup> To give acquittals equal treatment, and routinely include the arguments of counsel, necessitated a significant expansion in the size of the Proceedings, and in December 1778

the publisher, Joseph Gurney, increased the number of separate parts issued for each sessions to four.<sup>26</sup> Gurney explained the change in an advertisement at the back of the December edition, noting the requirement ‘that the trials at the Old Bailey shall, in future, be printed at large [in full accounts], as well in cases where the prisoners are acquitted, as when they are convicted’.<sup>27</sup> Accordingly from 1779 the length of trial reports, particularly acquittals, grew dramatically. As demonstrated in Figure 3, the shortest reports increased most significantly, though in the early 1780s some of these gains were reversed.<sup>28</sup>

**[Insert Figure 3 here: Portrait]**

Figure 3: Length of Trial Reports in the Proceedings, 1775-1795<sup>29</sup>

Each dot in this scatterplot represents a single trial; the congruence of similar values creates the appearance of vertical lines. The lowest black horizontal line represents the 25<sup>th</sup> per cent quartile, the middle line 50 per cent, and the top line 75 per cent. The shaded area thus represents the middle 50 per cent of all trial lengths.

Devereaux identified two motivations for this change. First, the Recorder of London needed better information on which to base his reports to the King concerning which of the convicts sentenced to death should be pardoned. But since this change also applied to acquittals, the second motivation may be more important. At a time of social instability (evident in radical politics and the disruption to transportation caused by the outbreak of the American War), the City was concerned, as previously advocated by Wilkes, that the Proceedings should represent ‘public justice’, that is, ‘the means by which justice is represented and seen to be done’. In other words, the City wanted the Proceedings to show the public that justice at the Old Bailey was conducted openly and fairly.<sup>30</sup> This is consistent with the fact that the Recorder at the time was a known supporter of radical politics.<sup>31</sup> It was a different conception of ‘public justice’ from that which had been represented in the Proceedings before 1775; as we shall see, at least one other conception of ‘public justice’ would be adopted before the century was over.

Almost immediately, as can be seen in Figure 2, explicit reporting of counsel in the Proceedings increased dramatically. In 1780, the year of the week-long Gordon riots, over a quarter of all trials reported show some evidence of the presence of counsel. And the reporting of their activities became more detailed, with occasional extensive reporting of aggressive questioning of witnesses. When John Benfield and William Turley were tried for coining in January 1780, for example, their unnamed counsel questioned the Bow Street officers who had arrested them extensively, using among other tactics one later used by William Garrow, suggesting that these witnesses had mercenary motives. David Prothero, for example, was asked, ‘I need not tell you, as

you know very well that you are entitled to a part of the reward if they are convicted?’<sup>32</sup> But the presence of counsel was still not routinely reported.

#### **iv. Edmund Hodgson and the ‘Golden Age’ of Reporting Counsel**

Further changes in reporting came with the appointment of a new publisher in September 1782. Under the proprietorship of Edmund Hodgson, the Proceedings entered what John Langbein called their ‘short golden age’,<sup>33</sup> when there was extensive reporting of counsel. Included now were counsel’s opening statements and lengthy cross-examinations, as well as some motions and arguments of counsel, judge’s rulings, and the judge’s summing up. From December 1783, the names of counsel were routinely provided for the first time, with their names associated with the questions they asked. As important as these developments were, it is important to note, as emphasised by Langbein,<sup>34</sup> that the Proceedings were still selective: the majority of courtroom speech was still not reported. Witnesses whose testimony repeated that of others were left out,<sup>35</sup> the judge’s summing up was frequently excluded, and the testimonies of character witnesses were frequently summarised in short statements. In the trial of three men and a woman for the theft of goods from the naval stores in April 1783, for example (in which counsel for both sides were present), the Proceedings report that ‘The Prisoner Jane Warrickshall called six witnesses who gave a good character’, without providing any evidence of that testimony or cross-examinations of these witnesses.<sup>36</sup> In some trials where the presence of defence counsel is noted, they are not reported as having said anything.<sup>37</sup>

Remarkably, these changes were most dramatic in the reporting of defence counsel. Twice as many defence counsel were reported as counsel for the prosecution,<sup>38</sup> and the interventions of defence counsel, particularly William Garrow, who first appeared at the Old Bailey in November 1783, were represented as increasingly aggressive. Thanks to the recent British TV series, ‘Garrow’s Law’, as well popular and academic writing,<sup>39</sup> we are now familiar with Garrow’s aggressive manner, his strong advocacy of the rights of his clients, and his challenges to the mercenary activities of the officers of Bow Street during his first decade at the bar. All of this was reported in detail in the Proceedings, particularly, as Beattie has shown, Garrow’s skewering of prosecution witnesses who had a financial interest in the outcome of the case because they might receive a reward, playing on jurors’, and the public’s, disapproval of thief takers.<sup>40</sup> But as we have seen, Garrow was not the first or only barrister to employ such tactics. Barristers are also reported as making frequent legal objections, as in the trial for fraud of Robert Jaques, where Garrow acted as prosecution counsel. When challenged by Garrow, Jaques’ counsel, ‘Mr. Sheppard’ (probably Samuel Shepherd), told the court, ‘I really think it is my duty to take every objection which I can when I stand as counsel for any man that is upon trial for his life’.<sup>41</sup>

Why were the compilers of the Proceedings so willing to report these challenges to judicial authority, taking a very different approach to previous reporting strategies? In part, this approach met the City's new definition of 'public justice'—it was a necessary outcome of the requirement that the Proceedings provide a 'true, fair, and perfect narrative' of what went on in the courtroom. Following Devereaux's suggestion that the City was concerned to demonstrate the fairness of Old Bailey trials, these changes may have been intended to secure support for a judicial system which was busier than at any time in its history: the prosecution wave which followed the end of the American War resulted in an average of 1,340 defendants tried each year at the Old Bailey between 1783 and 1786, the highest number in the whole century. At the same time, more defendants were convicted (64 per cent, compared to 59 per cent in the previous four years)<sup>42</sup> and punishments became increasingly savage: with transportation suspended, large numbers of convicts languished in the hulks and prisons, and increasing numbers were executed owing to the decision to curtail radically the number of pardons granted. Between 1781 and 1786, five hundred convicts were hanged at Tyburn, the highest execution rate in the century. At a time when there is growing evidence of convict resistance to this penal regime,<sup>43</sup> the thoroughness of Old Bailey trial reporting may represent an attempt to justify the court's harsh treatment of the increasing number of defendants tried. Even in trials where no defence counsel were present, the Proceedings demonstrated that the court looked out for the interests of the accused. When John Hogan was tried for murder in 1786 and did not have counsel (Garrow acted for the prosecution), the trial account records that the 'court' came to his aid, repeatedly asking Hogan if he wished to have any questions asked of the witnesses on his behalf. Although Hogan was convicted and sentenced to be hanged and his corpse dissected, readers would have been reassured that he had received a fair trial.<sup>44</sup>

Commercial considerations may have also played a role in the new reporting strategy, as Hodgson attempted to reach a wider audience. As Devereaux has demonstrated, owing to competition from the newspapers, sales of the Proceedings were declining in the 1780s, and Hodgson appears to have sought to reverse this by selling copies not only to lawyers (hence the detailed reporting of courtroom exchanges), but also to coffee houses, where the Proceedings were read by an increasingly literate public.<sup>45</sup> In particular, the near celebrity status achieved by the barristers Thomas Erskine and William Garrow guaranteed an audience. In particular, Garrow's often sarcastic and witty cross examinations and interventions rendered the adversarial trial an entertaining read.<sup>46</sup>

## **v. The Backlash**

It did not take long for opposition to this new approach to trial reporting to appear, as concerns began to be expressed that the Proceedings provided too much information to too wide a public. The social crisis of the late 1770s and early 1780s, which had started with the suspension of transportation in

1776 and was intensified by the Gordon riots in June 1780, was exacerbated by the prosecution wave (and resulting surge in executions) which followed the end of the American War in 1783, and was also manifested in continued prison escapes and mutinies on transport ships.<sup>47</sup> In this context, concerns began to be expressed that, instead of teaching its readers that crime would be punished, readers of the Proceedings were becoming dissuaded from initiating prosecutions, out of fear they would be unsuccessful or that prosecution witnesses would be humiliated by defence counsel in court, and that criminals were learning the wrong lessons.

While some praised defense counsel for protecting English liberties,<sup>48</sup> some of London's governors expressed alarm. In 1787, Sir John Hawkins, former chairman of the Middlesex sessions, observed that the way defendants were treated in the courts had changed, and now 'falls little short of respect'. 'Those whose duty it is to conduct the evidence, fearing the censure that others have incurred by a contrary treatment of prisoners, are restrained from enforcing it; and... every one interests himself on the side of the prisoner, and hopes, by his zeal in his behalf, to be distinguished as a man of more than ordinary humanity.' Consequently, 'the chances of eluding conviction, or if not that, of punishment, are so many, that they deter many injured persons from the prosecution of great criminals'.<sup>49</sup> Given that in 1786 almost two-thirds (64 per cent) of those who appeared at the Old Bailey were found guilty, the highest figure since 1767, Hawkins' views should be interpreted more as a reflection of his own fears, no doubt formed at least in part from reading the Proceedings, than as a reflection of what actually happened in the courtroom.<sup>50</sup> But these fears were shared by others.

In February 1787 concerns about delays in the publication of the Proceedings (and hence the submission of the Recorder's report to the king on capital convicts which informed the pardoning process), in the context of concerns about rising crime, led to the appointment of a City committee charged to come up with a resolution of the problem. Exceeding its brief, the committee complained about the current method of 'very extensive publication of all the trials indiscriminately' which not only delayed publication, but also created 'great mischief, operating both as an instruction and an encouragement to thieves'. Not only were burglars in particular instructed in 'the various modes of committing offences', but they also learned the 'manner of fabricating defences, especially alibis—which a man of any ingenuity may, by attending to the mode of examination at the Old Bailey, so frame, as to render extremely difficult to be detected'.<sup>51</sup> As reported in the Times, when the committee's report was discussed by the Court of Aldermen, the Recorder complained of 'the evils arising to the public, by the present mode of publishing trials of persons for burglary and other felonies, the evidence of accomplices, and the arguments of counsel, together with the points wherein the defect of evidence is frequently the occasion of the prisoners being acquitted', thereby instructing 'them in what particular points, when on their trial, they should rest a defence'.<sup>52</sup> Significantly, this suggests that City officials thought that the public audience for the Proceedings included criminals.

That such concerns were shared by the wider public is suggested by a satirical print, ‘The Old Bailey Advocate Bringing off a Thief’, published two years later, in 1789. (Figure 4) Both picture and text indicate that through their ‘impudence’ and deception, defence counsel were adept and getting the guilty acquitted, trampling on ‘truth’ in the process. These views were echoed in a report in the *Times* in the same year, when it appended an account of a robbery with some general comments on the criminal laws. These, it observed, were becoming ‘every succeeding day... more and more inefficacious. Death and transportation lose their terrors, from those various legal modes the ingenuity of council has adopted to save a culprit from conviction’.<sup>53</sup> Since the Proceedings were the primary means by which the public learned about the activities of counsel, it was necessary to alter trial reporting if this perception that justice had become corrupted was to be refuted.

**[Insert Figure 4 here: portrait]**

Figure 4: William Dent, ‘The Old Bailey Advocate Bringing off a Thief’ (1789) © Trustees of the British Museum

Consequently, the committee proposed to confine reporting in the Proceedings to cases resulting in capital convictions, or in which substantial points of law arose. It further recommended that ‘no other cases of acquittal should be published, on any pretence whatsoever’, and that ‘no trials of remarkable indecency or for any unnatural crimes should be published unless so important in point of law’. By doing so, the readership of the Proceedings would be dramatically reduced. Concluding their report, the committee proposed that this publication should be ‘neatly printed on a fine paper, and at proportionable price—so that the sessions paper shall in future be a book of the first authority in the kingdom, as to the criminal law—for the libraries of lawyers and magistrates, instead of tipling houses and thieves’.<sup>54</sup>

This radical reformulation of the content and intended audience for the Proceedings was not adopted, but it would be surprising if the concerns expressed did not reach the ears of Edmund Hodgson, the publisher. Indeed, such concerns were quite possibly behind the decline in the length of the shortest 50 per cent of trial reports in 1787, evident in Figure 3. Two examples from 1786 and 1787 indicate the types of key evidence excluded. The first, the trial of William Bartlett for the theft of a silver watch in January 1786, is well known to historians owing to the discovery of manuscript notes of the trial, inserted into a printed copy of the Proceedings, containing an account of an exchange between the defence counsel, William Garrow and Justice Heath over the admissibility of evidence from a prosecution witness who was ‘deaf and dumb’, and who could only communicate through an interpreter. The manuscript account runs to fourteen handwritten pages, whereas the exchange is reported in only two lines in the Proceedings. While the latter makes it clear Garrow

objected to the witness, it fails to give any indication of just how willing Garrow was to challenge the authority of the judge. After he had been told his objection was not valid, Garrow refused an order by Heath to sit down, and when Heath threatened to commit him for contempt of court, Garrow replied, ‘So your lordship may’. But this contretemps is glossed over in the Proceedings. As Beattie notes, the defendant was in the end convicted largely on the evidence of this witness, so this exchange was clearly material, but to have included it in the printed account would have thrown doubt on the safety of the conviction, which it had now become important to defend.<sup>55</sup>

Similarly, significant evidence was omitted from a trial in September 1787 for the theft of goods from a wagon by four men. Although the trial lasted for six hours, it was reported in the Proceedings in only 248 words.<sup>56</sup> Just like reports from earlier in the century, the trial report is cursory, summarising in the third person the prosecution evidence, providing only a very brief account of the defence, and failing to mention the presence of counsel. However, the Times, which was interested in the case because one of the accused was what it called ‘a genteel young man’ (trials involving elite defendants received disproportionate attention in late eighteenth-century newspapers),<sup>57</sup> tells us what was left out. Apparently the chief prosecution witness (George Turtle, a hackney coachman, and the only witness reported in the Proceedings) had been tampered with by the brother of this defendant. The judge went so far as to call Turtle ‘an abominable witness, and said there was no credit to be given to his evidence, except in so far as it was confirmed by others’.<sup>58</sup> The defendants were convicted, but none of this evidence which would have cast doubt on the conviction appeared in the Proceedings, which presented Turtle’s testimony as reliable and made no mention of witness tampering.

While the Proceedings continued to provide extensive reports of some of the activities of defence counsel in the late 1780s, these cases suggest that the publisher was becoming cautious about publishing evidence which might be seen to undermine the safety of convictions and the authority of the court. By 1788 there is more systematic evidence of this approach in the statistics concerning reports of counsel. Both Beattie’s figure for the proportion of trials involving defense counsel (Figure 1) and the keyword data (Figure 2) indicate that fewer counsel were reported in 1788, though the keyword data suggest a recovery in 1790. At the same time, reports of acquittals became shorter,<sup>59</sup> and once again provide limited evidence on why the defendant was acquitted. When John and Jane Leonard were tried for burglary in 1790, their acquittal, as reported in the Proceedings, appears to have resulted from a lack of certainty over the victim’s identification of the stolen goods as his. But a report in the Times indicates that the judge instructed the jury to acquit Jane owing to the principle of *feme covert* (that a wife could not be convicted of a crime committed in the presence of her husband).<sup>60</sup> It seems likely that Proceedings did not wish to report this apparent *carte blanche* given to women to commit crimes without penalty as long as their husbands were present. Thus in the late

1780s the Proceedings appear to have returned to an earlier definition of ‘public justice’, more in line with the concerns of the authorities to maintain order and suppress crime by demonstrating the likelihood of conviction, and once again editing out evidence that might have been perceived as giving succour to criminals.

In October 1790, the City went further and took the dramatic step of suppressing all reports of trials which resulted in acquittals. Although justified on the grounds of cost (and the fact it was claimed that the primary purpose of the Proceedings was to ensure the Recorder had the information he needed for his pardon reports—itsself a radical reformulation of the purpose of the Proceedings), also voiced were ‘doubts as to the propriety of publishing the trials of persons acquitted’.<sup>61</sup> Given the concerns expressed in 1787 that reports of acquittals sent the wrong messages to those accused of crime, this suggests that, with a revolution brewing across the channel and the growth of radicalism at home, there was renewed desire in 1790 among City authorities to censor the Proceedings in order to meet a more conservative idea of ‘public justice’.

Consequently, the character of the Proceedings changed dramatically in the early 1790s. Despite the fact trial reports lengthened (Figure 3), reports of the activities of counsel were fewer and briefer, particularly with respect to the defence. Landsman’s figure of the proportion of trials where defense counsel were reported for 1792, 14.6 per cent, was lower than in any of his sample years since 1777. Even when defense counsel were reported as present, what they said was much less often reported, with fewer questions asked in cross examinations and fewer arguments included. In the trial of Robert Norris in February 1792, we are told that ‘Mr Knowlys addressed the Jury on the part of the Defendant’, but this is all that was reported about the defence case.<sup>62</sup> By the early 1790s, reader expectations no doubt made it impossible to erase defence counsel entirely from the record, but reporting of their interventions was significantly reduced, and became even more selective.

#### **vi. 1792: Back to the Future**

In December 1792, however, the City reversed its decision to ban the reporting of acquittals. According to a report from Edmund Hodgson in September, it had led to a ‘considerable reduction in the sale, and the joint opinion of counsel, justices and purchasers, is that the present mode is not pleasing to the public’.<sup>63</sup> Also in December, the City revoked Hodgson’s contract to publish the Proceedings, possibly because he had occasionally employed note takers who did not know shorthand, and a new publisher, who was sworn to report trials ‘fairly and correctly’, took over.<sup>64</sup> In the ensuing years, under the proprietorship of Henry Fenwick and then William Wilson, trial reports continued to grow longer, and they included more substantial accounts of the case for the defence, with the activities of counsel once again frequently reported, and aggressive cross-examinations and reports of defence witnesses included. From 1796, there was a dramatic increase in the proportion of

trials which include keywords indicating the presence of counsel, amounting to almost one third of offences tried between 1796 and 1800. (Figure 2) But the language used to indicate their presence changed: the term ‘counsel’ itself was used less frequently, and barristers were referred to simply as ‘Mr Knowlys’ or ‘Mr Shepherd’, and the term ‘cross examined’ is frequently used. Nonetheless, John Langbein noted a ‘bleaching out’ of legal detail in trial reporting in these years,<sup>65</sup> as can be seen in the fact that it was often now unclear who framed the questions asked of the witnesses. Legal issues raised were often briefly summarised, such the discussion about the admissibility of a witness in a trial in 1800, which was reported simply as: ‘(Mr. Gurney and Mr. Alley contended that the witness was an incompetent witness, and the Court being of the same opinion, her examination did not proceed)’.<sup>66</sup> This may reflect a decision by Wilson as publisher not to target the legal profession as potential readers as intensively as Hodgson had done, but the participation of counsel was nonetheless still extensively reported.

How do we account for this dramatic reversal? In part, as indicated by Hodgson’s complaint, it may reflect an attempt to revive sales, but by this point the City was subsidising publication so heavily that commercial reasons are unlikely to have been paramount. While individual sales of the Proceedings to the general public all but disappeared in the 1790s, public readership continued in coffee houses. Devereaux argued that once again a different conception of ‘public justice’ had taken hold: with revolution and terror in France, the City did not want English justice to appear guilty of undermining the constitution through partiality. The fact that the shorthand note taker in these years, William Ramsay, was an active member of the London Corresponding Society may help explain the more extensive reporting (though ultimately it was the publisher who determined content).<sup>67</sup> As in the early 1780s, during a period of social volatility extensive trial reporting in the Proceedings may once again have been seen as a means of legitimating the decisions taken in the Old Bailey courtroom.

## **vii. Conclusion**

Throughout the last quarter of the eighteenth century, the reporting of the participation of counsel in the Proceedings was a subject of political significance, as those responsible for this quasi-official publication wrestled with the questions of who should read the Proceedings and what they should be told, as well as the more prosaic needs to control costs and the maintain the flow of pardon information to the Home Office. The resulting frequent changes in policy by publishers and the City render any attempt by historians to use this publication to chart the actual participation of counsel in the Old Bailey courtroom highly problematic. But these changes in strategy provide a fascinating window into official thinking about the purposes of trial reporting. Given the historical reluctance of the Proceedings to report the participation of counsel, what is most remarkable in this story is the efflorescence of a more radical and inclusive approach in the early to mid 1780s, when courtroom

altercations and challenges to judicial authority were routinely reported. Stimulated by the radicalism of John Wilkes and the City's desire to provide a more inclusive representation of 'public justice', the celebrity of William Garrow, and the publisher's desire to maintain circulation, the Proceedings dramatically extended the public sphere of courtroom reporting, only for it to be reined in when that wider readership was thought to be using the Proceedings for the wrong reasons. Yet the backlash was temporary, and in the 1790s the participation of counsel, including defence counsel, became a staple part of this publication. This aspect of the criminal trial had become part of the public discourse, and the wide range of readers who consulted the Proceedings, who were now aware of the frequent presence of counsel in the Old Bailey courtroom, had come to expect it. But as we have seen, this did not mean they would be told everything. In the early nineteenth century, City interference in the publication returned: in 1805, the City voted to expunge direct or indirect arguments of counsel from the record. According to Allyson May, this rule was implemented erratically, but it led to a significant reduction in the reporting of cross-examinations (with only answers, and not questions reported).<sup>68</sup> That the City once again felt it was necessary to impose such rules suggests that the Proceedings were still attracting a popular audience in the early nineteenth century, and that how the activities of lawyers were reported remained an issue of public significance. While the Proceedings were explicitly intended for the public sphere, the City continued to attempt to limit what the public would be told.

\* I would like to thank John Beattie and Stephen Landsman for helpful responses to my questions, William Turkel for his assistance with Figure 3, and Tim Hitchcock for his comments on the whole chapter.

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<sup>1</sup> Rough minutes of the 'Committee of Aldermen to Consider the Most Proper Methods that can be taken to Expedite the Report of the Several Capital Convicts', February 1787, London Metropolitan Archives (LMA), COL/CA/MIN/01/010.

<sup>2</sup> Published between 1674 and 1913, the title of this periodical varied, but in the late eighteenth century was typically *The Whole Proceedings on the King's Commission of the Peace, Oyer and Terminer, and Gaol Delivery for the County of Middlesex*; Held at Justice Hall in the Old Bailey. Although contemporaries (and some historians) called this publication the 'Sessions Papers', they are referred to here as the Proceedings, to avoid confusion with the manuscript sessions papers (largely comprised of pre-trial documents) held at the LMA.

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<sup>3</sup> Simon Devereaux, 'The City and the Sessions Paper: 'Public Justice' in London, 1770-1800', *Journal of British Studies* 35/4 (1996): pp. 466-503; Simon Devereaux, 'The Fall of the Sessions Paper : The Criminal Trial and the Popular Press in Late Eighteenth-Century London', *Criminal Justice History* 18 (2002): pp. 57-88.

<sup>4</sup> John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), pp. 183-90.

<sup>5</sup> Robert B. Shoemaker, 'The Old Bailey Proceedings and the Representation of Crime and Criminal Justice in Eighteenth-Century London', *Journal of British Studies* 47/3 (2008): pp. 567-71.

<sup>6</sup> Langbein, *Origins*, pp. 136-145; Allyson May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: University of North Carolina Press, 2003), pp. 123-132. For more general critiques of the legal profession, particularly those practising civil law, see David Lemming, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford, 2000), pp. 9-24.

<sup>7</sup> William Hawkins, *A Treatise of the Pleas of the Crown* (2 vols, [London], 1724), vol. 2, p. 400.

<sup>8</sup> John Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review* 9 (1991): pp. 221-67; Stephan Landsman, 'The Rise of the Contentious Spirit: Advocacy Procedure in Eighteenth-Century England', *Cornell Law Review* 75 (1990): pp. 497-609; Langbein, *Origins*. Most historians acknowledge this issue, but argue it does not fundamentally distort their findings about chronological change. See, for example, Beattie, 'Scales of Justice', pp. 228-29.

<sup>9</sup> While until 1836 formally defence lawyers were excluded in all felony cases, except when raising narrow points of law, it is argued that once prosecution lawyers began to appear more regularly, judges also started to allow defence lawyers to question witnesses in order to provide balance: Langbein, *Origins*, chap. 3.

<sup>10</sup> Beattie, 'Scales of Justice', p. 227; Landsman, 'Rise of the Contentious Spirit', p. 607.

<sup>11</sup> Beattie, 'Scales of Justice', p. 227.

<sup>12</sup> *Ibid.*; Landsman, 'Rise of the Contentious Spirit' p. 607. Beattie's figure for 1780 has been adjusted to include the trials for the Gordon riots, which he excluded. I am grateful to Tim Hitchcock for this figure.

<sup>13</sup> Old Bailey Proceedings Online ([www.oldbaileyonline.org](http://www.oldbaileyonline.org), version 5.2, consulted 6 January 2011); hereafter OBP.

<sup>14</sup> A better method of establishing the extent of the hidden presence of counsel in the Proceedings is to use data mining techniques to find trials which include language patterns used by counsel even when counsel are not named or identified by keyword, by mapping the language used in trials where counsel were identified as present, and then looking for other trials which contain similar language. This research is currently underway in

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the 'Data Mining with Criminal Intent' project (<http://criminalintent.org/about/>), and will lead to a forthcoming publication which will provide more precise evidence about the presence of counsel in the Proceedings, by Tim Hitchcock, Robert Shoemaker, and William Turkel.

<sup>15</sup> 'Cross examination' does not necessarily mean that lawyers were involved, but since 66 per cent of the trials which use the term 'counsel' (and variants) up to 1782 also use this term, this was often the case. For an exception, see one of the trials of the notorious pickpocket, George Barrington: OBP, April 1778 (t17780429-103).

<sup>16</sup> OBP, January 1772, trial of William Smith (t17720109-50); April 1772, trial of Isaac Liptrap (t17720429-19).

<sup>17</sup> OBP, February 1778, trial of Peter Ceppis (t17780218-38).

<sup>18</sup> OBP, January 1772, trial of Joseph Sloper (t17720109-60).

<sup>19</sup> OBP, April 1776, trial of Thomas Dempsey, *et al.* (t17760417-59). Landsman, 'Rise of the Contentious Spirit', p. 548, n. 268 notes further examples from 1777.

<sup>20</sup> Shoemaker, 'Old Bailey Proceedings', pp. 564-65.

<sup>21</sup> Devereaux, 'City and the Sessions Paper', p. 482.

<sup>22</sup> John Brewer, 'The Wilkites and the Law, 1763-74: A Study of Radical Notions of Governance', in John Brewer and John Styles (eds), *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (London, 1980), pp. 128-71.

<sup>23</sup> *Middlesex Journal*, and *Evening Advertiser*, 16-18 November 1775; Devereaux, 'City and the Sessions Paper', p. 482.

<sup>24</sup> Devereaux, 'City and the Sessions Paper', pp. 482-88.

<sup>25</sup> LMA, *Journals of the City Lands Committee*, vol. 70, COL/CC/CLC/01/62, fols. 142-43 (November 13, 1778).

<sup>26</sup> Langbein, *Origins*, p. 188.

<sup>27</sup> OBP, December 1778, p. 40 (t17781209-33). (This advertisement is not transcribed, but can be read on the original page image.)

<sup>28</sup> See also Devereaux, 'Fall of the Sessions Paper', p. 58; Devereaux, 'City and the Sessions Paper', p. 492.

<sup>29</sup> Graph kindly provided by William Turkel, using data calculated as part of the 'Data Mining with Criminal Intent' project.

<sup>30</sup> Devereaux, 'City and Sessions Paper', pp. 468-69, 484-90.

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- <sup>31</sup> John Glynn retired from the office in 1779, and was replaced by James Adair, also a supporter of Wilkes: Lemmings, *Professors*, pp. 216-17.
- <sup>32</sup> OBP, January 1780, trial of John Benfield and William Turley (t17800112-33).
- <sup>33</sup> Langbein, *Origins*, p. 188.
- <sup>34</sup> *Ibid.*, p. 185.
- <sup>35</sup> Devereaux, 'City and the Sessions Paper', p. 480.
- <sup>36</sup> OBP, April 1783, trial of Thomas Littlepage, Joseph Bell, Jane Warrickshall and Thomas Warrickshall (t17830430-9).
- <sup>37</sup> See, for example, OBP, January 1784, trial of Ruth Merger and Charlotte Smith (t17840114-45).
- <sup>38</sup> Beattie, 'Scales of Justice', p. 227; Landsman, 'Rise of the Contentious Spirit', p. 607.
- <sup>39</sup> 'Garrow's Law', created by Tony Marchant, was aired on the BBC in two series in 2009 and 2010. Another series is planned. See also, Beattie, 'Scales of Justice'; John Beattie, 'Garrow for the Defence', *History Today* 41/2 (1991): pp. 49-53; and Richard Braby and John Hostettler, *Sir William Garrow: his Life, Times and Fight for Justice* (Hook, 2009).
- <sup>40</sup> Beattie, 'Scales of Justice'.
- <sup>41</sup> OBP, January 1786, trial of Robert Jacques (t17860111-62).
- <sup>42</sup> OBP, statistics function, defendants by year and verdicts by year, 1779-86.
- <sup>43</sup> Tim Hitchcock and Robert Shoemaker, *London Lives, 1690-1800: Poverty, Crime and the Making of a Modern City* (Cambridge, forthcoming). chap. 7.
- <sup>44</sup> OBP, January 1786, trial of John Hogan (t17860111-1).
- <sup>45</sup> Devereaux, 'Fall of the Sessions Paper', p. 76.
- <sup>46</sup> Landsman, 'Rise of the Contentious Spirit', pp. 562-64; Beattie, 'Garrow for the Defence'; *May, Bar*, pp. 40-42.
- <sup>47</sup> Hitchcock and Shoemaker, *London Lives*, chap. 7.
- <sup>48</sup> Lemmings, *Professors*, pp. 223-25.
- <sup>49</sup> John Hawkins, *The Life of Samuel Johnson, L.L.D.* (London, 1787), pp. 521-22.
- <sup>50</sup> OBP, statistics function, tabulating year against verdict, counting by verdict. In 1783 also 64 per cent of the verdicts were guilty.
- <sup>51</sup> LMA, City of London Miscellaneous Papers, COL/CA/MIN/01/010, 398 (February 1787).
- <sup>52</sup> *Times*, 22 February 1787.

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<sup>53</sup> *Ibid.*, 6 October 1789.

<sup>54</sup> LMA, City of London Miscellaneous Papers, COL/CA/MIN/01/010, 398 (February 1787).

<sup>55</sup> OBP, January 1786, trial of William Bartlett (t17860111-30); Beattie, 'Scales of Justice', p. 245. For the manuscript notes, see reference number o17860111-1 in the OBP or follow the link from Bartlett's trial. The original notes are bound with the printed copy of the Proceedings for that sessions kept in the Harvard University Library.

<sup>56</sup> OBP, September 1787, trial of Charles Stokes *et al.* (t17870912-114).

<sup>57</sup> Simon Devereaux, 'From Sessions to Newspaper? Criminal Trial Reporting, the Nature of Crime, and the London Press, 1770-1800', *London Journal* 32/1 (2007): pp. 12-13.

<sup>58</sup> *Times*, 19 September 1787, col. 3c.

<sup>59</sup> Devereaux, 'City and the Sessions Paper', p. 492.

<sup>60</sup> OBP, January 1790, trial of John Leonard and Jane Leonard (t17900113-6); *Times*, 14 January 1790.

<sup>61</sup> LMA, Journal of the Court of Common Council, COL/CC, vol. 72, ff. 275-77 (21 October 1790).

<sup>62</sup> OBP, February 1792, trial of Robert Norris (t17920215-50).

<sup>63</sup> LMA, Journal of the City Lands Committee, COL/CC/CLC/01/076, vol. 84, f. 194 (19 Sept. 1792).

<sup>64</sup> *Ibid.*, ff. 267-68 (7 December 1792); Devereaux, 'City and Sessions Paper', p. 493. Devereaux suggests Hodgson had run into financial difficulties: 'Fall of the Sessions Paper', p. 78.

<sup>65</sup> Langbein, *Origins*, p. 190.

<sup>66</sup> OBP, January 1800, trial of John Hall, *et al.* (t18000115-31).

<sup>67</sup> Devereaux, 'Fall of the Sessions Paper', pp. 64, 66, 72, 76, 78.

<sup>68</sup> LMA, Journals of the Committee of City Lands, vol. 97, COL/CC/CLC/01/089, f. 145 (19 Nov. 1805); *May, Bar*, pp. 98-99.