

THE PRISONERS' COUNSEL ACT 1836: DOCTRINE, ADVOCACY AND THE CRIMINAL TRIAL

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Abstract:

In recent years greater numbers of thinkers have considered the Prisoners' Counsel Act 1836 but have viewed the Act through the lens of Whig history, as a further manifestation of the modernisation of criminal justice in the inevitable march towards adversarialism. This article addresses how the Act has been understood within broader literature concerning the nineteenth century felony trial. In particular, greater attention is paid to how counsel reacted to the Act, considering the nature of the contemporary Bar, the apparent silence from the Bar in reaction to the Act, what evidence might be drawn upon to gauge how members of the Bar might have reacted to changes within the trial and some possible explanation for such reactions. Lastly, some conclusions are drawn as to what these reactions reveal about pervading perceptions of the Bar during the mid-nineteenth century.

Keywords: Prisoners' Counsel Act 1836, English Bar, adversarialism, representation of accused

Introduction

The Prisoners' Counsel Act 1836 (hereafter, the Act) was arguably the most significant development in criminal trial procedure during the nineteenth century.² The Act gave prisoners in felony trials the right to delegate the presentation of their defence to professional counsel. Prior to this alteration prisoners could only rely on advocates to examine and cross examine witnesses and this was at the discretion of the trial judge. Should the prisoner have wished to put forward any defence to the court by way of an explanation or coherent narrative, they could only do this personally in a system labelled by John Langbein as the 'Accused speaks' trial.³ Such a trial relied almost exclusively upon the prisoner for an explanation of any possible defence. By forcing the prisoner to address the court, it was believed that the innocent accused was in the best position to demonstrate their innocence to the court.⁴ Theoretically, this was a genuinely truth-seeking measure but in reality, the

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² 6 & 7 Will. 4, ch.14 (1836).

³ John Langbein, *The Origins of Adversarial Criminal Trial*, (Oxford University Press, 2003) p.48.

⁴ John Langbein et al., *History of the Common Law. The Development of Anglo-American Legal Institutions*, (Aspen Publishers, 2009) p.600.

terrified, inarticulate or mentally less adroit prisoner was rarely able to offer the court any information beyond pleading for mercy, whether they had committed the offence or not.⁵

The Act was not solely the codification of the right for prisoners to have defence counsel, it was a political and cultural signal that defence counsel were a permanent fixture of the felony trial and the previous judicial discretion which allowed counsel to pave their way in trials was at an end; defence counsel were now a right and not a privilege.⁶ Consequently, the Act itself deserves significant academic attention as it represents a definitive shift in the felony trial, beyond that of merely consolidating trial practice.

This article addresses how the Act has been understood within broader literature concerning the nineteenth century felony trial. In particular, greater attention is paid to how counsel reacted to the Act, looking in particular at the nature of the contemporary Bar, the apparent silence from the Bar in reaction to the Act, what evidence might be drawn upon to gauge how members of the Bar might have reacted to changes within the trial and some possible explanation for such reactions. Lastly, some conclusions will be drawn about what these reactions might tell us about pervading perceptions of the Bar during the mid-nineteenth century.

1 Current Literature

The Act has largely been explored within a framework of Whig history.⁷ This framework assumes a progression toward greater constitutional freedoms and in the context of legal procedure, Whiggism might then be characterised as a march towards a triumphant adversarialism and all that might entail, or as a further manifestation of the modernisation of criminal justice. This approach presupposes a particular development of the felony trial and the modern day adversarial system to be the logical or foreseeable consequence of the debates surrounding felony reform during the nineteenth century; a development from one paradigm towards what is regarded by the Whigs as a better paradigm. Whilst this approach has yielded some excellent research, at times this deterministic thinking prevents consideration of alternative developments.⁸ This alternative approach not only reveals an underside to legal history, but to our understanding of where the adversarial trial ought to be situated in the modern legal system.

⁵ J.M. Beattie, *Crime and the Courts in England 1660-1800*, (Clarendon Press Oxford, 1986) p.350.

⁶ Although the actual presence of counsel in trials should not be overstated as counsel fees remained prohibitively high for the majority of prisoners.

⁷ By 'Whig History' I refer to both a literal understanding of development within the nineteenth century being viewed from a perspective of the Whig party and also in the sense defined by Herbert Butterfield in his essay, *The Whig Interpretation of History*, (W.W.Norton & Company, 1965).

⁸ The particulars of these alternatives cannot be considered in this forum but will form the focus of future research.

The potential flaws of Whig interpretation have previously been addressed by thinkers such as David Cairns.⁹ Cairns has criticised Langbein for taking a deterministic approach to his research surrounding the criminal trial but Cairns himself continues to assume the current adversarial system to be the natural consequence of the modernised trial. This approach is not uncommon in this field and the traditional, pre-reform trial, which limited defence counsel, is consistently portrayed as archaic, of its time or unreasoned. By way of contrast, the nineteenth century reforms influenced by political and ideological liberal values alongside a growing utilitarian ethos, have been understood by many scholars in terms of progressiveness and rationalisation of the justice system, which in turn, have led to our modern trial.¹⁰ This pre-modern trial can be understood as being a product of the *Ancien Regime*, a method of dispute resolution rooted in irrational medieval dogma and, to some extent, of course this is true. However, to assume that the system which followed is somehow more rational is rather optimistic and an assumption too far.

Moreover, by presupposing the outcome of the events and measures leading to the reforms throughout the nineteenth century, there is a danger of analysing these developments from too modern a perspective. Too much weight may be placed on the strength of argument surrounding the reforms; we should be careful not to assume that argument supporting the reforms was made stronger by the nature of the reforms themselves. It is dangerous to suppose that proponents of reform were moved by some philosophical zeitgeist as such an assumption detracts from the individual motivations behind particular reformers. For instance, the right of defence counsel to address the jury is generally held to be essential within the modern criminal trial and opinion may have begun to move in this direction during the eighteenth century.¹¹ However, such certainness of what constitutes a 'fair trial' and moreover, the very necessity for such a trial, has not always existed. To assume that reference to defendants' rights held the same importance historically as it does today is a gross misunderstanding of the criminal justice system in the early nineteenth century and before.

It is also misleading to think that certain reforms, such as those within the 1836 Act, survived public, political and professional scrutiny simply because the reforms were somehow

⁹ David J.A Cairns, *Advocacy and the Making of the Adversarial Trial 1800-1865*, (Clarendon Press Oxford, 1998) p.36.

¹⁰ Allyson N. May, *The Bar and the Old Bailey 1750-1850*, (The University of North Carolina Press, 2003) p.176.

¹¹ J.M. Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review*, 9 (1991) pp.221-267 at p.250.

considered to be more logical or rational than the status quo or the alternatives suggested by would-be reformers. This is not to argue that some reformers did not consider themselves to be rationalising the felony trial but again, their arguments were not couched in terms of progress for progress' sake. The great reformers such as Bentham and Brougham did not advocate change, they advocated rational developments which would result in the criminal law being more consistent and less reliant upon the mercy of judges and jurors. However, it is unhelpful to try to understand why some nineteenth century legal and political reforms were successful without fully addressing the cultural context within which such reforms were made. A fuller understanding of this key moment in the history of common law adversarialism might be reached by taking into account the cultural context and its role in shaping the reforming agenda. Any political or legal reform must be understood in an intellectual or cultural context and it would be misleading to think of the reforms of the felony trial as being designed to achieve only one end such as the perceived improvement to the rights of the prisoner. Martin J. Wiener approaches this challenge by utilising a dialectic of historiographical orientations: *internalism* and *pragmatism* with internalists defined as viewing legal history as a phenomenon which should be considered as unique and only understandable within a logic of legal history. In contrast, Wiener argues pragmatists take a more interdisciplinary approach. Wiener places scholars such as Langbein, with his criticism of Douglas Hay's *Albion's Fatal Tree*, as being firmly in the *internalism* camp, an approach which considers the development of the law to be an autonomous field. Wiener argues scholars such as Hay to be *pragmatists*, viewing historical practices and developments as the result of ad-hoc acts of individuals with unforeseen consequences. Whilst not going so far as to argue *pragmatists* to be contextualists, Wiener suggests that viewing legal developments within the confines of an internal logic is necessary but not sufficient to provide a coherent explanation for such developments.¹² The most interesting element of Wiener's dialectic and surrounding argument is his claim that both internalists and pragmatists 'have tended to take for granted the sort of naïve positivism that has become increasingly implausible'.¹³ This reflects the concern that within the field of legal history, scholars persist in analysing and understanding changes in the law in terms of developments and progressions toward the rationalised and the modern.

While assumptions of modernisation, understood in normative terms, are not unusual or in fact necessarily to be avoided when considering these developments, it is clear that we must recognise them if we are to justify reliance on particular sources such as Royal Commissions

¹² Martin J Wiener, *Reconstructing the Criminal. Culture, Law and Policy in England, 1830-1914*, (Cambridge University Press, 1990) pp.4-6 passim.

¹³ *Ibid*, p.6.

and not others, such as anecdotal evidence reflected in the media or Parliament. Whilst it may seem attractive to rely more heavily upon sources situated within an institutional system seemingly working to achieve modernisation and progress, sources which ostensibly sit outside of such a system may unearth an alternative understanding of how reforming policies were passed.

Herbert Butterfield posits that assumptions are often necessary when drawing inferences but stresses the importance of acknowledging that these conclusions are based upon such assumptions; whilst such recognition does not make the inferences drawn more reliable, it does provide some cautionary context within which to view the conclusions drawn.¹⁴ This is not a controversial argument, however its warnings are so often overlooked by paying disproportionately more attention to the evidence given to sources such as Royal Commissions rather than to other potentially illuminating sources.

2 Professional Reactions to the Act

Previous research concerning the legal profession's response to the Act has focused more upon the reaction of the judiciary and evidence given to Parliament by two leading counsel, Charles Phillips and Charles Ewan Law.¹⁵ By considering the response of other practising members of the profession, an additional light might be shone upon the period leading to the 1836 Act. In addition to widening the sources of evidence in understanding the response of other counsel, it is interesting to further consider one potential influence upon counsels' reaction to the Act, namely the reputation of the criminal Bar. The reputation of the criminal Bar with the public, the media, Parliament and within the legal professional itself, was exceptionally negative. It is the effect of this reputation upon the reaction of criminal barristers to the reforms set down in the 1836 Act which warrants consideration. A better understanding of professional reactions to these reforms may be achieved if considered more as a cultural reaction to cultural opinion.

Unfortunately there is a dearth of first-hand material relating to counsels' reaction to the Act. There are little contemporary first-hand accounts of individual barristers' response to the changes the Act introduced. For example, the Inns of Court have no record of any members writing on the subject of the Act or indeed, on changes within the felony trial around the time

¹⁴ Butterfield, *The Whig Interpretation of History*, p.23.

¹⁵ See, amongst others Cairns, *Advocacy*; Allyson N. May, *Reluctant Advocates: The Legal Profession and the Prisoners' Counsel Act of 1836* in Smith, May and Deveraux (eds) *Criminal Justice in the Old World and the New*, (University of Toronto, 1998).

of the Act.¹⁶ However, there are other sources such as the under-used Hansard reports which can be invoked to develop some understanding of the response by criminal counsel to the Act.

Acknowledgment must be made to the methodological difficulties in writing any generalised theory which considers the Bar to be a unified body. However, by extending our understanding of the role of the Bar and individual barristers in response to the reforms under the Act, a more contextualised approach to these legal reforms may be established. In achieving this more nuanced understanding of major reforms such as the 1836 Act, a bridge between the traditional and prevailing Whig approaches and other contemporary research into the history of the legal profession itself might be constructed.

A Fragmented Bar

It would be a futile task to try to ascertain any coherent approach of the Bar in the 1830's as there was no unified Bar. We cannot think of the Bar or the individual Inns in any cohesive sense such as that of trades union,¹⁷ and the Inns of Court played only a minor role in the regulation of counsel.¹⁸ There was yet to be any formal legal education as there existed no Bar examination and the delivery of law lectures within the University of London had only been introduced in the late 1820s. The Bar Counsel would not be established until 1894 and Circuits were essentially self-regulating and separate from each other with different circuit messes applying different codes of etiquette.

There are multiple examples of variation in the rules of etiquette across the different circuits in the nineteenth century. Whilst most circuits were opposed to counsel accepting briefs without the previous mediation of a solicitor, this rule was not restricted by law even by 1850 and the enforcement of the custom was very much reliant upon the etiquette of the particular circuit. Circuits played a more active and day-to-day role in the regulation and punishment of counsel, but again there is great variance between circuits. Some messes took to punishing breaches of etiquette through *fining with wine*, a system of penalisation whereby a member who had transgressed one of the rules of the circuit would be called out at a circuit dinner and made to purchase wine for some or all other members.¹⁹ Other circuits enforced

¹⁶ Correspondence with the author.

¹⁷ See, amongst others: Raymond Cocks, *Foundations of the Modern Bar*, (Sweet and Maxwell, 1983); David Lemmings, 'Ritual, Majesty and Mystery: Collective Life and Culture Among English Barristers, Serjeants and Judges c.1500-c.1830' in Wesley Pue and David Sugarman (eds) *Lawyers and Vampires. Cultural Histories of Legal Professions*, (Hart Publishing, 2003); May, *The Bar and the Old Bailey*.

¹⁸ Cocks, *Foundations*, p.22.

¹⁹ Daniel Duman, *The English and Colonial Bars in the Nineteenth Century*, (Croom Helm: London

preventative measures to breaches of professional etiquette such as the need for junior counsel to enter the assize town by foot in order to avoid touting for briefs whilst using public transport.²⁰ It was widely feared that if barristers travelled to the host venue of the assize by public transport, they may have encountered friends or family of the accused or those wishing to bring a prosecution and may have taken this opportunity to offer their professional services. Arguably this suggests that those seeking to regulate professional ethics of counsel had little faith in individual counsel not to take advantage of circumstances if a brief was to be gained. However, it may also suggest that those organising individual assize trips were aware of the unpopular perception of counsel as prone to unscrupulously obtaining briefs and thus, thought it best that justice and professional integrity be seen to be done so as to avoid false accusations of breaches of professional ethics.

In addition to the idiosyncrasies which divided each circuit, the Bar was internally divided by the strict hierarchy which formed the defining characteristic of the higher branches of the legal profession. David Lemmings notes the transition post-1600 from a Bar formed upon community and unifying ritual, to one of 'self-consciously aggressive individualism'.²¹ The earlier Bar was perhaps not quite an idyllic brotherhood but in order to climb the professional ladder, barristers had to conform to the pattern of promotion defined by the profession itself. Many of the more successful members of the Bar either pursued careers in Parliament or were elected to or purchased positions such as Common Pleader.²² By the mid seventeenth century the judiciary, serjeants and practising barristers relied upon government service to improve their position²³ and subsequently did not need to further the cohesion of the Bar by working within the parameters set out by members of the profession. Divisions within the Bar demonstrate the difficulty in trying to ascertain any general theory of the Bar as a unified entity speaking with one voice. In fact, the role of competition within the Bar for governmental promotion acted to break whatever fraternity previously existed amongst practising barristers. In light of this it is questionable whether the evidence of only two counsel to the Royal Commission, Charles Phillips and Charles Ewan Law, both from the same circuit, should be relied upon too heavily as a source for understanding the reaction of the Bar at that time. This concern would have been known to those leading the Commission. In light of this troublesome approach, an important question is raised: did the Royal Commission deliberately limit the evidence put before them when assessing the development of counsels' role in the felony trial? Unfortunately the motivations of those

and Canberra, 1983) p.38.

²⁰ Cocks, *Foundations*, p.15.

²¹ Lemmings, *Ritual, Majesty and Mystery*, p.34.

²² May, *The Bar and the Old Bailey* p.157

²³ *Ibid*, p.54.

conducting the Royal Commission are outside the scope of this paper and rather, our question is what can be gleaned about the reaction of those practising at the Bar prior to the 1836 Act?

The Silent Majority?

Undoubtedly there does not appear to have been a great outcry from the Bar in response to the Act. May suggests that the silence of the Bar and its members is evidence of the profession's acquiescence to the introduction of jury speeches for defence counsel. She argues that because the Bar did not protest against the pre-reformed system, it can be concluded that the pre-1836 felony trial was supported by counsel.²⁴ Barristers often circumvented the strict rules of witness handling to address the jury or to posit a defence. Prior to 1836, this could well explain why there is a dearth of evidence surrounding barristers' protestations against the unreformed system; counsel were not always suffering the disadvantages of having their role limited within the trial if judges were allowing covert addressing of the jury. This is only one potential explanation for the apparent silence from the profession at the Bar before the 1836 Act.

A source of information which may shine light on the Bar's reaction to the reforms surrounding the felony trial lies in Hansard. Between 1821 and 1836, reforms of the felony trial, particularly regarding the allowance of defence counsel to address the jury, were debated throughout Parliament at great length. The debates were detailed and often heated with multiple Members feeling compelled to speak on the subject. Little research into the particular members involved in the debate has been conducted and unfortunately this cannot be considered at length here. However, it is significant to note that Members of both Houses, and on either side of the debate, drew on anecdotal or hearsay evidence provided by practising members of the Bar to support their arguments. In many cases these references were to unnamed members of the profession and may have purely been rhetoric, but it does demonstrate either that members of the profession were vocal in their response to the reforms or, that politicians and the public of the time certainly felt that the profession was commenting upon the reforms.

Studying the debates from 1821 to 1836, there is a clear shift in reference to the opinion of the legal profession. In 1826, the Attorney General, opposing the reforms, argued most of the profession to be against the development of the role of felony defence counsel.²⁵ However, by 1836, Dr Lushington, advocate for the changes to the felony trial, argued that

²⁴ May, *Reluctant Advocates*, p.202.

²⁵ HC Deb, 25 April 1826, vol.15 cc.589-633.

members of the profession, including the Lord Chief Justice of the King's Bench, supported the reforms.²⁶ Obviously it is questionable whether either biased party could speak for the Bar as a whole. In June 1836, Lord Lyndhurst ably summarised the history of the Prisoners' Counsel Act and admitted that historically the legal profession had been opposed to such measures introduced by the various Prisoners' Counsels Bills. Lyndhurst went on to concede that the profession had recently grown more in favour of the lifting of felony trial restrictions.²⁷ Unfortunately Lyndhurst does not give any reasons for this volte face, or rather, Hansard does not record whether he gave any explanation for the apparent change in the reaction of the profession. This may be evidence of Lyndhurst enlisting the support of the profession to support his arguments for the sake of rhetoric rather than as a definite statement of fact. However, it certainly bolsters the impression that members of the Bar were expressing their opinions, at least to politicians, if only in a personal capacity.

3 Reflections upon Possible Reactions to the Act

By focusing upon the impact of public distrust of the legal profession, some insight might be gained into why counsel were perhaps less vocal in their opinions regarding reform than might be expected. What *is* clear from Hansard and media records is that there was a very real fear that the felony trial could descend into a theatre for avaricious counsel to actively mislead the court for financial and reputational gain. Perhaps because of this concern, the professional Bar deliberately avoided a vocal response to the debates surrounding the felony trial for fear of further damaging their profession.

It was apparent during the parliamentary debates surrounding the numerous Bills leading to the eventual passing of the 1836 Act that the effect of the legislation would be to develop the influence and role of counsel in the felony trial.²⁸ The arguments against such an extension of the power of barristers were multiple and varied but suffice to say that from a practising barrister's perspective, such a change was likely to increase the amount of work and financial profit that counsel could expect.²⁹ Prior to the Act, the role of defence counsel was limited to making legal submissions and examining witnesses.³⁰ Before the development of more complex rules of evidence in the nineteenth century, there were few rigidly followed rules of evidence and so legal submissions were often limited to questioning the indictment against the prisoner. As indictments were only disclosed to the prisoner and his counsel upon reading at the beginning of the trial, counsel had little opportunity to challenge even

²⁶ HC Deb, 17 February 1836, vol.31 cc.497-501.

²⁷ HL Deb, 23 June 1836, vol.34 cc.760-78.

²⁸ HC Deb, 6 April 1824, vol.11 cols.180-220.

²⁹ May, *Reluctant Advocates*, p.189.

³⁰ Langbein, *Origins*, p.254.

this. Langbein and Beattie have demonstrated that defence counsel acted beyond their remit in trials, using witness cross examination to put forward a narrative defence to the jury.³¹ Counsel would frequently push the boundaries limiting their jurisdiction using questioning of witnesses to paint a clear picture of the defence to the jury without directly addressing them.³² Langbein argues that by 1836, the 'accused speaks' trial was essentially undermined, with counsel having far more influence within the trial than mere witness handling.³³ It is not until 1836 that counsel would in fact have a right to address the jury. Following the Act, rather than officially being confined to witness handling and limited legal submissions, counsel would be able to deliver a defence to the jury in the form of a coherent and persuasive narrative. Subsequently, the official role of counsel within the trial, and assumedly prior to trial, would be developed. In light of these seemingly positive developments for the individual criminal barrister, an important question is why was the professional bar not more publically supportive of the Act?

May argues this subversion of the rules does not reflect a desire by counsel to reform the restrictions.³⁴ In this instance, counsels' attempt to address the jury through witness handling does not necessarily reflect defence counsel protesting against the restrictions upon them but rather, they were trying to have the best of both worlds by maintaining a system which mostly protected prisoners from the death penalty whilst also allowing a better defence to be submitted through asides to the jury.

Advocates should have supported the development of the adversarial trial predominantly because it was in their financial interests to do so.³⁵ As addressed above, adversarialism allowed more scope for counsel to develop their role and probably to increase their fees. If counsel extended their influence in the trial, it follows that there was greater possibility of increasing their pecuniary reward as more of their time, as well as their importance would be required. As counsels' role within both the trial and in preparations for trial became more time and resource consuming, it was to be expected that this increase in workload would yield more financial reward for the entire legal profession. However obvious the reasons may be for the practising criminal Bar to support the reforms of the Prisoners' Counsel Act, there is evidence from politicians' references in Hansard that some counsel did not support the reforms and there are a number of possible reasons why some did not.

³¹ See in particular Langbein, *Origins*, and Beattie, *Crime and the Courts in England 1660-1800*.

³² Beattie, *Crime and the Courts*, p.376.

³³ Langbein, *Origins*, p.255.

³⁴ May, *The Bar and the Old Bailey*, p.195.

³⁵ Stephen Landsman, *The Adversary System, A Description and Defense*, (American Enterprise Institute Studies in Legal Policy, 1984) p.25.

Leading up to the passing of the Act, Parliament used Royal Commissions to receive evidence from barristers which might help them gauge the reaction of the profession to the debates leading up to the final, successful Bill. Such evidence should not be too heavily relied upon when concluding that the legal profession were against the Act. In a similar vein disproportionate focus upon the evidence given to the Commission by only two members of the Bar, Phillips and Law, and over-reliance on this evidence is problematic for three main reasons. First, it is questionable whether evidence to Royal Commissions, which is compelled by Parliament, can be accepted without qualification. Second, the credibility of the Bar's two representatives ought to be questioned, particularly given the political sensitivity of the issue and the politicisation of the profession at this time.³⁶ Lastly, by focusing solely upon this evidence, scholars may assume that these members represented the entire practising Bar. Again, this type of assumption is so often necessary but likewise, frequently misleading and artificial.

4 The Effect of Paternalism: Counsel Opposition to the Act

Whilst many barristers supported the development of an adversarial system, they did not necessarily support the Prisoners' Counsel Act itself. Members of the Bar such as William Garrow opposed such reforms on paternalistic grounds.³⁷ It was felt that with the various penal codes in force at the time which created so many capital crimes, the only hope prisoners had was to fall upon the mercy of the court. To a large extent this approach worked very well and all parties to the felony trial, including prosecuting counsel, acted to save the pitiful accused in many cases.³⁸ Indictments were deliberately drafted to reduce felonies to misdemeanours, guilty pleas were rarely accepted (should a prisoner plead guilty to a felony the entire court would try to persuade him to plead not guilty³⁹) and in the majority of cases prosecuting counsel were measured and reserved in their submissions.⁴⁰ If there were any procedural errors made by the prosecution such as minor errors on indictments, the judge would, in most cases, acquit the prisoner immediately.⁴¹ Such measures greatly reduced the number of prisoners actually executed and many felt that without these measures, the death

³⁶ Wesley Pue, 'Lawyers and Political Liberalism' in Halliday and Karpik (eds) *Lawyers and the Rise of Western Political Liberalism*, (Clarendon Press, 1997) p.191.

³⁷ May, *The Bar and the Old Bailey*, p.57.

³⁸ Beattie, *Crime and the Courts*, p.336.

³⁹ Langbein, *Origins*, p.61.

⁴⁰ Although it is interesting to note that William Garrow, the proponent of the unreformed trial, who claimed the status quo to protect the prisoner through such unwritten behavioural codes of conduct such as the reserved prosecutor, was infamous to many for his 'hanging speech' when prosecuting in the case of Patch in 1820

⁴¹ Peter King, *Crime, Justice and Discretions in England 1740-1820*, (Oxford University Press, 2000) p.239.

toll would be unpalatable.⁴² This is not necessarily to say that the profession were altruistic in any sense, but were the Bloody Code to be strictly enforced without the balancing effect of customs such as pious perjury, the number of executions would rise to a previously unimaginable figure.⁴³ By the 1830s the entire court process looked increasingly like a filtering system consisting of several safeguards to prevent execution.⁴⁴ As alternatives to execution such as the increased use of transportation were introduced, the use of pious perjury became less necessary and juries were more inclined to convict on the original indictment⁴⁵ rather than altering the facts of the case in order to reduce the maximum sentence below that of death.

Many people, both MPs and Lords, as well as some publications, argued the extended use of counsel would have a negative effect for the prisoner as the aforementioned safeguards and leniency shown to the prisoner would be withdrawn.⁴⁶ This was undoubtedly a genuine fear for many of those opposing the Act but we should be careful not to conclude that opponents to the Act were paternalistic whereas proponents of the Act were more concerned with the truth finding benefits the reform would bring.⁴⁷

May's work often appears to view paternalism as being in opposition to liberalism and creates a dichotomy between the two. Paternalism is constructed in terms which are opposed to liberalism; as paternalism against individual responsibility. This approach to paternalism is too simplistic and does not allow for analysis of the reforms outside of the Whig-Tory dichotomy. It is misleading to understand the development of the reforms as being driven by liberal, progressive Whigs and railed against by paternalistic Tories. It could be accepted that Charles Ewan Law's opposition to the reforms as being due to his political views in that Law was a committed Tory and subsequently was more inclined to support the paternalistic approach of his party and oppose the Act.⁴⁸ However, Phillips' opposition to the Bills is more surprising because Phillips was a Whig. Paternalism infiltrated the debate surrounding the reforms on both sides with Phillips, opposing the reforms, making clear references to the need to protect the prisoner from the full force of the Bloody Code. We must be careful not to presuppose Phillips' motivations for opposing the reforms but his being a Whig, along with his evidence to the Royal Commission, would suggest some

⁴² Langbein, *Origins*, p.334.

⁴³ *Ibid.*

⁴⁴ King, *Crime and Law*, p.9.

⁴⁵ Langbein, *Origins*, p.58.

⁴⁶ May, *Reluctant Advocates* p.189.

⁴⁷ *Ibid.*, p.185.

⁴⁸ *Ibid.*, p.195.

consideration for the prisoner.⁴⁹ Phillips' opposition to the reforms astonished some of his friends such as Lord Brougham, champion of the Act.⁵⁰ This surprise was because Whigs of the day may have initially believed all Whigs to support such reform but perhaps Brougham did not appreciate the impact paternalist thinking had on the issue. Moreover, understanding paternalism as a coherent underlying cause behind any issue of legal or social reform is troublesome as such an approach ignores the divisions within paternalism itself. For example, it has been suggested that the increased popularity of paternalism from the end of the eighteenth century was in reaction to the growth of liberalism.⁵¹ Ostensibly this argument lends itself to the dichotomy between old world reactionary Toryism and the modernising force of liberalism but with regard to the 1836 Act, those supporting or opposing the reforms do not always fit into this model. As aforementioned, there were humanitarian paternalists, arguably such as Phillips, who were concerned with the harsh realities the prisoner may find himself in were the safeguards within the felony trial removed. Another Whig Member of Parliament who supported the Act was James Scarlett who might be described as a confused paternalist. Scarlett was a Whig in that he supported laissez-faire principles but he was also a Malthusian, an approach which lamented the decline of paternalism.⁵² Scarlett is highly demonstrative of the potential for inconsistency in politicians' approaches to societal responsibility and human nature itself. Moreover, Scarlett is a prime example of why we must be very careful not to assume that paternalist thinking was somehow opposed to the reforms.

5 The Effect of Conservatism: Counsel Opposition to the Act

A second reason for the Bar's resistance to reform may be derived from the very character of the profession itself. The Bar and the legal profession as a whole are not recognized for embracing radical change and this was no less the case in the early nineteenth century. Members of the profession commenting around the time of the 1836 Act refer to the Bar's 'repugnance to change long-established rules'.⁵³ This is not a useful argument in itself tending to lead to a dead end rather than any useful conclusion. The claim that all barristers abhorred change is not only too sweeping a statement but also fails to consider motives behind individual members of the profession. However, there may be some weight to the argument that law reform was traditionally seen as the preserve of lawyers and the encroachment of Parliament upon such reforms may have been met with some resistance by the profession.

⁴⁹ May, *The Bar and the Old Bailey*, p.189.

⁵⁰ May, *Reluctant Advocates*, p.197.

⁵¹ Kim Lawes, *Paternalism and Politics. The Revival of Paternalism in Early Nineteenth Century Britain*, (Macmillan Press Ltd, 2000) p.19.

⁵² *Ibid*, p.76.

⁵³ John Mackintosh quoted in May, *The Bar and the Old Bailey*, p.184.

Much has been made of the 40 years of 'progressive rationalisation' instigated by the coming to power of the Whigs in the 1820s.⁵⁴ The first half of the nineteenth century was unquestionably a period of great reform and change affecting most aspects of social and political life. For a profession such as the Bar, ostensibly both politically and socially conservative in outlook, such dramatic alterations to the fabric of society would understandably be resisted. Again we find ourselves returning to the narrow argument of professional conservatism but this seemingly limiting argument can be interpreted in a potentially illuminating way. If it were indeed the case that the legal profession saw itself as the true and justified reforming force of the law, then the measures surrounding the felony trial may have been resented by the profession which believed itself to have the monopoly of law reform. Whilst many of the MPs involved in the introduction of the Bills preceding the Act were at least members of the Inns, if not having previously been practising barristers, it is not unlikely that those still in practice may have resented such radical changes to their daily practice being driven solely by politicians.

One explanation for the conservatism of the Bar may be found in the perceived threat to the continued existence of the profession. Pue couches understanding of counsels' refusal to be more involved in reform in terms of the survival skills of the Benchers of the Inns of Courts;⁵⁵ the Bar did not wish to upset the political or economic status quo.⁵⁶ Like Phillips and Laws, Benchers' promotion to legal office relied upon the grace and favour of political benefactors. It would be imprudent for the ambitious member of the Bar to become politically radical thereby potentially risking alienating themselves from the politically powerful of the day.

There has been some discussion as to the role of party politics upon the behaviour of the Bar throughout the nineteenth century. As aforementioned, it is inadvisable to try to understand the Bar during this period as a unified organisation.⁵⁷ However, the English barrister had the opportunity to be 'involved in all aspects of the construction of a liberal polity in the nineteenth, as in the eighteenth, century'.⁵⁸ The Courvoisier trial, in which Phillips' career was deeply damaged by later claims that he deliberately misled the court knowing the prisoner, Courvoisier, to be guilty, are illustrative of this. Pue's claim that Courvoisier forwarded the liberal cause illustrates the need to consider barristers' political affiliations and approaches in their response to developments within the trial. No large

⁵⁴ Cairns, *Advocacy*, p.1.

⁵⁵ Pue, *Lawyers and Political Liberalism*, p.191.

⁵⁶ Lemmings, *Ritual*, p.62.

⁵⁷ Cocks, *Foundations*, p.25.

⁵⁸ Pue, *Lawyers and Political Liberalism*, p.190.

section of the Bar had any political affiliations per se and did not appear to behave in any consistent way politically.⁵⁹ Nonetheless, his previous claim that members of the Bar were pursuing methods designed to introduce liberalism into the trial, requires some reflection. If it is the case that some members of the Bar were in fact promoting change within the trial, this weakens the common argument that the Bar was a conservative profession railing against parliamentary driven reform of the criminal justice system as a whole and further strengthens the perception of a disjointed and fragmented Bar.

It is arguable whether some members of the Bar were indeed taking steps to liberalise the felony trial. Given the lack of any other regulatory body, it is true that the Inns did not play as significant a role in the regulation of the Bar as may have been expected. This does not definitively prove that there was no regulation of individual barrister's behaviour by the profession. There are limited examples of more liberal or radical members of the Bar in the first half of the nineteenth century but these members, such as Thomas Erskine, did not remain in the profession for long which may suggest that, amongst other reasons, the Bar was not an attractive environment for progressive individuals. There are also a number of examples of Benchers who were happy to repress the careers of junior counsel who stepped outside of the status quo. What these examples demonstrate is that whilst it may not have been the concerted effort of the Inns to formally enforce conservatism, there may have been alternative systems of control at play within the profession (such as the aforementioned controls within the circuits) which repressed any liberal tendencies. There are several examples of individuals being refused promotion from junior counsel or entrance to the Inns of Courts during the first half of the nineteenth century which prompted more progressive counsel such as Daniel O'Connell to protest against such obvious repression.⁶⁰ One of the most controversial being that of D.W. Harvey in 1821, in which the House of Commons intervened against the Inn's decision.⁶¹ Even so, this repression, assuming it was a concerted practice to restrain the more liberal at the Bar, was not wholly successful as demonstrated by the very existence of progressive counsel such as O'Connell.⁶²

6 Advocacy, Parliament and the Media: Public and Political Distrust

A third, and more complex reason for the lack of universal support for the reforms, may lie in the perception of the Bar by the public. The nineteenth century criminal barrister was not a well-paid or well-respected figure. On all circuits, but more so within the Central Criminal

⁵⁹ Ibid, p.191.

⁶⁰ As recognised by Pue, *Lawyers and Political Liberalism*, p.203.

⁶¹ Ibid, p.199.

⁶² O'Connell was also an influential MP playing a pivotal role in the passing of the Act itself.

Court, criminal barristers were often the younger members of the Bar, cutting their teeth within the criminal courts for the shortest time possible before escaping to the better paid and better respected civil and chancery courts. The criminal barrister in particular was contemptible even to his fellow members of the Bar: 'An Old Bailey Practitioner is a by-word for disgrace and infamy.'⁶³ Yet a disdain for advocates was by no means limited to the criminal bar and moreover, the morality of barristers has long been questioned by the public. There is ample evidence of this not only during the period of the Prisoners' Counsel debates but throughout the nineteenth century. There are high profile examples of the villainy of legal advocates in Victorian literature and there are also examples in the media of the time of public mistrust and hatred of counsel, and in fact of the felony trial in general. A common portrayal of the advocate in nineteenth century literature was that of being the criminal himself as though damned by association. Well known examples can be found in Charles Dickens' *Bleak House*, George Elliot's *Felix Holt* and more subtly in William Makepeace Thackeray's *Vanity Fair* in which lawyers were given the names of famous Victorian criminals.⁶⁴

Representations of counsel which have not been extensively explored by those writing in this field are again to be found in the Parliamentary debates of the period. During the second reading of the Prisoners' Defence by Counsel Bill, O'Connell, who was the Member of Parliament for Dublin, made very clear accusations against the evidence provided to the committee by members of the Bar, in particular Charles Phillips.⁶⁵ O'Connell went so far as to question the motives of Phillips in providing his evidence, implying Phillips to be distracted by pecuniary or political concerns. The following month, Colonel Perceval replied to O'Connell's accusation and strongly criticised him for charging Charles Phillips with giving false evidence to the Committee.⁶⁶ What then ensued was a ferocious argument between O'Connell and Perceval which greatly shocked the House and which demonstrates how seriously O'Connell's accusation was taken by both Phillips and Perceval. What is of particular interest is that when O'Connell made the accusation, no member of the House present disputed or corrected his accusation and there was no public response to the charge. Colonel Perceval only complained of the slur two weeks later and upon receiving a letter from Phillips requesting that his friend, Perceval, vindicate him. This clearly reflects that libellous criticism of counsel provoked no spontaneous reaction within Parliament or in public which further suggests an attitude to the professional Bar which was little short of contempt.

⁶³ (1844) 3 *Law Times* 501.

⁶⁴ Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology*, (Cambridge University Press, 2000) p.111.

⁶⁵ HC Deb, 17 February 1836, vol.31 cc.497-501.

⁶⁶ HC, 2 March 1836, vol.31 cc.1142-54.

Such a lack of complaint reflects how the act of claiming one of the most senior members of the Bar to be in the pocket of the government seemed to be an entirely reasonable statement to both Parliament and public alike.

More generally, a major concern voiced in Parliament in response to the reforms was the assumption that should defence counsel be allowed to speak on the prisoner's behalf, the felony trial would become a verbal gladiatorial arena. This criticism was raised dozens of times between 1821 and 1836 and by different members of both the Commons and the Lords. As one Member stated, the reforms would: 'change the sober floor of a court of justice into an arena for two ingenious combatants to display their strength and agility in; the stake for which they played being nothing less than the life of a man'.⁶⁷ The replacement of a trial, which many believed to elicit the truth through the direct testimony of the accused, with a system allowing for the manipulation of this testimony by counsel, was a worrying prospect for those who believed representation to undermine the quality of the evidence put before the court.

Throughout the Parliamentary debates of this period reference is often made to the public's displeasure with the use of counsel. In 1824, even the greatest proponent of the reforms, George Lamb, admitted that public satisfaction with trials would be improved if there was no counsel at all, prosecuting or defending.⁶⁸ The profession as a whole withstood the ravages of public opinion.⁶⁹ The profession feared that by setting itself against public opinion, the Bar would face questions as to the overall utility of advocates. Was it strictly necessary to have separate legal representatives merely for witness handling?⁷⁰ Moreover, older members of the Bar had already witnessed a crisis of unpopularity in the late 1800s and were aware of the difficulties this could pose. In a time of transition of professions, a serious reflection as to the utility of separate advocates could have proved fatal to the Bar. During the early nineteenth century there was little regulation of the profession and there was disagreement between the Inns with regard to the education or qualification process for new barristers.⁷¹ It may not have been impossible for the Bar to be subsumed into a general legal profession thereby disposing of the unpopular and expensive solicitor/advocate distinction. This eventuality may appear unlikely but it must be remembered that the profession did later dramatically alter through such measures as dissolving the Serjeants' Inn and through the

⁶⁷ HC, 6 April 1824, vol.11 cc.180-220.

⁶⁸ *Ibid.*

⁶⁹ Cocks, *Foundations*, p.26.

⁷⁰ *Ibid.*, p.56.

⁷¹ *Ibid.*, p.23

creation of the Bar Council in 1894.⁷² Additionally, the Bar as a profession was not equipped to defend itself against public criticism especially in light of the focus upon tradition which permeated not only everything the profession did but more importantly, the rationale for the majority of the customs of the Bar if not the Bar itself.⁷³ In an age of self-conscious rationalisation, an unpopular profession reliant on tradition as a rationale for its existence, was in a precarious position. Whilst it is true that the Bar as a profession and the Inns of Court felt somewhat untouchable in comparison with the development of other professions in the nineteenth century,⁷⁴ public opinion was still relevant, especially with regard to the 1836 Act.

Previous research surrounding the Act would suggest that the Bills leading to the Prisoners' Counsel Act received little public attention in the 1820s beyond a widely referenced article by Sidney Smith in the *Edinburgh Review*.⁷⁵ This is by no means the case as there are reports of the progress of the reforms throughout the media from 1824.⁷⁶ It is apparent though, that there was an increase of interest in counsel for the defence in the 1830s.⁷⁷ One illustrative example can be found in the *Quarterly Review* in 1836, in which the Prisoners' Counsel Bill attracted a great deal of public attention, far more than any other legal consideration.⁷⁸ The public recognised that the reforms contained within the Bill would have wide-reaching implications and many publications and journals keenly followed the reforms through Parliament. More generally, the public echoed the concerns raised in Parliament surrounding the nature of barristers and the Bar. During the debates concerning the reforms to the felony trial, members of the public wrote to various publications complaining of the behaviour of counsel and giving personal examples of mistreatment at the hands of barristers.⁷⁹

Many publications also mirrored the language used by parliamentary opponents to the reforms and the questioning of the honesty and integrity of barristers themselves. One example of this can be found in the 1826 publication of *The Age*, in which the fear of advocacy barring discovery of the truth was strongly expressed: 'We would have the simple and clear course of truth polluted and turned away by the mixture of elaborate speech-

⁷² Duman, *The English and Colonial Bars*, p.70.

⁷³ Cocks, *Foundations*, p.55.

⁷⁴ Cocks, *Foundations*, p.55.

⁷⁵ May, *Reluctant Advocates*, p.188.

⁷⁶ For example see *Bell's Life in London & Sporting Chronicle* which followed all the Bills that eventually made up the 1836 Act from 1824 onwards. It is important to note that *Bell's Life* was an anti-establishment publication which may explain why it followed this issue, concerning reforms impacting upon prisoners' rights.

⁷⁷ May, *The Bar and the Old Bailey*, p.181.

⁷⁸ Frederick Calvert, *Law Magazine, Quarterly Review of Jurisprudence*, 15, 394 (1836).

⁷⁹ One such example is that of Ralph Modest writing to *Bell's Life in London & Sporting Chronicle* 116 16 May 1824, p.157.

making and the jury be lead, not by the fact, but by their passions'.⁸⁰ Other publications went so far as to attack individual counsel, surprisingly including Charles Phillips who was against the reform: 'An experienced counsel, like Charles Phillips, or Mr Adolphus, for instance, will be so much better able to prove a rogue to be an honest man than could the said rogue himself'.⁸¹ There is no evidence of Phillips standing out as the figurehead of public distain for lawyers prior to the Courvoisier trial in 1840 and thus, it might be supposed that such attacks reflect a more general distrust of wily counsel and the abuses they might render onto criminal justice.

Public opinion and Parliamentary pressure was to prove influential upon the Bar in later years through such reforms as the Bar qualifying exam in 1872.⁸² Whilst the development of the Bar as a profession initially resisted parliamentary and public pressure, the nineteenth century saw the Bar increasingly responding to outside influence⁸³.

An illustrative depiction of public opinion regarding advocates is given in a speech made by John Stuart Mill in 1827 entitled 'The Influence of Lawyers' Mill argued the influence of lawyers to be 'pernicious to morals, jurisprudence and government', that lawyers 'live by roguery' and that they be immoral whatever their argument or whoever they represent even when on the side of justice. Evidently barristers are predominantly motivated by money and will happily stand in the way of justice for their own gains: 'But without dwelling upon the pecuniary advantages which lawyers derive from all vices of the law, sufficient reason for their constant opposition to all improvement in it is to be found in... professional narrowness of mind...'.⁸⁴

Conclusion

Current literature surrounding the development of the felony trial in the nineteenth century has done much to develop our understanding of the 1836 reforms and to the development of the adversarial system itself. However, further attention is warranted with regard to the reaction of the professional Bar to the introduction of the Act. This paper has pursued a different perspective by further regarding the role of the opinion of individual counsel and the perception of the Bar as a profession and the impact this may have had on trial development. Moreover, it has been questioned why particular groups or individuals reacted to these

⁸⁰ *The Age*, 30 April 1826, Issue 51, p.404.

⁸¹ *The Satirist, or the Censor of the Time*, 27 April 1834. p.131.

⁸² Cocks, *Foundations*, p.55.

⁸³ Duman, *The English and Colonial Bars*, p.55.

⁸⁴ John Stuart Mill, 'The Influence of Lawyers' in John M. Robson, *The Collected Works of JS Mill Vol.XXVI. Journals and Debating Speeches Part 1 (1820)*, (Routledge, 1988).

reforms in the way they did. By considering the responses and actions of those expected to implement the final decisions of criminal procedure reform, this approach has provide further exploration of the context in which Parliament solidified the rights of prisoners within the felony trial.

Two main explanations for the apparent silence of the Bar in response to such a significant piece of legislation have emerged. Firstly, the disparate nature of the Bar prohibited any united response to trial changes and secondly, the widespread distrust for and unpopularity of the Bar understandably prevented individual barristers from raising their heads above the parapet during such a time of upheaval. While it is true that there is little evidence of counsel speaking directly on the changes brought about by the Act, it is not the case that such silence suggests acquiescence with the changes. This is particularly so due to the apparent silence during the decade of discussion leading to the 1836 Act itself. An acquiescence explanation makes little sense in light of this ongoing silence as the reforms could have been successful or have failed and yet, counsel did not raise a public argument for either side. A more plausible explanation is that individual barristers were less likely to speak publically on the reforms without a more unified Bar supporting them and even if an individual barrister did want to make a public statement regarding the trial reforms, the profession's unpopularity rendered any voicing of counsel opinion to be inadvisable. This better understanding of the reaction of counsel to this particular trial reform not only provides further illustration of the climate within which the Act was passed but also, public and political perceptions of the Bar in the early and mid-nineteenth century, how such perceptions impacted on the behaviour of counsel and the consequences that a disjointed Bar had on the ability of the profession to play a role in the development of the felony trial.