

Published in Davis MT, Macleod E & Pentland G (eds.) (2019) *Political Trials in an Age of Revolutions: Britain and the North Atlantic, 1793-1848*. Palgrave Histories of Policing, Punishment and Justice. Cham, Switzerland: Palgrave Macmillan, pp. 79-107. This extract is taken from the author's original manuscript and has not been edited. The definitive, published, version of record is available here: <https://www.palgrave.com/gp/book/9783319989587#> and <https://doi.org/10.1007/978-3-319-98959-4>

## The English and Scottish State Trials of the 1790s Compared

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After the conviction and sentencing in Scotland of its representative, Joseph Gerrald, the London Corresponding Society (LCS) resolved on 14 April 1794: “That our abhorrence and detestation have been particularly called forth by the late arbitrary and flagitious proceedings of the Court of Justiciary in Scotland, where all the doctrines and practices of the *Star Chamber*, in the times of Charles the First, have been *revived* and *aggravated*.”<sup>1</sup> In September that year, with the Scottish sedition trials clearly in his mind, William Godwin told John Thelwall, then awaiting trial in the Tower of London, that “it is good to be tried in England, where men are accustomed to some ideas of equity, and law is not entirely what the breath of judges and prosecutors shall make it”.<sup>2</sup> That opinion was later supported by the Scottish Whig advocate and judge, Henry Cockburn, who wrote that “the whole proceedings were wrong from the first to the last”.<sup>3</sup>

The state trials for sedition and treason prosecuted in Scotland and England in the 1790s have usually been analysed as two more or less separate, if obviously connected, sets of events. They have rarely been compared in much detail. Where contrasts and comparisons have been drawn, these have tended to be asserted rather than demonstrated, and the general tenor of these assessments has usually followed the opinions of Godwin, the LCS and Cockburn. Although most reflection on the political state trials in Britain in the 1790s is now more careful and nuanced than the sweeping judgements of earlier commentators, which tended to emphasise the contrast between these trials in England and Scotland, there lingers a sense of greater injustice

and abuse of power in the Scottish courts than the English. This is partly because the most familiar contrast between the two sets of trials is that, while the best-known Scottish defendants were tried for sedition, convicted and transported to Botany Bay, the most famous English cases were prosecuted for high treason and resulted in acquittals. As John Erhman wrote, the Scottish trials “left an early sense of savage repression which has been cited ever since”.<sup>4</sup>

This distinction is not to compare like with like, however. In fact most of the English political trials of the 1790s were also prosecutions for seditious offences and reached convictions in many cases; and, while the one Scottish trial for treason resulted in the execution of Robert Watt in 1794, there was also an execution in England for treason (James O’Coigly, in 1798). For a reasonable comparison of the political trials in the two jurisdictions in this decade, we need to examine the prosecutions for sedition in each country alongside each other, and the trials for treason likewise. Furthermore, the speeches and writings of the Whig lawyers of the 1790s and Henry Cockburn’s generation that followed them, seem likely to have cemented this sense of a greater deficit of justice in Scotland than England in the 1790s – but the Whig lawyers, as Gordon Pentland shows elsewhere in this volume in relation to the later trials of 1816-20, had agenda beyond impartial assessment.<sup>5</sup> As well as their desire to advance the nineteenth-century Whig party political interest, the Scottish Whigs were scarred by their own experience of professional exclusion and detriment during the tensions of the 1790s.<sup>6</sup>

It is true that Robert McQueen, Lord Braxfield, Chief Justice Clerk in Scotland, who presided over all but one of the major Scottish political trials of 1793-94, was an unusually colourful character who became nearly as notorious as the English Judge Jeffreys of a hundred years previously.<sup>7</sup> Yet in both jurisdictions, judges displayed bias, juries were instructed, there was more than an element of show trial, and evidence which was circumstantial, indirect,

obtained by spies or from king's evidence was relied upon. Clearly both sets of trials were politically motivated, and, although the law officers were separate and the legal systems were different in each country, the same Westminster administration was managing them both. It would be surprising if the parallels were not substantial.

It is not the intention of this essay to attempt to defend the indefensible in the Scottish prosecutions. Nor can it try to offer a comprehensive comparison of the two sets of trials, which were many more than the dozen or so which are best known and revisited here. This chapter proposes only to submit a preliminary hypothesis that will require much fuller treatment in future. It argues that a closer comparison of the Scottish and English political trials of the 1790s suggests that examining the similarities between them sheds as much light on the state side of the prosecutions as does dwelling on the headline contrasts.

## I

The element of the state prosecutions in Scotland which caused contemporaries most horror was the sentences for sedition, and these clearly diverged from the penalties imposed in England. No defendant in England convicted of sedition was transported to Botany Bay as were Thomas Muir, William Skirving, Maurice Margarot, Joseph Gerrald and George Mealmaker, who were all sent to Australia for fourteen years each, Thomas Fyshe Palmer, who was exiled there for seven years, and James Patterson for five years. Charles James Fox and his opposition Whig colleagues raised these sentences as a matter of outrage five times in Parliament.<sup>8</sup> While Whig opinion was also shocked by the English punishments for sedition, these entailed at most imprisonment for up to two years with a fine of up to 200 pounds per offence (and additional sureties for good behaviour after release). This penalty, while certainly severe enough to ruin the

health of some prisoners and their families, was not judged by contemporaries to be nearly as harsh as transportation to New South Wales.<sup>9</sup> The Order in Council confirming Gerrald's sentence of transportation demonstrated little interest in his exact destination: he was to be banished "to the Eastern Coast of New South Wales, or some one or other of the Islands adjacent thereto".<sup>10</sup> Joseph Norris, the Scottish Clerk of Justiciary, compiled a report to answer the Foxite criticisms of the Scottish sentences, relying heavily on precedent, quoting extracts of cases from 1687-1754 to show that in Scotland transportation was a perfectly legitimate sentence for sedition ("a very heinous Crime, and of the most dangerous tendency").<sup>11</sup>

Transportation was very deliberately chosen by the judges in Muir's case, however. Contemporaries had not expected more than a short prison sentence: Reverend James Wodrow of Stevenston, Ayrshire, told his friend Samuel Kenrick days before Muir's trial began, "I suppose it will end as most of these tryals [*sic*] have. It draws little attention."<sup>12</sup> The printers John Morton, James Anderson and Malcolm Craig had each been sentenced to prison for nine months for sedition in January 1793 with a surety of 1000 merks (around fifty-five pounds sterling) to keep the peace for a further three years. Their penalty was comparable with – indeed, somewhat lighter than – the sentences for sedition in England in the 1790s. It was justified by their judges on the grounds that they were young and not "inveterate offenders" and that their crime had been a single, drunken incident at Edinburgh Castle among soldiers, although Lord Henderland did dwell at some sadistic length on the alternative possibilities of whipping, transportation and capital punishment.<sup>13</sup> In Muir's case, however, in August 1793, the offence was bound up with a sustained campaign for radical political reform carried out since at least July 1792 and aggravated by his having skipped bail and been outlawed in January. Henderland considered that a heavy fine would be unfair on Muir's parents, who had already paid his bail, that whipping was

“too severe and disgraceful” for a man of “his character and rank in life”, and that imprisonment was too temporary.<sup>14</sup> He had earlier observed that “Long imprisonments are usual in our neighbouring country [England]; their accommodations for it are great: – they are not usual here”, and had expressed the desire for a secure prison to be located in Edinburgh Castle.<sup>15</sup>

It is also worth noticing that by August and September 1793, when Muir and Fyshe Palmer were sentenced to transportation, the second Scottish Convention of the Friends of the People had been held, in May 1793, and Britain had been at war with France since February. By January 1794, when Skirving, Margarot and Gerrald were also condemned to transportation, their trials were centrally concerned with the roles of each man in the British radical reform convention in December 1793 which had followed the third Scottish convention in October 1793. Timing, tied closely to the occurrence of the radical reformers’ conventions, may have been as important as the jurisdiction in question for the severity of the sentencing. The next set of leading reformers to be arrested – Robert Watt, David Downie, and the leaders of the LCS and the Society for Constitutional Information (SCI) in London – were charged with a crime for which capital punishment was the sentence.<sup>16</sup>

Moreover, the sentences of transportation were imposed fewer than ten years after the passing of the 1785 “Act for the more effectual transportation of felons and other offenders in that part of Great Britain called Scotland”.<sup>17</sup> That Act had been passed as a sequel to the equivalent legislation for England in 1784, permitting the continued use of the hulks which had been used to imprison convicts since the removal of the American colonies as a destination for transported criminals in 1776, and extending their use to temporary holding locations for convicts awaiting transportation. Since 1776, moreover, Parliament had debated many new potential locations for a British convict colony, ranging from Falkland Islands to the East Indies.

The Gambia and Senegal were rejected partly because it was considered unlikely that north Europeans would survive their climate. New South Wales was settled upon only in 1785.<sup>18</sup> The debates on the sentences of the “Scottish martyrs” should therefore be understood in the context of an ongoing political discussion of why and how transportation should be imposed as a penal sentence.

While convictions were secured in the Edinburgh trials of Watt and Downie for high treason in September 1794, in contrast to the acquittals in London of Hardy, Horne Tooke and Thelwall between October and December that autumn, the English authorities did convict James O’Coigly of high treason in 1798 and he was executed as Watt had been. The fact that only two men were tried for one case of treason in Scotland across the decade makes it impossible to suggest that the Scottish courts were more likely to convict than the English on this charge. Much research remains to be carried out on local prosecutions for sedition, most of which are not recorded in Howell’s *Complete State Trials* volumes.<sup>19</sup> When only the English cases for offences of sedition in the 1790s which are listed in *State Trials* are considered, four out of fourteen defendants were acquitted (28.5 per cent). Of the 129 defendants on trial for sedition in England in the 1790s, identified by Clive Emsley in 1982, thirty-three were acquitted (25.5 per cent).<sup>20</sup> None of the twenty-five defendants in trials for sedition or seditious practices in Scotland in the 1790s were acquitted, though one was pardoned (Charles Sinclair), and the cases against three collapsed (William Elder, James Smith and James Menzies). Of the remaining twenty-one, fourteen were convicted and seven were outlawed because they fled before standing trial. This certainly suggests a lower chance of achieving an acquittal in Scotland, but it should not obscure the fact that a great majority of convictions were secured in these cases of sedition on both sides of the border in the 1790s.

The legal systems of England and Scotland, as Foxite questions implied and Norris's report corroborated, remained distinct after the Union of 1707. In England there was no crime of "sedition", and seditious libel was a misdemeanour, usually heard before magistrates, not a felony as in Scotland, heard by the High Court. This is one of the reasons why it could be punished with transportation in Scotland but not in England.<sup>21</sup> The criminal law in Scotland, based on Roman law, prioritised "the safety of the state ... before the rights of the individual", and it awarded substantial discretion to a judge over the written law.<sup>22</sup> On the other hand, the English law of treason was imported into Scots law in 1709, and suspension of the Scottish Act anent Wrongous Imprisonment in May 1794-July 1795 and in April 1798-March 1801 had the same result as the suspension of Habeas Corpus in England in the same periods.<sup>23</sup> And even the laws on sedition were characterised by substantial similarities in both jurisdictions: they had not previously been defined in statute law, both depended on interpretation of intention on the part of the accused, and in both countries seditious activities were declared in the 1790s to be approaching treason. The Scots law of sedition was based on written legal authorities, and few cases of seditious offences had been brought in Scotland during the eighteenth century until its last decade, resulting in a dearth of precedent to be referred to during the trials.<sup>24</sup> The more common crime prosecuted in Scotland in the eighteenth century was leasing-making, which involved disrespectful words about the king without any purpose behind them to raise action against the British state or constitution. Punishment for this crime, however, was also arbitrary according to the seriousness of the case, barring the capital penalty.<sup>25</sup> The English law of sedition was more frequently used over the eighteenth century and therefore more familiar in the courts. It was, however, as in Scotland until 1793, considered a quality of some other offence such as a libel or a riot, which necessitated a similar potential legal pliability to that in Scotland. Seditious

libel was only defined in English statute law in 1795.<sup>26</sup> In Daniel Isaac Eaton's trial for publishing a seditious libel in June 1793, his counsel, Felix Vaughan, complained that, "Among the numerous proceedings observable in our jurisprudence, there is no proceeding which contains so much obscurity, ambiguity, and confusion, as this charge of sedition, malice, and so on, by libel."<sup>27</sup> In their sedition trials, furthermore, the Scots law officers leant on recent English precedents. The defence tried to insist on differences in the law in each jurisdiction, but the legal distinction was not accepted by the court as making any difference in practice. Lord Braxfield insisted that

Sedition in England, gentlemen, must be sedition here; and sedition here must be sedition in England; and it would be right in forming your opinion to have a eye upon the judgments of the English courts, who have condemned the publication of that work [Paine's *Rights of Man*].<sup>28</sup>

The authorities in both countries, wishing to inflate the offence of sedition in a jury's eyes, argued that there was a fine line in any case between sedition and treason.<sup>29</sup> This was easier in Scotland, since both were crimes tried in the High Court. Yet already in Paine's trial in absentia in London for seditious libel in December 1792, Archibald Macdonald (then Attorney General), told the jury that "With respect to the *matter*, in my conscience I call it treason, though technically, according to the laws of the country, it is not."<sup>30</sup> And as early as the trial of Morton, Alexander and Craig in Edinburgh on 8 January 1793, Lord Henderland was suggesting that damning the king should be taken literally as expressing a wish for his death.<sup>31</sup> Joseph Norris's notes in late 1793, defending the sentence of transportation of Muir and Fyshe Palmer, blurred the distinction in law as well as in effect. He claimed that the sixteenth-century Scottish jurist John Skene had translated the crime denoted *Seditio Regni* by the medieval Scots law authority, *Regiame Majestatem*, as "Sedition against the Realm", and noted that "this crime was capital by

the law of Scotland and punished as Treason".<sup>32</sup> Sir John Mitford made it clear to Hardy's jury in October 1794 that in his opinion Margarot and Gerrald should have been tried for treason rather than sedition in Edinburgh.<sup>33</sup> He was of course trying to establish the legitimacy of charging his defendant with treason for the act of radical political campaigning; but the same opinion had been expressed by Margarot's and Gerrald's judge, Lord Braxfield, in the Circuit Court in Inverness in the previous month.<sup>34</sup>

The scale of the campaign to seize those accused of political crimes did differ markedly in each jurisdiction, but this largely reflects their different sizes. The Scottish court system was smaller and correspondingly less complex.<sup>35</sup> The operations to seize the Scottish prisoners were much more restricted, focusing on two individuals operating distinctly in summer 1793, and the handful of leaders of the British Convention in December. The English authorities, however, conducted vast investigative operations in London and Sheffield (where Henry Redhead Yorke had been based), arresting thirty-three London leading reformers in the major sweep of May 1794 alone, and they were preoccupied with uncovering the connections of their prisoners with political reformers throughout Britain. Had Thomas Hardy, secretary to the LCS, corresponded with or did he know named individuals in Sheffield, Birmingham, Norwich, Edinburgh, Newcastle, Stockport, Warrington, Newton, Derby, Manchester, Nottingham, Longacre and Kilmarnock?<sup>36</sup> The government spent substantial sums of money on some provincial sedition cases. The Treasury Solicitors' bill came to 622 pounds, seven shillings and sixpence for enquiries made in Plymouth between 10 December 1792 and 28 April 1794, entirely in relation to Winterbotham's prosecution. This was to meet the costs of "searching for evidence" (twice), the "loss of time" for various witnesses, petty expenses, and "a vast number of Attendances on the witnesses". Most of this money was spent before the trial in July 1793, well before the main

period of active government alarm raised by the prospect of a serious pan-British radical convention.<sup>37</sup>

None of these differences in themselves necessarily led to a comparative justice deficit in the Scottish trials if that is evaluated by adherence to the laws of each jurisdiction.<sup>38</sup> The major difference was the sentence of transportation found available to punish sedition in Scotland but not in England. In 1793-94 the Scottish authorities prosecuted what they were sure they could convict, whereas in the most famous English cases, the authorities were playing for the highest stakes, and lost. The great majority of English cases, however, were for sedition, and resulted in convictions, just as in Scotland.

## II

If a greater abuse of power in the Scottish state trials is at least debatable on the issues of convictions, sentences, legal system and scale, it is easier to demonstrate cross-border comparability than contrast with regard to the charges, juries, judges, evidence and rationale. Although the trials of Muir, Palmer, Skirving, Margarot and Gerrald in Scotland on the charge of sedition are usually contrasted with those of Hardy, Horne Tooke and Thelwall in England for treason, they are more properly compared with the trials of defendants such as Frost, Eaton and Winterbotham for sedition, and the English treason trials compared with those of Watt and Downie in Edinburgh. This eliminates most of the question of the Scottish and English authorities pressing different charges. The application of the charge of treason to London discussions of a convention or to the collection in Edinburgh of a few pikes and a handbill encouraging soldiers to mutiny was of course overblown, but the choice of prosecuting for treason rather than sedition again seems to have owed as much to timing as to jurisdiction. Watt

and Downie were tried for treason in Edinburgh in August and September 1794, and Hardy, Horne Tooke and Thelwall were tried for treason in London over the following three months. The charge was pressed in the wake of the failure of the Scottish sedition trials of January 1794 to close down discussions among extra-parliamentary radical reformers of a political convention. Skirving, Margarot and Gerrald were arrested during the sitting of the British Convention in December 1793, which had followed closely on the heels of the third Scottish Convention of the radical Friends of the People societies and had succeeded that body, incorporating a handful of English and Irish delegates. Their sentences of transportation for fourteen years each did nothing to prevent the members of the LCS and the SCI from planning a further convention. This intended convention was therefore one of the chief concerns of the House of Commons Committee of Secrecy examining the activities of the LCS and the SCI in two reports published on 16 May and 6 June 1794, because it implied an autonomous anti-parliament inspired by the revolutionary National Convention in Paris.<sup>39</sup> “I call them French Conventionists”, Robert Dundas, the Scottish Lord Advocate, had declared in summing up for the prosecution of Margarot; “it is the essence of the charge against them”.<sup>40</sup>

It is true that Scottish juries were easily packed and controlled from the bench – “the hireling Jury and the Judge unjust”, as Southey dubbed them. The selection of Scottish jurors, Cockburn noted, proceeded at the judge’s “absolute, unexplained, unchecked, unquestioned, unquestionable, mysterious pleasure”.<sup>41</sup> David Lemmings suggests that there was a much stronger historical tradition of popular participation and community influence over English trials, of which the jury was an important part, than in Scotland, where the dominance of lawyers was more powerful.<sup>42</sup> Until 1825 Scottish defendants did not have the right of the English accused to object to a certain number of jurors without reason, but must successfully argue the case for each

protest. Objections to jurors on political grounds made by Muir, Skirving, Margarot and Gerrald were all repelled.<sup>43</sup> There were no outright acquittals in the Scottish cases for sedition or treason.<sup>44</sup>

Too much can also be made of the libertarian tradition of English juries, however, *pace* Cockburn, who optimistically suggested that an Englishman such as Margarot in January 1794 “had never seen, and probably never fancied the jury, in a political case, being selected by the presiding judge”.<sup>45</sup> John Ehrman judges that Horne Tooke’s jury was “obviously packed”, perhaps unsurprisingly after the government had lost its prosecution of Hardy’s case.<sup>46</sup> English defendants were not allowed, any more than Scots, to know the list of potential jurors in advance, as the owners of the *Morning Chronicle*, James Perry and James Gray were told in their trial for seditious libel in December 1793.<sup>47</sup> Nor were they permitted to object to any potential jurors when the trial began without citing a cause acceptable to the judge, as Henry Redhead Yorke found at his trial for seditious conspiracy in Sheffield in July 1795.<sup>48</sup> Moreover, Scottish juries had always had the right to decide on law as well as on fact, which English juries only won with Fox’s Libel Act of 1792 (though this did not apply in cases of treason).<sup>49</sup> That Act also involved the concession of the right of English judges to instruct juries, and this they certainly did in the political trials of the 1790s, such as Sir John Mitford and Sir James Eyre in autumn 1794, and Lord Kenyon in the cases for sedition of John Frost in 1793 and of the veteran radical publishers Joseph Johnson and Jeremiah Jordan in 1798.<sup>50</sup> On the other hand, occasionally a jury, such as Winterbotham’s, decided against a defendant despite the advice of a more liberal judge.<sup>51</sup> Muir’s jury was made up of one baronet, seven gentlemen, three merchants, two bankers, a bookseller and a portioner or smallholder. It was clearly drawn from the comfortably off ranks of society; but then, so was Muir himself, a legal advocate and the son

of “a flourishing hop merchant and grocer”, so it cannot be claimed that he was not tried by his peers.<sup>52</sup> Hardy’s jury in London was, comparably, a collection of “substantial London businessmen”, brewers and wholesale grocers; all of the major London trials involved special juries, which were socially selective.<sup>53</sup> It is not, then, obvious that the Scottish juries had less liberty or acted less liberally than their English counterparts in comparable cases.

Evidence that the Scottish judges were more unreasonably harsh than their English counterparts has been obscured by the particularly two-dimensional portrayal of Robert McQueen, Lord Braxfield, Lord Chief Justice Clerk of Scotland, and by the differences in the legal systems. Brian D. Osborne’s biography of Braxfield usefully questioned the caricature of cruelty and crudity created by Henry Cockburn and by Robert Louis Stevenson’s *Weir of Hermiston* (1896), and still frequently perpetuated. Osborne portrays a much more sympathetic, warm, cultured and sociable character, details the esteem in which he was held by the profession over most of his career and by his clients, and demonstrates that there is no evidence for Braxfield having uttered some of the more regrettable remarks attributed to him.<sup>54</sup> Meanwhile in England, in 1792 Lord Camden, supporting Fox’s Libel Bill’s extension of the rights of juries in cases of seditious libel, told the House of Lords that (English) judges might be susceptible to political influence and therefore it was safer to allow a jury to decide intention.<sup>55</sup> And John Barrell’s and Jon Mee’s assessment of Sir James Eyre in Hardy’s trial is that he summed up “for a conviction, paying much more attention to the evidence for the prosecution than to that for the defence, and treating [the defence counsel]’s legal arguments with brief contempt”.<sup>56</sup> Joseph Gerrald raised an objection to Braxfield’s sitting on his case because he had been heard, outrageously, prejudging all of the January 1794 cases at a private dinner.<sup>57</sup> However, according to Sir John Scott’s later account, Eyre similarly expressed the view in the Privy Council’s pre-

examination of the treason trial defendants in 1794, that they were guilty.<sup>58</sup> He may have done so in a less coarse manner than Braxfield was reported to have done, but that he did so was no less procedurally objectionable.

Scott also said, however, that Eyre became less certain of this assessment over the course of Hardy's long trial and, in Horne Tooke's trial, Eyre eventually came down on the side of his defence.<sup>59</sup> It is difficult to imagine any of the Scottish trial judges expressing doubts about these cases; and at best they were undeniably energetic in their suppression of reform politics. Osborne also noted that even Braxfield's colleagues, such as Robert Dundas, branded him "violent and intemperate". Indeed, the Dundases ensured that Braxfield was only one of a commission of nine judges to sit on Watt's and Downie's treason trials in early autumn 1794 because his behaviour both on and off the bench was indefensible.<sup>60</sup> Osborne's point that Braxfield, while perhaps the most colourful and egregious of the Scottish High Court judges active in these cases, was by no means out of step with colleagues such as Lords Henderland, Swinton, Eskgrove and Abercromby, is important for assessing Braxfield himself, but it does not rescue the Scottish judges from the charge that they were worse than their English counterparts. "God help the people who have such judges!" Fox is said to have exclaimed.<sup>61</sup>

Certainly, the Scottish judges often seemed to be engaging in prosecution from the bench.<sup>62</sup> Yet this approach was consistent with Scottish criminal law tradition as recently established by Anne-Marie Kilday. Kilday notes that in pre-modern Scotland, criminal prosecutions did not usually proceed where there was room for doubt about the verdict. Defence was virtually redundant in court because of the weight of investigation carried out before a trial to remove doubt of guilt, and the primary concern in the trial was therefore to lay out evidence of guilt rather than to presume innocence until proven otherwise.<sup>63</sup> Understanding the Scottish trials for

sedition in the light of Scottish criminal trial tradition suggests a facet beyond a simple monstrous brutality in the Scottish bench in 1793-94, without removing the need to admit Braxfield's overenthusiasm for conviction and punishment in these political trials.<sup>64</sup> Clearly a condition of prosecuting only when confident of the verdict did not hold in the case of the London prosecutions for treason in 1794. The contrast between the conduct of the judges in Edinburgh and London, though perhaps difficult to deny, is then too closely based on the Privy Council's decision to try treason in autumn 1794, to stand as an absolute contrast between similar instances.

In both Scottish and English trials evidence which was indirect, circumstantial and obtained by spies formed an important part of the prosecution's case. Just as in the prosecution of the Baptist preacher William Winterbotham in July 1793, witnesses' memories of speeches delivered but not printed were crucial in the trial of Henry Redhead Yorke two years later for seditious conspiracy.<sup>65</sup> Felix Vaughan complained of the prosecution's employment of Loyal Association members, spies and informers to procure evidence against Daniel Isaac Eaton in his trial for publishing a seditious libel.<sup>66</sup> There was, as Barrell and Mee put it, "a running argument" in Hardy's trial regarding the admissibility of evidence.<sup>67</sup> It was very difficult to bring anything other than indirect evidence to support a case of intention, of course; and the prosecution insisted that the timing of the radical conventions and the activities of the radical societies were crucial in defining their activities as seditious. Muir's question posed no difficulty to his prosecution: "Shall what was patriotism in 1782 [reform politics], be criminal in 1793?"<sup>68</sup> Robert Dundas, had already argued in January 1793, in the prosecution of Morton, Alexander and Craig, that "what at one time would be considered as an act of mere folly and rashness, and as having no seditious

tendency, is, at another, and at a different conjuncture, an act of a more mischievous and serious nature”.<sup>69</sup>

English courts admitted highly questionable evidence, such as a letter from Thelwall to a friend in America which had never been posted, or the perjury of the spy John Taylor in the same trial, and even manufactured evidence, the most flagrant of which perhaps was that brought by the spy Edward Gosling in Hardy’s prosecution, inflating radical plans for armed insurrection.<sup>70</sup> Manipulation of the process and drastic tactics were therefore apparent south as well as north of the border. The London “Pop Gun” plot of September 1794 was thought by radicals to have been seized on by ministers, despite its absurdity, because it occurred in the latter stages of preparation of the case against Hardy and might add to the weight of circumstance being stacked against him.<sup>71</sup> There is plenty of evidence of ruthlessness surrounding the English trials, such as John Richter’s complaint of the brutality with which his house was searched by the authorities when he was arrested in May 1794.<sup>72</sup> On the other hand, the evidence allowed by the courts in both jurisdictions to be brought or discussed by the defence was often very limited.<sup>73</sup>

### III

The desperation of such tactics and the harshness of the courts in both jurisdictions beg the question as to why the authorities acted in such a fashion. Much of the published work on these trials is focused on the defendants. Government ministers, and their legal and administrative officers, who are somewhat shadowy figures, are sometimes implicitly treated as cruel opportunists rather than considered with greater curiosity. The question is not, whether or not it was reasonable for them so to fear apparently subversive activity that they took such drastic action to subdue it, but whether they in fact feared it, realistically or otherwise. How far did

prosecutors and government ministers believe their own “wilder imaginings”<sup>74</sup> It is perhaps too attractive, with the benefit of hindsight, to follow the Whig defence counsel, Thomas Erskine, in accusing the Pitt administration of deliberately piecing together disparate pieces of evidence to construct the appearance of a widespread and dangerous but ultimately unconvincing plot.<sup>75</sup> Given the context of revolution across the Channel, which had descended during 1793-94 into its most violent and arbitrary phase, and whose leaders had declared their willingness to encourage revolution abroad as recently as 1792, and given also the circumstances of a war which was not only strategic but ideological, it should not be surprising that the British government was easily alarmed by hints of conspiracy, convention, and arming. Nor is it remarkable that the authorities wanted, in an age before substantial police resources, to deter such activity unambiguously.<sup>76</sup>

Paine’s prosecutors argued that the popular style and cheap price of his *Rights of Man* demonstrated that he had intended to rouse the lower orders against the government, and the charge was frequently made that defendants had deliberately sought to rally the poor, characterised variously by the prosecution as “the mob” and the ignorant but well-meaning.<sup>77</sup> Regardless of the fact that Lord Braxfield’s summings-up were laden with hyperbole and exaggeration, it is not at all impossible that the authorities seriously believed that the institution of universal manhood suffrage would lead to anarchy, as he claimed.<sup>78</sup> It may have been a “hysterical” or “delusive” conviction on their part, but it is arguable that government ministers and senior legal officers believed that there was a conspiracy to overturn the government, and not entirely absurd that they should have feared it. It had happened in France.<sup>79</sup> Sir John Scott later explained that he had taken nine hours to lay out the evidence for a charge of high treason against Hardy, not because convictions were the most important objective, but rather to demonstrate to the country all the evidence of its danger from the radical plotters: the swift

spread of radical organisation in aid of the campaign for popular sovereignty, involving societies, sophisticated structures, correspondence, publications, an Anglo-Scottish-Irish convention of delegates, plans for emergency organisation, and hints of arming.<sup>80</sup> Scott's exhaustive and exhausting effort to convince the jury of Hardy's treason certainly, as Barrell points out, exposes the weakness of the decision to try for treason; it does not suggest that he and his colleagues were not afraid of the radical movement.<sup>81</sup> The utter defeat of the government argument in Hardy's prosecution, whose jury took only eight minutes to decide on his acquittal, raises the question as to why ministers persevered with the trials of Horne Tooke and then Thelwall if not because they were convinced of danger.

In fact another common government concern, rarely discussed, was with legality or at least its appearance.<sup>82</sup> The "purchase" of the ideology of the rule of law, discussed by John Brewer and John Styles, is frequently apparent in statements and actions of ministers and law officers during these trials.<sup>83</sup> In John Frost's sedition trial, the Attorney General (unlike Rooke in Winterbotham's case or Law in Yorke's) at least discussed the difficulties involved in determining the criminality or otherwise of words spoken in the past.<sup>84</sup> In Thomas Fyshe Palmer's trial, Lord Abercrombie put up with a great deal of long-winded defence from the advocate John Haggart (whom Cockburn denounced as "a disgrace to any cause"), wearily responding to him at one point, "Take your own time ... No, you are not obliged to me. It is your privilege and your right", before submitting to another lengthy disquisition.<sup>85</sup> The lengthy report of May-June 1794 by John Bruce into the Jacobite treason trials of the late seventeenth and early eighteenth centuries is a fascinating investigation of legal precedent, and not the only report Bruce was commissioned by Dundas to compile in the 1790s in order to establish historical models of process.<sup>86</sup> On 11 October 1794 Sir John Scott and Sir John Mitford asserted that

judges who were Privy Councillors must rule on the individual cases of permission sought by various individuals to visit the prisoners on the charge of high treason, rather than the trial judges, who needed to be seen as impartial towards the prisoners – perhaps not a very high standard of judicial transparency, but clearly they thought it was worth stating.<sup>87</sup> Sir James Eyre allowed Horne Tooke to stand with his defence team rather than in the dock for his trial because of the volume of evidence that was involved, and conscientiously warned him repeatedly against admitting what he did not have to admit.<sup>88</sup> Eyre sided with the defence on the credibility of the spies Gosling and Taylor. Sir Richard Perryn summed up, though unsuccessfully, for an acquittal in Winterbotham's second trial.<sup>89</sup> Even Lord Braxfield wanted to be clear that Skirving should not have been exempted from trial by the fact of his having stood as a witness for the prosecution at Palmer's trial, though his scruples were easily assuaged by the fact that Skirving had not been called to give evidence; and all of Margat's many attempted legal challenges were heard and replied to, if with increasing judicial impatience. The bench was often long-suffering with defendants and defence, Braxfield for instance responding to a rebuke from Gerrald midway through his summing-up, rather than repressing Gerrald's intervention.<sup>90</sup> The judges and prosecution in the treason trial of O'Coigly, O'Connor, Binns, Allen and Leary were clearly horrified by evidence that an attempt had been made to influence the jury ahead of the trial, even though they decided that the jurors could not be discharged without impugning their characters.<sup>91</sup>

The likenesses between the sedition trials in Scotland and England, and between the treason trials in both jurisdictions, reflect the common context of panic among the political elite caused by the French Revolution and perceived constraints on the state, more clearly than differences of articulation demonstrate rougher justice in Scotland. The authorities in both countries were deeply interested in and fearful of nationwide and cross-border correspondence

between political reformers, past and prospective radical conventions, popular politicisation, French influence upon radical reformers and the prospect of French aid or invasion, an Anglo-Scottish-Irish-European conspiracy to overthrow the British government, law and order and the social hierarchy, and the arming of British subjects.<sup>92</sup> In both countries these prosecutions were show trials, staged “to deter others from Committing the like Crimes in all time coming”, and in both countries public loyalist participation and brutality were in evidence.<sup>93</sup> The constant in both sets of trials was Henry Dundas, Home Secretary till July 1794, through the two periods of the Scottish sedition trials and the weeks of seizing leading reformers in England in May and June 1794. It was Dundas who commissioned John Bruce’s report into historic treason trials in May 1794. Moreover, although he became Secretary of State for War in July 1794, he remained centrally involved in the Privy Council pre-trial examinations of the prisoners, whose memoirs show that he led their questioning.<sup>94</sup> He continued to manage Scottish political affairs on Pitt’s behalf (which of course included the treason trials of Robert Watt and David Downie in September). More broadly, after July 1794 Dundas continued to operate in the inner Cabinet triumvirate with Pitt and Grenville. That month, Pitt had written of Dundas that “every act of his [is] as much mine as his”.<sup>95</sup>

#### IV

All of the factors discussed in this chapter require much fuller examination than space here permits, and there are many more factors which remain to be compared in these two sets of trials, such as the government’s choice of defendants, the nature of the pre-trial procedures, the language used by prosecutors and defendants, the role of defence counsel (sometimes distrusted by defendants), and the witnesses and their roles. The preceding argument has suggested that the

sedition and treason trials in Scotland and England in the 1790s were less dissimilar than the radical and Whig interpretation claimed and than the headline contrasts suggest. The lingering sense of rougher justice in Scotland during these trials is certainly supported by the behaviour particularly of Lord Braxfield, and by the harsher sentences available to the Scottish judges for the crime of sedition. Some contrasts between the trials in the two jurisdictions, however, do not appear to have been clearly responsible for lesser justice for defendants in Scotland, such as the choice of charge pressed against the defendants, the verdicts reached, the difference in legal traditions and the scale of operation. Many facets of the trials, moreover, seem to have been comparable, such as the treatment of juries, the general behaviour of judges, the permission of indirect and circumstantial evidence in the prosecution's case, and the manipulation of courtroom procedures to weight the probability in favour of conviction.

The impression of a comparative justice deficit has been exaggerated by three factors. First, Whigs and radical reformers, not altogether unreasonably but nevertheless inaccurately, saw a two-dimensionally tyrannical state. Britain in 1793-94 was not Paris – it was governed by an alarmed conservative elite, not a cold-bloodedly tyrannical despotism. The Whigs themselves were badly treated, particularly in Scotland, where many of them were legal advocates whose careers suffered because of the trials. But both Whigs and radical reformers, therefore, had their own agenda in commenting on the trials, and we should not follow their interpretations unquestioningly. Even in the Scottish trials, the results were not quite a foregone conclusion, although Braxfield and his colleagues did their best to help the prosecution secure victory.<sup>96</sup> Second, the trials most often correlated are not properly comparable because the most infamous Scottish convictions were for sedition, and they have been contrasted with acquittals in England for treason. Treason was undoubtedly the wrong charge to have pursued in London in autumn

1794, and the correct verdicts were reached by Hardy's, Horne Tooke's and Thelwall's juries. Third, timing, rather than the jurisdiction in question was crucial for the severity of sentencing, which was closely tied to the occurrence and anticipation of radical reform conventions. While such a conclusion vindicates the sequential approach often taken to examining the trials in Scotland and England, the comparability of the English and Scottish prosecutions has not previously been properly scrutinised.

The two most important commonalities between the Scottish and English trials of the 1790s, which dominated over the legal elements, were the French Revolutionary context which created the climate of political alarm throughout Britain, and the Pitt administration at Westminster which governed both jurisdictions. Within the Pitt administration, Henry Dundas was crucial. Dundas was the single most influential individual involved in the trials across Great Britain. It is not surprising that the political trials of the decade in both jurisdictions straddled by him were harmonised in so many respects.

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\* The author wishes to acknowledge with gratitude funding from the Carnegie Trust (ref. 70422) for the Universities of Scotland in support of research for this chapter.

<sup>1</sup> LCS General Meeting, 14 April 1794, in Mary Thale (ed.), *Selections from the Papers of the London Corresponding Society, 1792-1799* (Cambridge, 1983), 133.

<sup>2</sup> Cited by Nicholas Roe, "The Lives of John Thelwall", in Steve Poole (ed.), *John Thelwall: Radical Romantic and Acquitted Felon* (London, 2009), 17.

<sup>3</sup> Cockburn, *Examination*, I: 246.

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- <sup>4</sup> John Ehrman, *The Younger Pitt*, Vol. 2: *The Reluctant Transition* (London, 1983), 390; cf. Atle L. Wold, *Scotland and the French Revolutionary War, 1792-1802* (Edinburgh, 2015), 67-69.
- <sup>5</sup> Gordon Pentland, “State Trials, Whig Lawyers and the Press in Early Nineteenth-Century Scotland”, in this volume; see also Jim Smyth and Alan McKinlay, “Whigs, Tories and Scottish Legal Reform c.1785-1832”, *Crime, Histoire & Sociétés / Crime, History and Societies*, 15 (2011), 111-32.
- <sup>6</sup> Henry W. Meikle, *Scotland and the French Revolution* (Glasgow, 1912), 155-60.
- <sup>7</sup> Henry Cockburn, *Memorials of His Time* (Edinburgh, 1856), 116.
- <sup>8</sup> Ehrman, *The reluctant transition*, 390; Wold, *Scotland and the French Revolutionary War*, 52.
- <sup>9</sup> Clive Emsley, “An Aspect of Pitt's Terror: Prosecutions for Sedition During the 1790s”, *Social History*, 6 (1981), 173.
- <sup>10</sup> The National Archives [TNA], PC 1/22/37, 31 December 1794. Draught of an Order in Council Declaring and appointing the Place to which Joseph Gerald who has been Sentenced to be Transported in Scotland beyond the Seas shall be Conveyed, f.5.
- <sup>11</sup> National Records of Scotland [NRS], GD 214/658/1; draft at NRS JC 49/6JC 49/6.
- <sup>12</sup> Dr Williams's Library, London, James Wodrow to Samuel Kenrick, 24 August 1793.
- <sup>13</sup> *State Trials*, XXIII: 22-4.
- <sup>14</sup> *Ibid.*, 233.
- <sup>15</sup> *Ibid.*, 25.
- <sup>16</sup> By contrast, the failure of the London treason trials in autumn 1794 caused the authorities to prosecute Henry Redhead Yorke for seditious conspiracy rather than, as originally planned, treason. Timing was also responsible for his charge. Amanda Goodrich, “Radical ‘Citizens of the

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World', 1790-95: The Early Career of Henry Redhead Yorke", *Journal of British Studies*, 53 (2014), 634.

<sup>17</sup> 25 Geo III c.46.

<sup>18</sup> A.G.L Shaw, *Convicts and the Colonies. A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire* (London, 1966), 38-57. See Henry Dundas to William Grenville as early as 17 Dec. 1789 for Dundas's opinion that employment in public works in Scotland such as canal building were not an appropriate substitute for transportation. "Death, transportation and Bridewell are ... the only variety of punishment that the manners of our country will admit of." Historical Manuscripts Commission, Thirteenth Report, Appendix, Part III, *The Manuscripts of J.B.Fortescue, Esq., Preserved at Dropmore*, 10 vols (London, 1892-1927), X: 555-6.

<sup>19</sup> But see Steve Poole, "Pitt's Terror Reconsidered: Jacobinism and the Law in Two South-Western Counties, 1791-1803", *Southern History*, 17 (1995), 65-87.

<sup>20</sup> Emsley, "An Aspect of Pitt's Terror", 179-84.

<sup>21</sup> I am grateful to Lindsay Farmer for advice on this point; see his *Making the Modern Criminal Law* (Oxford, 2015), p. 71.

<sup>22</sup> Christina Bewley, *Muir of Huntershill* (Oxford, 1981), 83; Lindsay Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge, 1997), 44.

<sup>23</sup> John Cairns, "Scottish Law, Scottish Lawyers and the Status of Union", in John Robertson (ed.), *A Union for Empire: Political Thought and the British Union of 1707* (Cambridge, 1995), 250; Lisa Steffen, *Defining a British State: Treason and National Identity, 1608-1820*

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(Basingstoke, 2001), 5-6; Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA and London, 2010); Wold, *Scotland and the French Revolutionary War*, 17.

<sup>24</sup> Wold, *Scotland and the French Revolutionary War*, 38-69, 209; idem, “Was there a Law of Seditious in Scotland? Baron David Hume’s Analysis of the Scottish Seditious Trials of 1794” in Gordon Pentland and Michael T. Davis (eds), *Liberty, Property and Popular Politics: England and Scotland, 1688-1815. Essays in honour of H.T. Dickinson* (Edinburgh, 2016), 163-75.

Lindsay Farmer points out in his chapter in this volume that seditious *per se* was not a crime in Scots law until 1793. Until that year, as in England, it was treated as a quality of some other offence, such as libel or the related offence of leasing-making.

<sup>25</sup> Wold, *Scotland and the French Revolutionary War*, 48-51.

<sup>26</sup> Ibid., 58; James Epstein, “‘Our Real Constitution’: Trial Defence and Radical Memory in the Age of Revolution”, in James Vernon (ed.), *Re-reading the Constitution: new narratives in the political history of England’s long nineteenth century* (Cambridge, 1996), 35; Barrell and Mee, *Trials*, I: xliii, 352.

<sup>27</sup> *State Trials*, XXII: 801.

<sup>28</sup> Ibid., XXIII: 230.

<sup>29</sup> Barrell, *Imagining the King’s Death*, 164-5.

<sup>30</sup> *State Trials*, XXII: 383.

<sup>31</sup> Ibid., XXIII: 11-12, cf. Barrell, *Imagining the King’s Death*, *passim*.

<sup>32</sup> NRS, GD 214/658/1, unfoliated, [18].

<sup>33</sup> *State Trials*, XXV: 512.

<sup>34</sup> Barrell and Mee, *Trials*, V: 475-6.

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<sup>35</sup> Ehrman, *The reluctant transition*, 391; Poole, “Pitt’s Terror Reconsidered”, especially 65-73; Farmer, *Criminal Law, Tradition and Legal Order*, 66-74; Anne-Marie Kilday, “Contemplating the Evil Within: examining attitudes to criminality in Scotland, 1700-1840”, in David Lemmings (ed.), *Crime, Courtrooms and the Public Sphere in Britain, 1700-1850* (Aldershot, 2013), 151-2.

<sup>36</sup> TNA, PC 1/21/35A, 14<sup>th</sup> May 1794. Copy. Examination of Jere.h Joyce Tho.s Hardy and John Thelwall. Evidence Wm Mainwaring Esq.r Rt Hon.ble W.m Pitt Mr John King. Ross & Thaw, Messengers. Office.

<sup>37</sup> TNA, TS 24/1/2, ff. 1-5, The Treasury Solicitors' (Chamberlayne and White) bill for “Seditious Prosecutions”.

<sup>38</sup> Epstein, ““Our Real Constitution””, 36.

<sup>39</sup> T.M. Parsinnen, “Association, convention and anti-parliament in British radical politics, 1771-1848”, *English Historical Review*, 88 (1973), 512-15; Barrell, *Imagining the King’s Death*, 182-210, *passim*; *The First Report from the Committee of Secrecy of the House of Commons* (London, 1794), 8-9, 20, 27, 40, 42; *The Second Report from the Committee of Secrecy of the House of Commons* (London, 1794), 11-12, 15, 49ff.

<sup>40</sup> *State Trials*, XXIII: 700.

<sup>41</sup> Robert Southey, “To the Exiled Patriots. MUIR AND PALMER” (1794), in *The Poetical Works of Robert Southey, complete in one volume* (Paris, 1829), 698; Cockburn, *Examination*, 80-3. In Scottish criminal cases till 1825 a jury of 15 men was selected by the judge from a pool of 45 presented to him by the clerk of the court. Smyth and McKinlay, “Whigs, Tories and Scottish Legal Reform”, 116, 129; T.J. Dowds, “Muir’s ‘Good Cause’ 1820”, in Gerard Carruthers and Don Martin (eds), *Thomas Muir of Huntershill: essays for the twenty-first century* (Edinburgh, 2016), 266-7.

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<sup>42</sup> David Lemmings, “Introduction: Criminal Courts, Lawyers and the Public Sphere” in idem (ed.), *Crime, Courtrooms and the Public Sphere in Britain, 1700-1850* (Farnham, Surrey and Burlington, VT, 2013), 7.

<sup>43</sup> *State Trials*, XIX: 11 note; *ibid.*, XXIII: 134-5, 513, 679-80, 701, 901.

<sup>44</sup> The cases against John Elder and John Smith collapsed in 1793 and that against James Menzies, in 1798.

<sup>45</sup> Cockburn, *Examination*, II: 28. Henry Yorke, for one, had been accusing the government of packing juries well before his own trial in July 1795. *State Trials*, XXV: 1049.

<sup>46</sup> Wold, *Scotland and the French Revolutionary War*, 67-9; Ehrman, *The Reluctant Transition*, 397; Emsley, “An Aspect of Pitt's Terror”, 170; Epstein, ““Our Real Constitution””, 34; Philip Harling, “The Law of Libel and the Limits of Repression, 1790-1832”, *Historical Journal*, 44 (2001), 115; E.P. Thompson, *The Making of the English Working Class, 1780-1832* (Harmondsworth, 1968), 509. See also James Epstein's chapter in this book, which notes that Winterbotham's supporters expected his jury to be packed.

<sup>47</sup> *State Trials*, XXII: 965-85.

<sup>48</sup> *Ibid.*, XXV: 1004.

<sup>49</sup> *Ibid.*, XXIII: 114 and note, referring to John Burnett, *Criminal Laws of Scotland* (Edinburgh, 1811); on trials for treason see Barrell and Mee, *Trials*, VII: 437, 467-8.

<sup>50</sup> Barrell and Mee, *Trials*, I: xvi-xvii, xlv, 257 note; *State Trials*, XXII: 254-5516-19; *The Prison Diary of Horne Tooke*, 15; Kenneth R. Johnston, *Unusual Suspects: Pitt's Reign of Alarm and the Lost Generation of the 1790s* (Oxford, 2013), 192. See also the speech of the Recorder in Eaton's trial in February 1794, *State Trials*, XXIII: 1047-54.

<sup>51</sup> *State Trials*, XXII: 875-6; see Epstein's essay in this volume.

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<sup>52</sup> NRS, JC 26/1793/1/4, 1-9; H.T. Dickinson, “Thomas Muir (1765-99)”, *ODNB*.

<sup>53</sup> R.R. Palmer, *The age of democratic revolution: a political history of Europe and America*, 2 vols (Princeton, 1959), II: 480.

<sup>54</sup> Brian D. Osborne, *Braxfield: the hanging judge?* (Glendaruel, Argyll, 1997); see, for instance, Bewley, *Muir of Huntershill*, 83.

<sup>55</sup> Peter D.G. Thomas, “Charles Pratt, First Earl Camden (1714-1794)”, *ODNB*.

<sup>56</sup> Barrell and Mee, *Trials*, V: 324-443, 477 n. 324.

<sup>57</sup> *State Trials*, XXIII: 808.

<sup>58</sup> *Lord Eldon’s Anecdote Book*, eds Anthony L.J. Lincoln and Robert Lindley McEwen (London, 1960), 57; see also Walter Sichel (ed.), *The Glenbervie Journals* (London, 1910), 212.

<sup>59</sup> *Lord Eldon’s Anecdote Book*, 57; Sichel (ed.), *Glenbervie Journals*, 213; *State Trials*, XXV: 555-743; Barrell and Mee, *Trials*, VII: 467. See also Douglas Hay, “Sir James Eyre (*cap.* 1734, *d.* 1799)”, *ODNB*.

<sup>60</sup> Osborne, *Braxfield: the hanging judge?*, 218; NRS, RH2/4/83, ff. 178-9, Robert Dundas to Henry Dundas, 27 April 1798.

<sup>61</sup> Meikle, *Scotland and the French Revolution*, 136.

<sup>62</sup> Wold, *Scotland and the French Revolutionary War*, 65; Epstein, ““Our Real Constitution””, 38.

<sup>63</sup> Kilday, “Contemplating the Evil Within”, 153-54; Farmer, *Criminal Law*, 43-44.

<sup>64</sup> This point is worth much fuller investigation; it has the potential to explain comparative acquittal rates in both countries. There were, however, a number of other factors which affected differences in acquittal rates (such as the proportion of public to private prosecutions, and the difference in law between sedition as a misdemeanour and sedition as a crime, discussed above), so care is required in laying great weight on it here.

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<sup>65</sup> *State Trials*, XXV: 1138; cf. Epstein, “Sermons of Sedition” in this volume.

<sup>66</sup> *Ibid.*, XXII: 802.

<sup>67</sup> Barrell and Mee, *Trials*, II: 446-47.

<sup>68</sup> *Ibid.*, XXIII: 194.

<sup>69</sup> *Ibid.*, 10, cf. *ibid.*, 88.

<sup>70</sup> Palmer, *The age of democratic revolution*, II: 480; Steve Poole, *The Politics of Regicide in England, 1760-1850* (Manchester, 2000), 97; Barrell, *Imagining the King’s Death*, 190, 212-16; Barrell and Mee, *Trials*, VIII: 30, 87-8, 94, 108.

<sup>71</sup> Poole, *Politics of Regicide*, 99.

<sup>72</sup> Roe, “The Lives of John Thelwall”, 18.

<sup>73</sup> See, at least as reported in *State Trials*, the cases of Daniel Holt (XXII:1202-35), Maurice Margarot (XXIII: 672-4), Henry Redhead Yorke (XXV: 1021); and Barrell and Mee, *Trials*, I: xlvi-xlvii; *ibid.*, II: 446-7.

<sup>74</sup> John Barrell, “Thelwall in his own defence: the Natural and Constitutional Right of Britons”, in Poole (ed.), *John Thelwall*, 40.

<sup>75</sup> *State Trials*, XXIV: 891. Cf. the Foxite notion of the “Pitt system” of the 1790s more broadly, a wicked, deliberate plan to go to war against France in order to have a reason to expand the power of the executive and create opportunities for personal ministerial gains. E.g. *War with France! Or, Who Pays the Reckoning* (London, 1793), 23.

<sup>76</sup> F. Murray Greenwood, “Judges and Treason Law in Lower Canada, England, and the United States during the French Revolution, 1794-1800”, in F. Murray Greenwood and Barry Wright (eds), *Canadian State Trials, I: Law, Politics, and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996), 241-95.

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<sup>77</sup> Barrell and Mee, *Trials*, I: 2-3; *State Trials*, XXIII: 284, 696-8.

<sup>78</sup> *State Trials*, XXIII: 592; see also Lord Swinton, *ibid.*, 898-9.

<sup>79</sup> Horne Tooke, *Prison Diary*, 11; *State Trials*, XXIV: 179 and XXV: 258.

<sup>80</sup> *Lord Eldon's Anecdote Book*, eds Lincoln and McEwen, 55-6. Scott also said (57) it had been necessary to prosecute for treason to prevent an acquittal in a trial for sedition on the grounds that the correct charge would have been treason. This is less convincing, and it is impossible to know whether, *vice versa*, convictions for sedition might have been secured had that charge been prosecuted instead of the unsuccessful charge of treason.

<sup>81</sup> Barrell, *Imagining the King's Death*, 329-30.

<sup>82</sup> Though see also Katrina Navickas's essay in this volume; and also E.P. Thompson, *Whigs and Hunters: the Origin of the Black Act* (London, 1975; 1990 edition), p. 263. Thanks to James Epstein for pointing out the latter.

<sup>83</sup> John Brewer and John Styles, *An Ungovernable People: the English and their law in the seventeenth and eighteenth centuries* (London, 1983), 14, 16, 19. See also H.T. Dickinson, *Liberty and Property: political ideology in eighteenth-century Britain* (London, 1977), 159-62.

<sup>84</sup> *State Trials*, XXII: 479-80.

<sup>85</sup> *Ibid.*, XXIII: 269; Cockburn, *Examination*, I: 185.

<sup>86</sup> John Bruce (1744-1826), previously professor of logic of the University of Edinburgh and by 1794 Under Keeper of the State Paper Office. TNA HO 102/62, [John Bruce], Report by Mr Bruce on Treason 1794. A copy of part 1 of 7 of this document (ff. 1-52 of 315ff.) is held at NRS, GD152/222/3/5.

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<sup>87</sup> TNA, PC 1/3111, 11 Oct. 1794. Letter from Mr Attorney and Solicitor General on the subject of granting permissions to persons to visit the prisoners now under confinement for High Treason.

<sup>88</sup> *State Trials*, XXV: 6-12; Barrell and Mee, *Trials*, VI: 474.

<sup>89</sup> *State Trials*, XXIV: 1379; Barrell and Mee, *Trials*, VIII, 94. On Winterbotham, see note 38 above.

<sup>90</sup> *State Trials*, XXIII: 509, 606-7, 629-32, 635-6, 704, 1001.

<sup>91</sup> *Ibid.*, XXVI: 1220-1.

<sup>92</sup> E.g. TNA PC 1/21/35A and 35B, *passim*; *First Report from the Committee of Secrecy*; *Second Report from the Committee of Secrecy*; NRS, JC 26/1793/1, *passim*.

<sup>93</sup> NRS, JC26/1793/1/1/1, Criminal Letters His Majesty's Advocate Ag<sup>t</sup> Mr Thomas Muir – 1793. Seditious. Recorded, unfoliated [28]; John Barrell, "Imaginary Treason, Imaginary Law", in Barrell, *The Birth of Pandora and the Division of Knowledge* (Basingstoke, 1992), 120; Michael T. Davis, "Prosecution and radical discourse during the 1790s: The case of the Scottish Seditious Trials", *International Journal of the Sociology of Law*, 33 (2005), 148-58.

<sup>94</sup> Greenwood, "Judges and Treason Law", 249.

<sup>95</sup> HMC, *Dropmore*, II, 595, Pitt to Lord Grenville, 5 July 1794.

<sup>96</sup> See Mike Rapport's helpful test of a robust legal system in his chapter below; and the figures of casualties of the French Terror cited at his note 8.