Defending the accused: the impact of legal representation on criminal trial outcomes in Victoria, Australia 1861-1961

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Access to legal representation by accused felons was entrenched as part of the adversarial system from the early nineteenth century, but a substantial minority of defendants remained undefended at superior court level well into the twentieth century. Using a sample of criminal trials collected across a crucial hundred-year period that saw the development of incipient legal assistance schemes, this article seeks to examine what effect the presence of defence counsel had on individual trial results. It is shown that there was a significant association between defence status and a variety of outcomes, including pleas, verdicts, trial length, bail status and sentencing. This relationship was to some extent affected by the specific offence with which the accused was charged, but remains evident across various other factors, including defendant ethnicity, sex, occupation and age, and lawyer assigned to the case. The results suggest that representation was highly desirable for defendants throughout this period.

I. INTRODUCTION

Existing scholarship on the criminal law has highlighted the contribution of the defence lawyer to the rise of the adversarial trial.¹ In an influential account John Langbein mapped out the transition that he argued occurred during the eighteenth century, marking the increasing presence of the lawyer in criminal trials even at a time when their advocacy still

¹ Tom Smith, 'Zealous Advocates: The Historical Foundations of the Adversarial Criminal Defence Lawyer', 2 *Law, Crime and History* (2012), 1-20.

laboured under judicial restraints.² His account is consistent too with the work of those who aimed to document the transition in quantitative terms, including Beattie and most recently Hitchcock and Shoemaker.³ This consensus is challenged by Cairns for whom the transition is by no means complete until the middle of the nineteenth century. His account highlights the importance of the struggle of the 1830s over the right of prisoners to have counsel for their full defence, and the subsequent refinement of advocacy technique to take full advantage of the newly-won right of the accused.⁴

Taking heed of Cairns' emphasis on Victorian-era developments, in this article we push the case further to suggest that much is yet to be understood in the rise of legal defence even after the mid-nineteenth century. For one thing it is clear from the sources discussed above that no more than one-third of accused in the eighteenth century trial had legal counsel, a proportion which had not improved much by the mid-nineteenth century when still only a minority were professionally defended. And so the full admission of defence counsel to the English criminal trial (especially following the 1836 Prisoners Counsel Act) nevertheless begged the question of equitable access to adequate representation. There followed a century and more of patchy development of legal assistance schemes, more studied in their policy and statutory development than in their practical effects.⁵ In sum, while there has been considerable interest shown in the effect of the introduction of defence counsel on courtroom

² John H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford Studies in Modern Legal History, Oxford, 2002.

³ J. M. Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', 9(2) *Law and History Review* (1991), 221–267, doi:10.2307/743649; Tim Hitchcock and Robert Brink Shoemaker, *London Lives: Poverty, Crime and the Making of a Modern City, 1690-1800*, Cambridge, 2015.

⁴ David J. A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (New York, 1999); Allyson N. May, *The Bar and the Old Bailey, 1750-1850* (Chapel Hill: University of North Carolina Press, 2003). J. B. Post, 'The Admissibility of Defence Counsel in English Criminal Procedure', 5 *Journal of Legal History* (1984), 23-32.

⁵ Francis Regan ed., *The Transformation of Legal Aid: Comparative and Historical Studies*, Oxford, 1999.

practice, there has been limited study of the benefits or costs of such a development for individual defendants.

In this article, we draw on new data to examine the impact of defence counsel less in terms of the character and styles of advocacy than in terms of trial outcomes. In short, did lawyers make a difference, and for whom? Using for the first time Australian data made available through a longitudinal sample of criminal trials in the colony and later state of Victoria (1861-1961), we examine trends in the impact of representation on trial outcomes and the degree to which this impact differed in relation to different types of defendants and crimes. We seek also to put the question of the efficacy of professional legal defence to the test by considering the challenges faced by unrepresented defendants.

II. ACCESS TO LEGAL REPRESENTATION

The history of the Australian criminal trial is virtually co-terminous with the rise of the lawyer in the criminal trial in common law jurisdictions. As Bruce Kercher's illuminating excavations of the early New South Wales trials have demonstrated, lawyers were active even in the unpromising years of military courts.⁶ From their inception other colonies such as Western Australia and South Australia offered fertile ground for lawyers plying their trade.⁷ Over time, increased access to legal representation in Australia was facilitated by government policy and judicial discretion.⁸ But long before the establishment of legal aid provisions, clients of Australian courts were quite heavy users of legal assistance as litigants in civil proceedings, defendants in magistrate's courts and in criminal trials. Their access to counsel flowed from the extension to the colonies of the changes wrought by the 1836 Prisoners

⁶ Bruce Kercher, *An Unruly Child: A History of Law in Australia*, St Leonards, 1995, 39-40.

⁷ Enid Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979*, Nedlands, 1980; John James Emerson, *History of the Independent Bar of South Australia*, Adelaide, 2006.

⁸ Mary Anne Noone and Stephen A. Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid*, Annandale, 2006.

Counsel Act. After the Australian Courts Act 1828 such statutes would not apply in the colonies unless taken up by the local legislature. However, in *Ex parte Nichols* (1839) the New South Wales supreme court determined by majority that the provisions of the English Act applied in New South Wales; they had in fact already been expressly adopted in Van Diemen's Land.⁹ In 1840 the New South Wales legislative council settled the issue in the Defence on Trials for Felony Act which recited the English provision that 'it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them'. The law now provided that such defence might be by counsel or attorney in both trials for felony and in summary jurisdiction.¹⁰

By 1840 then it was legally settled that an accused might retain legal representation for full defence in a criminal trial in the superior courts of the colonies. Yet their ability to do so remained dependent on their personal circumstances and the type of offence with which they were charged. Until the twentieth century, only defendants charged with capital crimes were entitled to apply for state assistance in paying for representation across Australia's various legal jurisdictions.¹¹ Defendants charged with murder and rape were therefore likely to be represented; but the majority of criminal defendants, even at supreme court level, were charged with non-capital property offences. Interest in extending legal aid began to grow in the early 1900s, particularly following the passage in the Westminster parliament of the Poor Prisoner's Defence Act 1903. Similar measures for relief were included in the federal

⁹ *Ex parte Nichols* [1839] NSWSupC 76 (12 Oct. 1839) (<http://www.austlii.edu.au/au/cases/nsw/NSWSupC/1839/76.html#n3>, acc. 13 May 2016); Greg D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Annandale NSW, 2002), 142–50. Alex C. Castles, *An Australian Legal History*, Sydney, 1982, 430-1. For Tasmania see [1837] An Act For Extending To This Colony Sundry Statutes Passed For The Amendment Of The Criminal Law (8 Will. IV, No 1), s. vi.

¹⁰ [NSW] An Act for enabling persons prosecuted for Felony to make their Defence by Counsel or Attorney (4 Vict. c. 27 1840), ss. 1, 2.

¹¹ Chris Field and Jeff Giddings, 'A History of Legal Aid in Victoria', in Jeff Giddings, ed., *Legal Aid in Victoria: At the Crossroads Again*, Fitzroy, 1998, 21.

Judiciary Act 1903 that applied to all indictable offences brought under Australia's Commonwealth law. Queensland and New South Wales also both enacted a Poor Persons Defence Act in 1907.

It was another decade until Victoria enacted its own Poor Prisoners Defence Act 1916. Administrative and financial planning for the provision of legal aid under this statute was chaotic but the effect was seen in an increase in the rate of legal representation in the decades after 1916. The restrictive criterion of the 1916 Act (that 'it is desirable in the interests of justice that such legal aid should be supplied') was removed by amendment in 1927 and a more ambitious Poor Persons Legal Assistance Act 1928 established an office of public solicitor to administer legal aid in both civil and criminal matters.¹² It remains unclear just how much improved representation resulted from these legal aid provisions but in the nineteenth century the rate of representation in Victoria never reached sixty per cent; in the twentieth century it was never below that threshold. Nevertheless these figures suggest that a good proportion of those facing trial for serious offences remained without legal counsel. We estimate that between a quarter and a third of defendants continued to be unrepresented at trial through to 1961.

Part of the reluctance to institute legal assistance schemes, or apply them to a wider range of defendants, can be traced to attitudes about criminal defence lawyers themselves. Historically as today, the public enjoyed jokes about the deviousness and cupidity of 'keen witted' lawyers.¹³ The effectiveness of lawyers in defending their clients could earn admiration or be a source of humour, but also aroused unease and contempt. Concerns that

¹² John Adrian Lynch, 'Legal Aid and Legal Profession in Victoria 1841-1995,' a thesis submitted for the degree of Doctor of Philosophy, La Trobe University, Melbourne, 1996, 99-140.

¹³ *Age* (Melbourne), 7 Nov. 1908, 4; *Berringa Herald*, 26 Sept. 1914, 4.

state legal assistance to prisoners would allow an increased number of guilty defendants to go free played a part in continued efforts to block legal assistance schemes.¹⁴

Irrespective of the equity considerations in access to justice, the deployment of defence counsel was always vulnerable to public scepticism. Although by the nineteenth century the prohibition against defence counsel speaking for accused felons had been relaxed, into the early twentieth century there was a continued perception that the truly innocent had little need of a defence beyond what they themselves could simply and honestly state. Australian newspaper reporting suggests ongoing hostility towards the role of defence lawyers, which was perceived to be to secure an acquittal by any means necessary, no matter how legally tenuous. A multi-part exposé by a journalist who went undercover at the Brisbane gaol in 1883 thus complained that criminal lawyers were often found on the grounds of the gaol ‘touting for business’ and were well able to ‘scent out the moneyed men’. According to the reporter, during the subsequent interview the prisoner would state ‘his case with considerable freedom no matter what rascality is involved’ and after admitting ‘his guilt off hand’ would collude with counsel on an ‘elaborate scheme of defence’. The only reservation of the lawyer was as to the question of financial terms. ‘Money does a lot of things the public knows very little about in the way of proving guilty men innocent’, the journalist opined.¹⁵ In such an account access to a defence lawyer was perceived as a double injustice, available on the one hand only to those able to afford the fees, and on the other enabling a perverse outcome through questionable defence strategies.

In 1894 *The Bendigo Independent* likewise excoriated the underhand dealings of lawyers, who it claimed were largely immune to the law; their tricky legal knowledge and the fraternal feeling within the profession were said to frustrate successful prosecutions of wrong-doing. In short, ‘He may be an arrant rogue, a liar, extortioner, thief, embezzler,

¹⁴ Noone and Tomsen, *Lawyers in Conflict*, 27.

¹⁵ *Queensland Figaro*, 13 Jan. 1883, 5-6.

perjurer and suborner of perjury, but he is not directly amenable to the common laws of his country'.¹⁶ In particular, the paper alleged that Victorian lawyers frequently entered into illicit champertous agreements, whereby the lawyer agreed to defend a thief in return for a portion of the stolen plunder.

Such insinuations continued to appear even after the importance of legal representation to securing equitable justice had been acknowledged by the passage of Victoria's 1916 Poor Prisoners Defence Act. In 1917 the *Melbourne Age* thus reproduced a story from a New York paper entitled 'The Criminal Lawyer as a Cause of Crime'. Alleged to have been written by an ex-convict, the article claimed that most criminals knew that 'freedom or imprisonment was largely a matter of money', and that if they could afford legal counsel they would likely be acquitted.¹⁷ Such fears continued to hamper the administration and deployment of legal assistance schemes; nevertheless, after 1916 there was a better chance that poor persons could obtain legal aid. But it was one thing to increase the availability of professional advice, another to know whether it really made a difference to the client, an accused facing trial or sentence. In the following sections, we therefore analyse the impact of legal representation, however it may have been obtained, on a variety of processes and outcomes in the course of criminal prosecution.

III. METHODOLOGY

The data set we analyse in this article is drawn from a database compiled by the Prosecution Project. The project digitises information on Supreme Court trials across multiple Australian jurisdictions by the transcription of historic court registers or related record sets, storing the data in a relational database enabling complex analysis of numerous factors associated with

¹⁶ *The Bendigo Independent*, 26 Feb. 1894, 2.

¹⁷ *Age* (Melbourne), 10 Feb. 1917, 4.

each prosecution.¹⁸ In Victoria, this has been achieved using trial brief registers, which include information such as name of accused, trial place and date, committal location and date, names of witnesses, judge, verdict and sentence.¹⁹ Importantly, especially after 1915, additional information was often recorded, including the name of the crown prosecutor and a defendant's legal representation status, with the name of their lawyer when defended.

In this article we analyse a five-yearly sample of individuals scheduled to be tried in the months of February, July and October between 1861 and 1961. Not counting cases where the trials were postponed to another month, this leaves a sample of 5,572 indicted individuals whose cases terminated either in a trial verdict (3,341), jury disagreement (88), guilty plea (1,833) or in the prosecution abandoning the case (310). Of these 5,572 individuals, it has been established that at least 2,685 were defended. This information is gathered mostly from the trial registers. Where defence status was unstated in the trial register, it was otherwise determined from newspaper coverage of trials, accessed through the National Library's Trove database.²⁰ A further 1,741 individuals were confirmed as being undefended through the same sources. This left 1,146 individuals (20.6 per cent) whose defence status remains unknown.

The proportion of defendants whose defence status was unknown falls to 14.4 per cent when only the 3,341 defendants whose cases terminated in a trial verdict are considered. This is largely because of the high proportion of defendants whose representation status was unknown among those against whom the prosecution was abandoned. This is understandable; if there was never an actual trial, the retention of legal counsel was less likely to be noted in either official records or newspaper coverage, even if counsel was consulted in the lead-up to the trial. Those who pleaded guilty were similarly slightly over-represented among those

¹⁸ Mark Finnane et al., The Prosecution Project, <https://prosecutionproject.griffith.edu.au/>.

¹⁹ Criminal Trial Brief Register I, 1855-1891, VPRS 3523/P0 and Criminal Trial Brief Register II, 1892-1961, VPRS 3524/P0, Public Records Office Victoria.

²⁰ National Library of Australia, <http://trove.nla.gov.au/>

whose representation status was unknown (as well as being significantly over-represented among those who were undefended). As the purpose of this paper is to consider the impact of professional legal defence for defendants put on trial, unless otherwise stated the analysis below relates to the 3,341 defendants whose cases resulted in a verdict of guilty, guilty on some or lesser charges, or outright acquittal. Our analysis compares those listed as defended with those known to be undefended and with a total sample that also includes the unknown residuum. It should be noted that it seems likely that a higher proportion of individuals whose defence status remains unknown were undefended than defended, as their known characteristics more closely follow the patterns evident in relation to undefended accused, and newspapers were typically more likely to note the presence of defence counsel than its absence.

Finally, while some attributes of defendants (especially gender, often ethnic identity) can be inferred from their name in court registers, other factors that might have characterized trial process and outcomes can only be determined from additional sources. We have established details of age and occupation for some defendants from newspaper accounts, police gazettes or prison records. For the most part the latter two sources are a record of convicted defendants, skewing the resulting sample to show a much lower acquittal rate than that found among defendants as a whole. Nevertheless, such data help provide some insights into the relevance of membership of particular age and class groups to the likelihood and impact of legal representation.

In the following pages we consider a range of measures concerning the impact of legal representation. What effect did defence counsel have on verdict and sentencing? How strong was this effect across different types of defendants? Did the presence of counsel have a measurable impact on the process of individual trials? Were particular lawyers more effective than others? The levels of significance of the statistical findings presented in

relation to these questions were first tested through chi-square analyses; subsequently, multivariate relationships were examined through several multinomial logistic regressions. In light of the results presented we conclude with a discussion on the importance of defence counsel and the challenges of appearing at trial without a lawyer.

IV. IMPACT OF LEGAL REPRESENTATION ON VERDICT

Well before the development of legal aid schemes, representation by defence counsel was sought by a majority of defendants. Our data suggest that the impact of legal aid provisions such as those provided by the Poor Prisoners Defence Act and its successors was incremental rather than revolutionary. Defendants presumably employed counsel because they perceived that it would benefit them. Across the entire century from 1861 legal representation was positively associated with more favourable outcomes for the defendant. Of 3,341 defendants in our sample, whose cases proceeded to a trial verdict across the 1861-1961 period, 45.5 per cent were acquitted overall; among the 1,953 who were defended, this rate rose to 55.8 per cent, while among the 908 known to be undefended it dropped to 28.1 per cent (see Table 1). A multinomial logistic regression confirms that compared to a defendant without representation, a defendant with representation was 3.2 times more likely to be acquitted than convicted (see Table 3).²¹

The regression analysis also shows that even when convicted there was a small advantage in having counsel – compared to undefended accused, those with representation were 1.5 times more likely to be found guilty of a lesser offence, or of only some charges, than be convicted as charged. Defended accused were similarly 1.6 times more likely to be recommended to mercy, as opposed to being convicted as charged, than undefended accused. In other words, representation was more likely to result in some form of mitigated verdict,

²¹ The odds ratios of acquittal pertain in particular to the Exp(B) scores listed in Table 3.

although the difference was relatively minor: among convicted defendants, those who were undefended were found guilty as charged in 68.6 per cent of cases, compared to 64 per cent among defended accused. Likewise, while only 7.5 per cent of all convicted defendants in the sample were recommended to mercy by the jury in their case, this figure rose to 9.7 per cent among those convicted who were defended, and dropped to 5.8 per cent among those listed as undefended.

This association between defence status and the type of verdict appears across different categories of offences. Although less likely to be defended than those charged with crimes against the person, property offenders who employed counsel had an acquittal rate of 54.9 per cent, compared to 28.6 per cent of those undefended, and an overall acquittal rate of 42.5 per cent. Those accused of crimes against the person were more likely to be defended, with the result that the improvement of their chances of acquittal was only marginally better than the overall acquittal rate, which was 49.1 per cent compared to 54.4 per cent among defended accused. However, among those facing personal offence charges who were confirmed as undefended, the acquittal rate was only 25.5 per cent. Less common types of crime that fell outside these categories, such as perjury and bigamy, demonstrated the highest acquittal rates, 64.3 per cent among defended accused, against 28.1 per cent who were undefended, with a 56.4 per cent acquittal rate overall (see Table 1). The significance of the findings were further underlined by a multinomial logistic regression, which showed representation increased the odds ratio of acquittal to 3, 3.5 and 4.6 among property, personal and other offenders respectively (see Table 3).

When more specific offence types are examined, however, the strength of association between verdict and representation shows greater variance. The reasons for this variance are not immediately apparent. Two of the offences that show the strongest levels of significance between representation and verdict, stealing and sexual offences involving underage females,

show about equal odds of acquittal or conviction when representation is not taken into account. It could then be speculated that representation made a greater difference in cases where the nature of the offence and the sort of evidence that could be presented in relation to it meant that one outcome was no more likely than another. For other offences, especially more serious crimes such as murder and rape, the correlation between defence status and outcome faded to non-significance. Possibly the benefit of legal representation with regard to some of these cases may be obscured by the overall higher rate of representation among such high stakes cases – without legal counsel those facing homicide or serious sexual offence charges may have had even poorer acquittal rates. It is also possible that such variations in effect of defence status might be partly an artefact of sample size for specific offences, although smaller sample sizes did not necessarily result in non-significance findings: representation still showed as having a significant association with verdict for the 45 embezzlement defendants for instance, but not the 265 robbery defendants. Conversely, there was a clear advantage in outcome for those charged with multiple offences: in particular, for defendants charged with three or more offences the acquittal rate was 30.1 per cent among defended accused, against just seven per cent of those that were undefended (see Table 1).

These overall positive effects of defence status on trial outcome disguise significant change over time in this 100 year sample. Notably the advantage of having a lawyer to defend the accused appeared to increase. Of the 1,528 defendants tried during the nineteenth century, the acquittal rate among accused with counsel was 48.4 per cent against 29.7 per cent among those who lacked representation. In the twentieth century, the overall acquittal level rose, and the difference the presence of a lawyer made in the rate also grew. Of 1,813 twentieth-century defendants, 60.4 per cent of defended accused were acquitted against 26.4 per cent of the undefended (see Table 1). A multinomial logistic regression shows that while nineteenth-century defendants with representation were 2.2 times more likely to be acquitted

than convicted compared to those without representation; among twentieth-century defendants the odds of acquittal doubled to 4.3 (see Table 3).

But how far can this change be attributed to more effective advocacy? The higher overall acquittal rate at trial in the twentieth century probably owed something to rising representation rates, but can also be attributed to the increasing use of the guilty plea in this period. Around forty per cent of all defendants originally *committed* for trial pleaded guilty in the twentieth century, compared to 16.7 per cent of those in the nineteenth century. Such guilty pleas presumably weeded out many defendants who faced strong prosecutorial cases; those who remained stood a better chance of acquittal, particularly if they had legal representation and so did not confront the obstacles faced by undefended accused.

American scholars have associated the rise of the guilty plea (which took place in the United States at a much earlier stage, beginning in the nineteenth century) with the growing role of lawyers in both sides of criminal cases.²² Evidence of counsel orchestrating plea deals is also occasionally apparent in Australian courtrooms, even during the nineteenth century. For instance, in 1861 the crown prosecutor in the trial at Geelong of Cornelius Egan for libel announced to the judge that he had conferred with his colleague for the defence and it had been agreed that Egan was willing to accept a guilty verdict without contest if the penalty was restricted to a good behaviour bond. The judge agreed to this arrangement.²³ Another defendant on trial that same year pleaded guilty after their lawyer negotiated the charge down from grievous bodily harm to common assault.²⁴ However, the statistical evidence undermines the suggestion that defence counsel played a major role in the rise of the guilty plea in Victorian courtrooms. Of the 1,833 sampled defendants who pleaded guilty, only 34.4

²² Mary E. Vogel, 'The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860', 33 *Law & Society Review* (1999), 161-246. Michael McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History* (Oxford, 2005).

²³ *Geelong Advertiser*, 22 July 1861, 3.

²⁴ *Mount Alexander Mail*, 24 July 1861, 2.

per cent were recorded as being defended, while 43.9 per cent were known to be undefended. Presumably there was a circuitous logic in place here: defendants who planned to plead guilty did not see the necessity of representation (nor did the crown deem it necessary to afford such defendants legal assistance), and defendants without representation may have been more easily persuaded to plead guilty.

V. IMPACT OF LEGAL REPRESENTATION AMONG DIFFERENT DEFENDANTS

Representation was therefore positively associated with the likelihood of jury trials, and with not guilty verdicts at those trials. However, did that positive association remain constant among different types of defendants? Our sample data provide some capacity to consider the relevance of geography (rural/urban), ethnicity, gender, age and occupation to trial outcomes.

Considering ethnicity first, we know that jury attitudes and acquittal prospects could be influenced by the personal characteristics associated with defendants, which lawyers would have to take into account when deciding whether to accept and how best to proceed with a case. During a royal commission into the administration of justice in Victoria in 1899, barrister John Gurner observed that juries were often racially biased, especially against Chinese defendants.²⁵ Alfred Stephen Burvett, a police detective in Victoria from the 1880s through to the end of the first world war, likewise commented in his memoir upon the prejudice shown by juries against Chinese individuals.²⁶ It is not surprising then to see that the overall acquittal rate for Asian-origin defendants (most of them Chinese) was lower than

²⁵ 'Law reform: report of Royal Commission for Inquiring as to the Means of Avoiding Unnecessary Delay and Expense and of Making Improvements in the Administration of Justice and in the Working of the Law: together with minutes of evidence and appendices: presented to both Houses of Parliament by His Excellency's command,' *Victoria Parliamentary Paper*, Melbourne, 1899.

²⁶ Alfred Stephen Burvett, *Crimes and Their Detection*, 1937, MS 11990, State Library of Victoria, 199.

that found among Europeans, 37.2 to 45.9 per cent (see Table 2). But the advantage of employing skilled counsel was well known to Chinese communities in Victoria, who often pooled their resources to engage even senior counsel in their cause.²⁷ For them, as for other colonials, the employment of counsel was associated with a higher likelihood of acquittal (48.1 per cent against 17.2 per cent among undefended accused).²⁸ Representation was in fact more beneficial to Asian defendants: represented Asian defendants were 4.4 times more likely to be acquitted than convicted compared to their unrepresented counterparts, whereas represented European defendants' odds ratio improved to 3.3 (see Table 3).

As in the majority of historic and contemporary criminal jurisdictions,²⁹ the sex of a defendant was also an important predictor of trial verdict. Of 297 women in the sample, 57.9 per cent were acquitted, compared to the 44.3 per cent of the much larger number of male defendants. Retaining defence counsel increased the likelihood of acquittal significantly for each sex. For men, the presence of defence counsel improved the acquittal rate to 54.4 per cent against 27.2 per cent among undefended males (or increasing the odds of acquittal versus convictions to 3.2). The effect was slightly stronger among women with legal representation increasing the acquittal rate to 69.4 per cent, compared to 39.1 per cent among undefended females (raising defended women's odds ratio of acquittal to 3.5) (see Tables 2 and 3). In fashioning their strategies defence counsel made use of those gender stereotypes that improved the prospects of acquittal among women as a whole. Blaming women's crimes on the frailty of female nature or physiology probably sounded more convincing coming from lawyers than from women themselves. At the trial of Alice Baum for infanticide in 1901, her barrister Mr Fink, in addition to urging the difficult position Baum's pregnancy had placed

²⁷ Mark Finnane, 'Law as Politics: Chinese Litigants in Late Colonial Court-Rooms', 9(2) *Journal of Chinese Overseas* (2013), 193–211.

²⁸ The numbers of identified Aboriginal defendants in this Victorian sample are too few to establish the effect of legal defence on their trial outcomes.

²⁹ Frances Heidensohn, *Women and Crime*, Houndsmills, 1996, 2-3.

her in as an unmarried domestic on a rural property, thus argued that she had not acted ‘maliciously’ in concealing her baby in a chest of drawers, but had merely exhibited the ‘dissimulation’ that was ‘natural to women’.³⁰ Conversely, it may have been harder for undefended women to portray themselves as victims, as the very act of speaking up in the courtroom constituted an exhibition of agency that may have been perceived as undermining their femininity.

Irrespective of gender, the tactics of defence counsel were often adapted to the peculiar circumstances of the defendant or case. In rural courtrooms, for instance, the issue of jury selection could be particularly important. The more tight-knit nature of the communities, and the smallness of the potential jury pool, meant that there was a higher likelihood that jurors would have some prior acquaintance or knowledge of defendants. Rural lawyers were said to be particularly active in challenging potential jurors.³¹ At the trial of two men for horse-stealing at Beechworth in 1881, their lawyer challenged twenty jurors on behalf of the defendants, ten times the number of challenges by the crown. This strategy was apparently successful; an acquittal was returned, although only after the jury had been locked up for over six hours.³² Other defence counsel applied for trials to be moved to other jurisdictions in order to avoid local prejudice.³³

Despite such evidence of success, regional lawyers were sometimes described as less skilled than their metropolitan counterparts. Edward Kinglake, in his 1892 work *The Australian at Home*, claimed it was only barristers who did not have ‘much reputation in the metropolis’ who got work by travelling around Victoria’s circuit court.³⁴ If so, there is little

³⁰ *Camperdown Chronicle*, 9 Feb. 1901, 2. The jury found Baum guilty on the lesser charge of concealment of birth and the judge bound her over without imprisonment.

³¹ *Queensland Figaro*, 13 Jan. 1883, 5-6.

³² *Ovens and Murray Advertiser*, 18 Oct. 1881, 4.

³³ *R v Albert James Giddings*, 1916, unit 3, VPRS 469 P/0, PROV.

³⁴ Edward Kinglake, *The Australian at Home: Notes and Anecdotes of Life at the Antipodes, Including Useful Hints to Those Intending to Settle in Australia*, London, 1892, 37.

evidence of this in this sample, which shows that regional and metropolitan defendants were acquitted at similar rates, and that retaining legal representation improved their prospects with about equal force. Of 1,071 total regional defendants, 46.2 per cent were acquitted overall, compared to 55.5 per cent of those who were defended and 28.8 per cent that were undefended (representation improving odds ratio of acquittal to 3.1); among the 2,270 defendants tried in Melbourne, 45.2 per cent were acquitted, against 56 per cent of those defended and 27.7 per cent of those undefended (representation improving odds ratio to 3.3) (see Tables 2 and 3). Once more it is evident that legal representation continued to be associated with higher acquittal rates irrespective of other factors.

Finally, was age or occupation associated with any variation in the intersection of legal representation with trial outcomes? A caveat here must be the skewness of our data; these attributes are more heavily dependent on sources that give information about the convicted (as discussed earlier). In line with findings by existing scholarship,³⁵ the sample shows that younger defendants were more likely to be acquitted than older ones, and that defendants from middle-class occupations such as merchants or clerks were more likely to be acquitted than defendants working as labourers or in low-status trades. Once again, the acquittal rates for all these categories of defendants improved when they had legal counsel (see Tables 2 and 3). Notably though, the strength of association between representation status and verdict was also stronger among younger and middle-class defendants. Representation improved the odds ratio of acquittal among defendants under thirty years to 2.1, compared to 1.7 for older defendants. Representation similarly meant that working-class defendants were 3.5 times more likely to be acquitted compared to 5.4 for middle-class defendants. As with female defendants, this may be because lawyers were even more effectively able to exploit existing biases among juries. Older defendants were also more

³⁵ Peter King, *Crime, Justice and Discretion in England 1740-1820*, Oxford, 2000, 235-237.

likely to be involved in offences that were less likely to show an association between legal representation and verdict, such as forgery or fraud, and less likely to participate in those crimes that showed the strongest association between representation and verdict, such as breaking and entering.

It appears that legal representation made a difference to trial outcomes irrespective of other social attributes among defendants. Having a lawyer improved the chances of acquittal by at least ten per cent for any particular social group, even for those facing significant prejudice by juries. Some groups though benefitted from representation to a stronger extent than others, with multinomial logistic regression showing it to have been particularly important for Asian, middle-class, younger and female defendants. Moreover, representation had other consequences both before and after verdict: we turn now to consider the significance of legal representation to features such as length of trial process and sentencing dispositions.

VI. IMPACT OF LEGAL REPRESENTATION ON TRIAL PROCESS AND SENTENCING

The presence or absence of legal representation could have an important impact on issues other than trial verdict. Simply the act of going to court or retaining legal counsel was likely to have had significant repercussions for some defendants. As legal scholar Malcolm Feeley has explored, in the criminal justice system sometimes the process is in itself a punishment, especially if the process is expensive or drawn-out.³⁶ Across the 1861-1961 period, legal assistance schemes were limited and hard to access. Securing legal representation was therefore a potentially costly endeavour; even if a defendant was acquitted, they potentially

³⁶ Malcolm M. Feeley, *The Process is the punishment: Handling cases in a lower criminal court*, New York, 1979.

faced hardship on return to ordinary life. In 1915, for instance, a solicitor made an application to the state for funds for the defence of James Waters, charged with conspiracy in relation to larceny of a cheque. The solicitor pointed out that the complexities of the charge were such that questions of law were likely to arise during the trial. The costs of counsel were beyond Waters; he was a labourer at the Mooroopna cemetery earning four pounds a month, on which he had to support a wife and seven children. His only asset was a dray, which he had used as the security for the three pounds lent to him by a neighbour to cover the solicitor's costs during his committal hearing. Waters' application for assistance was refused; unrepresented at trial, he was convicted and sentenced to twelve months' hard labour.³⁷

Having legal representation seems to have had a bearing on the time it took for a defendant to be brought to trial and a verdict secured. This was probably largely due to requests for postponements by counsel for additional time to let them subpoena witnesses or seek additional evidence pertinent to the case. In a small number of cases it may also have been the result of jury disagreement at an initial trial, an outcome that appears to have been more likely with representation. (Among the 88 sample cases that ended in jury disagreement, 67 per cent were defended compared to 58.5 per cent of other cases that proceeded to jury trial.) In other instances, adjournments were allowed in order to enable the accused to secure defence counsel. John Stoddart had his 1881 poisoning trial postponed to the following month in order to enable him to find an attorney, despite the objections of the crown that he should have done so earlier.³⁸ Other defendants were allowed only much shorter adjournments. In 1891, robbery defendant William Coridos was given just one day to find legal representation; McDermott appeared for him and secured his acquittal.³⁹

³⁷ *R v James Waters*, 1915, Unit 3, VPRS 469 P/0, PROV.

³⁸ *Argus* (Melbourne), 6 June 1881, 7.

³⁹ *Warragul Guardian and Buln Buln and Narracan Shire Advocate*, 27 Oct. 1891, 3.

Across sampled defendants whose cases terminated in an actual verdict, the mean number of days a defendant waited between being committed for trial and the ultimate disposal of the case was 44.9 days. This rose to 49.4 days for those with counsel, and dropped to 38.13 days for those without. The effect of defence status on length of trial process decreased across time though, with a mean wait in the nineteenth century of 42.81 days among all accused, 49.99 days among defended accused and 34.78 days among undefended accused, against 47.11, 48.94 and 42.97 days for twentieth-century defendants. While this may not sound particularly significant in aggregate, it suggests that for some defendants the cost of having legal representation involved additional weeks if not months facing the uncertainty of a criminal trial. While a higher proportion of defendants released on bail were defended than those under remand (80.2 to 40.9 per cent), this still meant a considerable proportion of represented accused spent the time waiting for their trial in gaol. We should also note the probable importance of legal help in securing bail: of undefended accused, 83.1 per cent remained on remand.

While retaining legal representation could have financially and emotionally exhausting effects, especially if defendants were ultimately convicted anyway, for many the benefits probably still outweighed the costs. Even if convicted, legal representation had a strong correlation with more favourable sentencing outcomes. In particular, among convicted accused as a whole (including those who pleaded guilty), represented defendants were significantly more likely to be released on a bond or suspended sentence, with 31.9 per cent of defended accused being thus disposed of compared to only 19.1 per cent of those undefended. Represented accused were also slightly more likely simply to be discharged, discharged with a fine or sentenced to a purely nominal term of imprisonment, such as until the rising of the court. Correspondingly, defendants with counsel were less likely to receive gaol terms (see Table 4).

However, when sentencing is examined in conjunction with type of offence, the significance of having legal representation weakens or disappears in relation to some charges. There was little association between representation and sentence for many of those charged with personal offences. This is not surprising in relation to serious charges such as murder, which carried a mandatory death sentence across much of the period. Yet there was also no significant correlation between sentence and defence status for defendants charged with manslaughter, assaults or most sexual offences. The exceptions were the seventy-six defendants convicted of homosexual offences and the 198 defendants convicted of sexual assaults against underage females; among these prisoners, having legal representation was strongly associated with a decreased likelihood of a prison term above three years during the nineteenth century, and, as punishments became more individualized during the twentieth century, with an increased likelihood of a non-custodial sentence.

Conversely, the presence of defence counsel appears to have been broadly beneficial in respect to those charged with property crimes, the great bulk of defendants. Only a few charges, such as robbery or stock offences, do not show a significant relationship between representation and sentence. Sentencing tariffs were significantly lower among those having legal representation who were convicted of burglary, breaking and entering, larceny, false pretences and embezzlement. For instance, of the 1,016 defendants convicted of breaking and entering, 31.9 per cent were placed on bond, probation or suspended sentences, compared to 46.7 per cent of the 317 represented defendants, and 26 per cent of the 557 undefended accused. Even when imprisoned for property crimes, those who had been represented tended to receive shorter terms. Of the 310 defendants convicted of simple stealing who were given gaol terms, those with representation were thus sentenced to a mean term of 347 days against 420 days among those without representation.

VII. WHICH LAWYERS MADE AN IMPACT?

The names of a large number of lawyers appear within the sample as acting for one or more accused. There were 644 men admitted to practise as barristers or solicitors in Victoria between 1841 and 1865 alone; over the next one hundred years, a further 4,882 names would be added to the rolls, overwhelmingly male until the last few decades of the twentieth century.⁴⁰ Not all of these individuals would practise in criminal law or act as the lead defence attorney in court. However, 388 different lawyers' names appear in the sample as the lead defence counsel. Most of the lawyers listed in the sample only acted for an extremely small number of defendants within it, even if the lawyer was one of the leading figures of their time.

Eleven lawyers did produce more sizeable samples though, with the data suggesting that the success rate among counsel differed significantly. Even so, the defence lawyer with the lowest acquittal rate among this group, Hickman Molesworth, for whom only 37.8 per cent of his 45 defendants were acquitted, still offered better prospects than those found among accused confirmed to be undefended, whose acquittal rate was only 27.2 per cent (see Table 5). Part of the divergence between the success rates among different defence counsel can be ascribed to the time periods in which they were operating. Lawyers acting in the twentieth century, when the acquittal prospects of defendants who went to trial were higher overall, appear at the upper end of acquittal rates; those who acted in the nineteenth century, or across the two centuries, appear in the middle or bottom of the pack. Despite this, considerable variation is evident in the record even among those acting within the same time period. Cullity and Long, two twentieth-century lawyers, had respective acquittal rates of 79.7 and 65.4 per cent (improving the odds ratio of acquittal for their clients, in comparison

⁴⁰ Simon Smith, 'The Shaping of the Legal Profession', in Simon Smith ed., *Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016*, Crows Nest NSW, 2016, 90.

to being undefended, 10 and 5.1 times); among the nineteenth-century lawyers, of whom more appear with significant numbers of defendants presumably because there were fewer acting lawyers to dilute the sample size, the percentage rates of those acquitted vary between the high thirties and low sixties. These discrepancies doubtless arise in part from the nature of cases themselves, such as the type of offences or offenders involved.

Presumably at least some of the variation in acquittal rates was also due to the skill of the lawyers, at least in terms of their ability as criminal advocates. Molesworth appears at the bottom of the list even though Leech, the lawyer just ahead of him on a forty per cent acquittal rate, predominantly represented harder-to-acquit property offenders; the bulk of defendants in Molesworth's sample were charged with non-fatal assaults. This low success rate does not accord with other accounts of Molesworth, described by a biographer as having built his reputation by his great 'personal popularity with juries'.⁴¹ Fellow lawyer John Leonard Forde recalled others in the profession commenting that Molesworth had been 'industrious, careful, and painstaking', qualities that had rendered him the 'best junior at the bar'.⁴² Perhaps they were not sufficient when Molesworth was called to act as senior counsel.

The success rates of some others accord with their historical reputations. James Liddell Purves, whose cases occurred predominantly in the nineteenth century, appeared towards the head of those in this group. He was described as the 'leader of the Bar' and the 'Russell of Australia' in English journalist Harry Furniss's account of his colonial travels.⁴³ Purves was said to be especially skilled in the cross-examination of hostile witnesses, and in

⁴¹ Elise B. Histed, 'Molesworth, Hickman (1842-1907)', *Australian Dictionary of Biography*, Australian National University, <http://adb.anu.edu.au/biography/molesworth-hickman-7613/text13303>, published first in hardcopy 1986, accessed online 3 May 2016.

⁴² John Leonard Forde, *The Story of the Bar of Victoria: From Its Foundation to the Amalgamation of the Two Branches of the Legal Profession*, Melbourne, 1910, 272-272.

⁴³ Harry Furniss, *Australian Sketches Made on Tour*, London, 1899, 27-28.

making highly technical evidence or contested points clear to the jury.⁴⁴ Butler Cole Aspinall likewise pulled ahead of his nineteenth-century contemporaries Molesworth, Leech and Fisher. Aspinall was involved in many noteworthy criminal trials, and was said to have had an extremely entertaining manner in conducting a defence.⁴⁵ Crowds reputedly attended court just to hear Aspinall's remarks, with Forde describing him as 'fluent of speech, eloquent, witty, resourceful, wonderfully successful with juries', although he commented that the effect was sometimes marred by his 'deep, nasal intonation'.⁴⁶

The personal characteristics of lawyers may have sometimes influenced the jury's perceptions of the merits of the case, just as the characteristics of defendants appear to have done. An 1896 newspaper profile of barrister G. A. Maxwell (acquittal rate 61.4 per cent) intimated that Maxwell's 'distinct Scotch accent' had sometimes assisted his success at the bar:

It is quite probable that of the 'twelve intelligent men' whom Mr. Maxwell so frequently addresses, there will be, at all events, one honest Sandy who will be captured by a speech in broad Forfar English. One day, when a prisoner whom Mr. Maxwell defended, and who seemed, from the evidence, certain to be 'potted,' was pronounced 'Not guilty,' an attorney's clerk in Court turned to a Police Court practitioner beside him with the remark, 'Well, I'm hanged!' 'Don't you know why he got off?' said the

⁴⁴ Marian Aveling, 'Purves, James liddell (1843-1910)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/purves-james-liddell-4419/text7215>, published first in hardcopy 1974, accessed online 3 May 2016.

⁴⁵ Joanne Richardson, 'Aspinall, Butler Cole (1830-1875)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/aspinall-butler-cole-2905/text4173>, published in hardcopy 1969, accessed online 3 May 2016.

⁴⁶ John Leonard Forde, *The Story of the Bar of Victoria: From Its Foundation to the Amalgamation of the Two Branches of the Legal Profession*, Melbourne, 1910, 206.

astute Police Court man. ‘Didn’t you hear that one of the jurymen was named Alexander Mc—.’⁴⁷

The information being collated by the Prosecution Project opens up new possibilities for adjudicating such statements about the talents of historic legal luminaries. Although more data is needed to draw firm conclusions about success rates in respect to individual lawyers, the findings reported here nevertheless demonstrate that while the impact of representation on verdict was not even across all defence counsel, simply having representation remained beneficial, irrespective of which individual lawyer was retained.

VIII. THE ADVANTAGE OF A LAWYER

The significance of legal representation to verdicts brought against accused persons is not that surprising. Even before the more general acceptance of the role of lawyers in criminal defence, John Beattie concludes that eighteenth-century defence counsel were able ‘to do a great deal for their clients’,⁴⁸ without engaging in any of the dubious practices of which they were sometimes accused. The idea that an innocent accused did not necessarily need legal counsel within the English model of criminal justice relied on outdated understandings of the trial process itself and how it had operated prior to the introduction of lawyers into courtrooms, which resulted in the rise of the adversarial trial system. Prior to this, under what John Langbein refers to as the ‘altercation’ or ‘accused speaks’ trial system, medieval and early modern defendants would simply answer the charges against them, which were usually directly brought by their victims, by giving their own account of what transpired.⁴⁹ By the nineteenth century, however, defendants were confronted not just by their victims but by

⁴⁷ *Table Talk* (Melbourne), 7 Feb. 1896, 5.

⁴⁸ J. M. Beattie, *Crime and the Courts in England 1660-1800*, Oxford, 1986, 361.

⁴⁹ John H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford, 2003.

trained prosecutors; until the end of the century their ability to testify in their own defence was also limited.⁵⁰

It is clear from qualitative evidence as well as quantitative data that undefended accused were handicapped when it came to mounting their own defence. In principle at least, undefended accused could put their case to the jury in various ways. Although fears of inciting perjury initially meant defendants and their spouses were prohibited from testifying in their defence, accused persons could also give unsworn statements to the jury providing their rebuttal to the prosecution's claims. Those who were nervous about reading out such statements themselves could have a prepared statement, or their previous statements during the committal hearing, read out by a constable or the judge.⁵¹ However, because such statements were not made on oath and could not be cross-examined, they were considered less worthy than sworn testimony from other witnesses. It was not until 1891 that Victoria legislated in its Crimes Act to allow defendants to testify, following similar reforms introduced in the early 1880s by South Australia and New South Wales (some years before such a step was taken in England).⁵² Even if defendants chose not to testify or give a statement in their own defence, they were still able to cross-examine prosecution witnesses or call witnesses of their own.

Not all defendants proved incompetent at raising doubts in the minds of the jury through such means. In 1861 James Simpson was able to secure the acquittal of his wife and himself from larceny charges by cross-examining the complainant about his own criminal history and recent incarceration at Pentridge.⁵³ That same year James McFarlane, charged with an assault on a five-year-old child, was described having put his defence, in a written

⁵⁰ Allyson N. May, *The Bar and the Old Bailey, 1750-1850*, Chapel Hill, 2003, 87-117.

⁵¹ *Ovens and Murray Advertiser*, 26 Oct. 1861, 3; *Ovens and Murray Advertiser*, 31 Oct. 1861, 2.

⁵² Greg Taylor, *A Great and Glorious Reformation: Six Early South Australian Legal Innovations*, Kent Town, 2005, 133-167. Woods, *History of Criminal Law*, 367-69.

⁵³ *Mount Alexander Mail*, 23 Oct. 1861, 2.

statement read by the judge, in ‘a very able manner’. His claims that the bruising on the girl’s legs and genitals had resulted during a game in which he had been tossing her in the air were accepted and he was consequently acquitted.⁵⁴ Recidivist criminals may have become especially knowledgeable in the matter of legal proceedings and so more likely to put forth a more active defence. Another 1861 defendant at the conclusion of the case against him was thus described making a ‘long “old hand” speech’ to the jury proclaiming his innocence; likewise, ‘old hand’ John Dogherty in 1863 impressed spectators with his cross-examination of witnesses as well as his address to the jury, which nevertheless did not save him from conviction.⁵⁵

Other defendants were inhibited or overwhelmed by their circumstances or the legal process. In 1910, while advocating the introduction of a poor prisoners defence scheme to South Australia, Adelaide’s *Daily Herald* argued that it was not to be expected that a defendant would be able to speak up for himself when through ‘his natural terror, added to ignorance of legal procedure, he may convey an impression of guilt, or neglect to present his side of the question in the most favourable light’.⁵⁶ Some prisoners neither cross-examined witnesses nor said anything on their own behalf.⁵⁷ Others simply protested their innocence of the charge without offering any real defence.⁵⁸ Then there were those who were described putting an ‘elaborate defence’ to the jury but offering no witness testimony to corroborate it.⁵⁹ It was common for newspapers to make fun of the efforts of undefended prisoners to establish their innocence. Undefended prisoners were commonly reported as having made

⁵⁴ Ibid., 24 July 1861, 2.

⁵⁵ *Star* (Ballarat), 13 July 1861, 2; *Star* (Ballarat), 14 April 1863, 2.

⁵⁶ *Daily Herald* (Adelaide), 13 Aug. 1910, 8.

⁵⁷ *Geelong Advertiser*, 28 Feb. 1866, 2.

⁵⁸ *Bendigo Advertiser*, 11 July 1866, 3.

⁵⁹ *Argus* (Melbourne), 25 July 1866, 6.

‘rambling’ statements in their own defence.⁶⁰ Foreigners were likewise said to have made statements to the jury in ‘very bad English’.⁶¹

Defendants’ cases could be strengthened if they were able to refute or downplay the evidence against them through skillful cross-examination of witnesses; however, an unskilful one could actually make the case against a prisoner worse. Edward Bateman’s imprudent wording of a question to a police constable in a horse stealing case provided the constable with an opening to bring up the subject of his prior knowledge of Bateman, which included overseeing his conviction on a number of charges.⁶² John Reed was likewise described at the same sessions as having ‘damaged himself’ in his long cross-examination of the complainant in his case.⁶³

Some defendants appear almost over-confident in their ability to conduct their own defence. In an 1861 trial for robbery in company, Jacob Parkinson was undefended, while his two co-accused were both defended. Parkinson made quite a show of trying to defend himself even when told to stand down by a co-defendant’s lawyer as he was only damaging the defence by his theatrical but unhelpful cross-examination of the witnesses. Parkinson told the lawyer to mind his own business, and continued his cross-examination. All three men were ultimately convicted.⁶⁴ Other undefended accused demonstrated a faulty knowledge of the law in their efforts to improve their situation. At his committal hearing in 1926, William Gregory, after cross-examining the witnesses against him, was asked to enter a plea. He responded that he was not willing to plead guilty to a stealing charge but would be willing to plead guilty to a charge of larceny as a bailee. The magistrate informed him that this was a distinction without a difference as far as the penalty to be faced; Gregory then pleaded not

⁶⁰ *Star* (Ballarat), 15 Feb. 1861, 2; *Geelong Advertiser*, 26 Oct. 1861, 3.

⁶¹ *Gippsland Times*, 28 Oct. 1871, 3.

⁶² *Star* (Ballarat), 11 July 1861, 1.

⁶³ *Ibid.*, 13 July 1861, 2.

⁶⁴ *Ibid.*, 16 Oct. 1861, 2.

guilty.⁶⁵ Changes in crime reporting during the twentieth century – specifically a tendency to focus on the events of the crime itself and no longer report the minutiae of trial proceedings – may have only decreased legal literacy among undefended accused in this period.

For the most part, the types of defence raised by undefended accused at trial do not appear that different from those put forward by legal counsel on behalf of their clients. Incapacity in the form of debilitating drunkenness was a common defence raised by those accused of all manner of crimes, defended or undefended.⁶⁶ In theft cases, the type of offence where the presence of defence counsel appears to have been most significant, both defence lawyers and undefended accused acting on their own behalf usually concentrated their cross-examination on the ability of witnesses to identify the accused or stolen property. Lawyers might simply have put such defences with greater skill. In one nineteenth-century case involving stolen poultry, for instance, the defence counsel was described as getting the jury on side by a humorous speech that ‘contended that the identity of the old gander was not fully proved’.⁶⁷

Other defences might simply have been more convincing coming from lawyers rather than from the accused themselves. The common strategy of victim blaming for instance, might have been less palatable coming from an accused.⁶⁸ Defence counsel were also more likely to employ such tactics beyond the usual sexual assault cases, with lawyers during the nineteenth and early twentieth centuries trying the victim-blaming approach in regard to a range of property offences. For example, criminal barristers attempted to excuse larcenous activity on the part of their clients by proclaiming that shopkeepers were partly to blame for shoplifting as they induced crowds to visit their stores and placed them in the way of

⁶⁵ *Age* (Melbourne), 21 Sept. 1926, 19.

⁶⁶ *Mount Alexander Mail*, 25 Oct. 1861, 5; *Ovens and Murray Advertiser* (Beechworth), 14 Oct. 1871, 7.

⁶⁷ *Argus* (Melbourne), 5 Feb. 1861, 6.

⁶⁸ *Bendigo Advertiser*, 14 Feb. 1871, 2.

temptation.⁶⁹ Others blamed alleged embezzlements by their clients on the lax business methods of the complainants, earning them recommendations to mercy if not outright acquittals.⁷⁰ Allegations of police malfeasance may likewise have been more believable coming from legal professionals. In his later reminiscences, David George O'Donnell, a Melbourne police detective across the turn-of-the-century period, described defending barristers making much of rewards offered in certain cases in an effort to convince juries that the police were trying to convict some 'poor innocent dupe' in order to claim the money.⁷¹

Lawyers were also in a better position to secure the evidence or witnesses necessary in order to prove the defence being made, especially if the accused was remanded in gaol and so unable to move or communicate freely. Robert Handley, convicted of bigamy in 1861, contended that the woman he had reputedly married had been his wife in name only. He complained bitterly at his trial that not only had he already been nine months and three weeks in gaol on remand, but that he could have provided evidence to dispute the charge if he had had the means to command defence counsel or the attendance of witnesses at the trial.⁷²

Even when defendants had evidence to support their defence, lack of legal representation to oversee the procedure for verifying such evidence meant it was sometimes disallowed. In 1861 William Taylor tried to defend himself on charges of stealing jewellery from a store by producing two receipts for the merchandise in question. The judge told him that he should have produced these prior to the trial, and he could not accept them into evidence unless the clerk who signed them could attest to them. The storekeeper admitted he did have an employee who went by that name, but that it was not the man's handwriting. The

⁶⁹ *Age* (Melbourne), 6 July 1906, 6.

⁷⁰ *Bendigo Advertiser*, 11 July 1861, 2; *Mount Alexander Mail*, 24 July 1861, 3.

⁷¹ D. G. O'Donnell, 'Reminiscences of a Victorian Detective,' *Gisborne Gazette*, 12 Aug. 1926, 8.

⁷² *Geelong Advertiser*, 22 July 1861, 3.

receipts were not accepted and Taylor was convicted.⁷³ That same year the judge in the trial of Jacob Pretorius officially reprimanded the police for not ensuring that the defence witnesses subpoenaed by the accused were in attendance. This must have been cold comfort to Pretorius, who was convicted after failing to corroborate his statement that the seven pounds he was accused of stealing had been entrusted to him by the complainant's wife to stop her violent husband spending it on drink.⁷⁴

Legal representation was thus often important because of what had to be or could be done prior to the trial itself. As Beattie points out, lawyers were better able than an unrepresented accused to spot errors on indictments or move for the dismissal of charges on technical grounds.⁷⁵ They could also make motions on a range of pre-trial issues that might affect the ultimate outcome of the case, such as the need to sever a defendant's trial from that of his co-accused or to have the evidence decided by a special jury.⁷⁶ Lawyers could also make motions for a change of trial venue if an alternative location would more easily enable them to bring forward character or other defence witnesses.⁷⁷ Alternatively, they might oppose similar applications made by the prosecution. In 1899, for example, the police applied for a change of trial venue in relation to a charge of larceny as a servant brought against Bendigo police constable Edward Johnson. Constable George McPherson stated his belief that Johnson would not receive an impartial trial in Bendigo, as there was much local sympathy for him and his family.⁷⁸ Johnson's attorney argued against a change of venue; the trial was held in Bendigo and Johnson was acquitted.

⁷³ *Bendigo Advertiser*, 11 July 1861, 2.

⁷⁴ *Star* (Ballarat), 13 July 1861, 2.

⁷⁵ J. M. Beattie, *Crime and the Courts in England 1660-1800*, Oxford, 1986, 361.

⁷⁶ *R v Thomas Bingham Muntz*, 1893, Unit 2, VPRS 469 P/0, PROV; *R v Arthur Harvey, John Drysdale and Patrick Francis Mulqueeny*, 1911, Unit 3, VPRS 469 P/0, PROV.

⁷⁷ *R v James Murdoch*, 1884, Unit 1, VPRS 469 P/0, PROV; *R v Franz Klingsporn*, 1913, Unit 3, VPRS 469 P/0, PROV.

⁷⁸ *R v Edward Johnson*, 1899, Unit 2, VPRS 469 P/0, PROV.

If nothing else, defence counsel could ensure that defendants properly understood the evidence against them. During the nineteenth century, arrangements for defendants who might have difficulty comprehending courtroom testimony were sometimes ad hoc. When largely deaf John Williamson appeared undefended on larceny charges in 1886 the court crier had to shout the evidence into his ear as it was given in order to enable Williamson to conduct his own defence; the difficulties this entailed possibly contributed to the guilty verdict against him.⁷⁹ Defence counsel could help ensure a fair hearing by making certain that their defendants understood the evidence against them and were given an opportunity to refute it. Dr Mackay, for example, insisted that the case against his client On Sam be postponed until the court secured an interpreter to explain the case to him, as the interpreter that had been provided by the court was found to speak a different dialect of Chinese.⁸⁰

In spite of the seeming disadvantage of the undefended accused as against those with legal counsel, the overall significance of the impact of defence counsel is in some ways surprising, especially given that the nineteenth-century preparations of defence counsel and their inclusion in the trial process was often itself haphazard and last minute. Sometimes representation was retained at very short notice. In some instances an order would only be made at trial for the police to release a prisoner's funds for the purposes of securing legal representation. If leave was not granted to remand the trial to a later sessions, a lawyer had to be sought quickly from the court's precincts, read the trial brief and confer with their client to enable the trial to proceed in that sessions.⁸¹ In 1861 Justice Barry commented unfavourably upon this state of affairs at the trial of Sanders and Johnson for a rape and robbery. As they were facing a capital charge the duo had been assigned representation by the crown, but the

⁷⁹ *Argus* (Melbourne), 16 Oct. 1886, 9.

⁸⁰ *Bendigo Advertiser*, 14 Oct. 1861, 2; Nadia Rhook, "'The Chief Chinese Interpreter' Charles Hodges: Mapping the aurality of race and governance in colonial Melbourne', 18 *Postcolonial Studies* (2015), 1-18.

⁸¹ *Ovens and Murray Advertiser*, 26 Oct. 1861, 3 (*R v Pickup*); *Goulburn Herald*, 26 April 1865, 2 (*R v Winderbank*).

barrister in question had only received instruction that morning, and no solicitor had been appointed to the case. At Barry's insistence a solicitor who happened to be in court was also appointed to the case, and the co-accused were allowed to retire to a private room at the court-house to confer before the case came on.⁸² Eventually the case was stood over until the next day. Both men were convicted, and Sanders was executed for the crime. At Robert Smith's trial for larceny, also in 1861, barrister Dr Mackay received the brief from Smith's solicitor not only on the day of the trial, but after the first witness had already given their testimony. A few minutes adjournment was allowed for Mackay to read the trial brief before the case continued.⁸³

Even if a defendant had retained counsel, if for some reason they failed to show up, the courts often showed little leniency. In 1871, John Buckley, on trial for murder at Ballarat, informed the court at the start of proceedings that he had hired McDonnell to defend him but that he had not yet arrived in court. The judge announced that he would nevertheless begin the case, and look after Buckley's interests until McDonnell arrived. After two witnesses had already given testimony, McDonnell showed up. He complained that an injustice had been done to his client in starting the case without him, but the case nevertheless proceeded and Buckley was convicted.⁸⁴ Such a case highlighted the long-standing opposition of some judges to the role of defence counsel, contending as they did that it was the judge who was entrusted with making the trial fair. While many judges may have striven to fulfil this role, the evidence presented here strongly suggests that the undefended accused fared significantly worse under the adversarial trial system than their represented counterparts.

IX. CONCLUSION

⁸² *Age* (Melbourne), 16 Oct. 1861, 6.

⁸³ *Argus* (Melbourne), 22 Feb. 1861, 7.

⁸⁴ *Ballarat Star*, 22 July 1871, 4.

The late nineteenth and early twentieth century was an important transition period for the role of defence lawyers in criminal trials. Future research on larger datasets and other jurisdictions may establish more conclusively the interaction of charge, defendant characteristics, and the deployment of legal advice in shaping trial outcomes in the changing criminal trial of the nineteenth and twentieth centuries. Yet analysis of this large sample of prosecutions over a 100-year period provides compelling evidence of the impact of defence counsel on the criminal trial. The normalization of the role of defence counsel was the product of judicial and statutory recognition, and bolstered by the emergence of legal aid provisions. Both factors were reflected in the rate of representation increasing significantly between 1861 and 1961. Quantitative analysis comparing the experience of those defended or undefended at criminal trial across this period shows that the presence of a defence lawyer was positively associated with a variety of judicial outcomes of benefit to the accused, including verdicts, pleas, length of trial process, bail status and sentencing. While this associative relationship was not present for every offence type, it was nevertheless evident across a range of offence, trial and defendant variables. This is not necessarily definitive evidence of causation. However, the level of association without any other factors clearly acting as mediators is enough to suggest that legal representation was highly desirable for defendants across the entire period. Conversely, it seems the difficulties that beset those unable to access professional assistance even during the rise of legal assistance schemes was an important impediment to the overall justice of the criminal trial process.

Notes on Contributors

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Table 1. Impact of legal representation on verdict by trial variables with chi square analysis*			
Variable	Defence status	Number	% Acquitted
All defendants ^a	Total	3,341	45.5
	Defended	1,953	55.8
	Undefended	908	28.1
19 th century ^b	Total	1,528	40
	Defended	748	48.4
	Undefended	468	29.7
20 th century ^c	Total	1,813	50.2
	Defended	1,205	60.4
	Undefended	440	26.4
Property offences ^d	Total	2,179	42.5
	Defended	1,113	54.9
	Undefended	714	28.6
Personal offences ^e	Total	849	49.1
	Defended	619	54.4
	Undefended	137	25.5
Other offences ^f	Total	312	56.4
	Defended	221	64.3
	Undefended	57	28.1
1 charge ^g	Total	2,375	50.2
	Defended	1,413	59.9
	Undefended	607	32.9
2 charges ^h	Total	701	38.5
	Defended	397	50.6
	Undefended	215	22.8
3 or more charges ⁱ	Total	265	21.9
	Defended	143	30.1
	Undefended	86	7
<p>*There were no chi square analyses for which the expected count was less than 5 for more than 20% of cells.</p> <p>a. $\chi^2(2) = 209.89, p < .001$</p> <p>b. $\chi^2(2) = 45.48, p < .001$</p> <p>c. $\chi^2(2) = 158.3, p < .001$</p> <p>d. $\chi^2(2) = 143.07, p < .001$</p> <p>e. $\chi^2(2) = 37.5, p < .001$</p> <p>f. $\chi^2(2) = 24.31, p < .001$</p> <p>g. $\chi^2(2) = 136.11, p < .001$</p> <p>h. $\chi^2(2) = 56.73, p < .001$</p> <p>i. $\chi^2(2) = 16.98, p < .001$</p>			

Table 2. Impact of legal representation on verdict by defendant variables with chi square analysis*			
Variable	Defence status	Number	% Acquitted
European ^a	Total	3,224	45.9
	Defended	1,890	56.2
	Undefended	869	28.3
Asian ^b	Total	94	37.2
	Defended	52	48.1
	Undefended	29	17.2
Male ^c	Total	3,040	44.3
	Defended	1,767	54.4
	Undefended	838	27.2
Female ^d	Total	297	57.9
	Defended	183	69.4
	Undefended	69	39.1
Metropolitan defendants ^e	Total	2,270	45.2
	Defended	1,335	56
	Undefended	599	27.7
Regional defendants ^f	Total	1,071	46.2
	Defended	618	55.3
	Undefended	309	28.8
Under 30 ^g	Total	595	15.3
	Defended	316	20.9
	Undefended	21	11.2
30 or over ^h	Total	573	11.9
	Defended	249	16.1
	Undefended	223	9.9
Working class ⁱ	Total	835	12
	Defended	386	18.9
	Undefended	303	6.3
Middle class ^j	Total	220	14.5
	Defended	144	20.1
	Undefended	45	4.4
<p>*There were no chi square analyses for which the expected count was less than 5 for more than 20% of cells.</p> <p>a. $\chi^2(2) = 205.32, p < .001$</p> <p>b. $\chi^2(2) = 7.59, p < .05$</p> <p>c. $\chi^2(2) = 184.07, p < .001$</p> <p>d. $\chi^2(2) = 25.82, p < .001$</p> <p>e. $\chi^2(2) = 156.27, p < .001$</p> <p>f. $\chi^2(2) = 58.57, p < .001$</p> <p>g. $\chi^2(2) = 18.52, p < .001$</p> <p>h. $\chi^2(2) = 8.44, p < .05$</p> <p>i. $\chi^2(2) = 32.82, p < .001$</p> <p>j. $\chi^2(2) = 10.51, p < .05$</p>			

Table 3. Results of the multinomial logistic regression predicting not guilty (vs. guilty)					
	Defended (reference = undefended)				
Defendants	B	SE	Wald	Exp(B)	95% CI
All ^a	1.17*	.09	183	3.23	2.73-3.83
19 th century ^b	.8*	.13	40.79	2.22	1.74-2.84
20 th century ^c	1.45*	.12	138.52	4.26	3.35-5.43
Property offence ^d	1.11*	.10	118.03	3.04	2.49-3.72
Personal offence ^e	1.25*	.21	34.69	3.48	2.3-5.28
Other offence ^f	1.53**	.33	21.89	4.61	2.43-8.73
European ^g	1.18*	.09	178.13	3.26	2.74-3.87
Asian ^h	1.49**	.57	6.98	4.44	1.47-13.44
Male ⁱ	1.16*	.09	162.62	3.2	2.67-3.82
Female ^j	1.26*	.29	18.36	3.53	1.98-6.28
Metropolitan ^k	1.20*	.11	126.84	3.32	2.7-4.1
Regional ^l	1.12*	.15	56.12	3.06	2.29-4.11
Working class ^m	1.25*	.27	21.35	3.49	2.05-5.92
Middle class ⁿ	1.69**	.75	5.05	5.42	1.24-23.7
Under 30 ^o	.74**	.27	7.44	2.09	1.23-3.54
Over 30 ^p	.56**	.28	3.89	1.75	1-3.05
<p>*p <.001 ** p<.05</p> <p>a. -2 Log Likelihood = 211.8, $\chi^2(1) = 196.74, p < .001$</p> <p>b. -2 Log Likelihood = 55.81, $\chi^2(1) = 42.32, p < .001$</p> <p>c. -2 Log Likelihood = 167.7, $\chi^2(1) = 153.91, p < .001$</p> <p>d. -2 Log Likelihood = 139.17, $\chi^2(1) = 124.89, p < .001$</p> <p>e. -2 Log Likelihood = 50.9, $\chi^2(1) = 38.92, p < .001$</p> <p>f. -2 Log Likelihood = 34.41, $\chi^2(1) = 24.35, p < .001$</p> <p>g. -2 Log Likelihood = 206.44, $\chi^2(1) = 191.45, p < .001$</p> <p>h. -2 Log Likelihood = 15.81, $\chi^2(1) = 8.11, p < .05$</p> <p>i. -2 Log Likelihood = 190.11, $\chi^2(1) = 175.24, p < .001$</p> <p>j. -2 Log Likelihood = 29.167, $\chi^2(1) = 19.02, p < .001$</p> <p>k. -2 Log Likelihood = 151.22, $\chi^2(1) = 136.96, p < .001$</p> <p>l. -2 Log Likelihood = 72.69, $\chi^2(1) = 59.83, p < .001$</p> <p>m. -2 Log Likelihood = 35.86, $\chi^2(1) = 25.21, p < .001$</p> <p>n. -2 Log Likelihood = 15.22, $\chi^2(1) = 7.66, p < .05$</p> <p>o. -2 Log Likelihood = 18.63, $\chi^2(1) = 8.07, p < .05$</p> <p>p. -2 Log Likelihood = 14.21, $\chi^2(1) = 4.03, p < .005$</p>					

Table 4. Sentence by defence status and time period with chi square analysis*			
Time period	Defence status	Prison term	Other sentence
19th century ^a	Total**	1,141 (93.4%)	80 (6.6%)
	Defended	385 (89.9%)	43 (10.1%)
	Undefended	351 (95.4%)	17 (4.6%)
20 th century ^b	Total	1,474 (60.9%)	948 (39.1%)
	Defended	536 (50.4%)	528 (49.6%)
	Undefended	751 (69.2%)	334 (30.8%)
* 0 cells have expected count less than 5. **Includes both those convicted by jury and who pled guilty a. $\chi^2(2) = 16.15, p < .001$ b. $\chi^2(2) = 88.05, p < .001$			

Table 5. Acquittal rates by different defence counsel and results of multinomial logistic regression predicting not guilty (vs. guilty)							
Lawyer name (reference = undefended)^a							
Defence counsel	No. defendants	% Acquitted	B	SE	Wald	Exp(B)	95%CI
Cullity (20 th century)	69	79.7	2.31*	.31	56.06	10.06	5.5-18.41
Dunne (19 th -20 th century)	33	66.7	1.63*	.38	18.81	5.12	2.45-10.71
Long (20 th century)	52	65.4	1.58*	.30	27.48	4.84	2.68-8.72
Maxwell (19 th -20 th century)	57	61.4	1.4*	.28	24.82	4.07	2.34-7.08
Martley (19 th century)	30	60.0	1.35*	.39	12.55	3.84	1.82-8.09
Purves (19 th -20 th century)	32	50.0	.94**	.36	6.78	2.56	1.26-5.2
McDermott (19 th century)	82	47.6	.843	.23	13.07	2.32	1.47-3.67
Aspinall (19 th century)	34	44.1	.70**	.35	3.97	2.02	1.01-4.04
Fisher (19 th century)	46	41.3	.59	.31	3.65	1.8	.99-3.3
Leech (19 th century)	35	40.0	.54*	.35	2.3	1.7	.855-3.41
Molesworth (19 th century)	45	37.8	.441	.32	1.95	1.56	.84-2.89
<i>Undefended</i>	<i>908</i>	<i>28.1</i>	-	-	-	-	-
*p <.001 **p<.05							
a. -2 Log Likelihood = 194.197, χ^2 (11) = 141.22, $p < .001$							