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THE RISE OF THE CONTENTIOUS SPIRIT: ADVERSARY PROCEDURE IN EIGHTEENTH CENTURY ENGLAND

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† Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. B.A. 1969, Kenyon College; J.D. 1972, Harvard University. This article is dedicated to Lewis Jordan (1912-1983) who taught me the love of two arts, writing and fishing. The article grew out of a paper entitled The Rise of the Adversarial Process: Changes in Criminal Procedure at the Old Bailey 1717-1797, presented at the meeting of the Law and Society Association held in 1987 in Washington, D.C. I wish to acknowledge the generous support of the Cleveland-Marshall Fund, the Wolfson College of Cambridge University, and the Institute of Advanced Legal Studies of the University of London. I also wish to thank a number of colleagues and friends for their generous assistance in reviewing earlier drafts of this piece, including John Beattie, Thomas Green, Steven Smith, Lloyd Snyder and William Twining.
INTRODUCTION

Criminal trials in Tudor and Stuart England were, according to J.S. Cockburn, “nasty, brutish, and essentially short.” Counsel seldom participated, few, if any, rules of evidence constrained enquiry, judges routinely examined witnesses and defendants in the most vigorous, and at times ruthless, manner, only prosecution wit-

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2 J.S. Cockburn, A History of the English Assizes 1558-1714 at 109 (1972). Cockburn especially emphasized the incautious evidence practices of the era and the fact that virtually no trial took more than 20 minutes. As many as 25 cases might be heard by a single judge and jury within a 12 hour sitting. Id. at 124-25, 137-38. The quoted remark quite clearly is a paraphrase of Hobbes’s famous description of life in the state of nature.
3 According to John Langbein, it was not until the 1730s that counsel began to appear with any regularity on either side in non-political felony trials. See John H. Langbein, The Criminal Trial Before the Lawyers, 45 U. CHI. L. REV. 263, 307-14 (1978) [hereinafter Langbein I]. On the prosecution side, this was apparently a matter of choice. See J.M. Beattie, Crime and the Courts in England 1660-1800 at 352-56 (1986); John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. CHI. L. REV. 1, 126-27 (1983) [hereinafter Langbein II]. Defendants, however, were barred from having counsel. See Thomas Andrew Green, Verdict Accord- ing to Conscience 155-36 (1985). The first formal step taken to lift this prohibition came in 1696 when Parliament authorized defendants to employ counsel in treason trials. 7 & 8 Will. 3, ch. 3 (1696). All restrictions on the employment of defense counsel were finally lifted in 1836. 6 & 7 Will. 4, ch. 114 (1836).
4 “At the trial of Warren Hastings in 1794, Edmund Burke is reported to have said that he knew a parrot who could learn the rules of evidence in a half-hour and repeat them in five minutes.” William Twining, Theories of Evidence: Bentham and Wigmore 1 (1985) (citing 1 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 237 (2d ed. 1923)). While Burke’s claim was undoubtedly exaggerated, a number of scholars have suggested that during the Tudor and Stuart eras few evidence rules were utilized to control the presentation of proof at trial. See G.W. Keeton, Lord Chancellor Jeffreys and the Stuart Cause 21 (1965); Langbein I, supra note 3, at 315-16.
5 From at least medieval times onwards, judges functioned as courtroom interro-
nesses were allowed to swear testimonial oaths and thereby enhance the credibility of their statements, jurors were free to utilize private knowledge gained outside the confines of the courtroom, judges frequently introduced their political views into proceedings, and there was virtually no appellate procedure.

While civil litigation in this era was more refined, it shared many of the attributes of its criminal counterpart. Civil proceedings were in the hands of the same strong-willed, politically motivated judges who presided in criminal cases. The majority of court time...
and effort was devoted to technicalities of pleading and procedure. The fact-finding function frequently was relegated to a subordinate place in the process, and was used only when a single narrow question of fact had been framed. Jurors, who were free to rely on private information, decided that narrow question.

The fundamental expectation of an adversarial system is that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting will come the information upon which a neutral and passive decision maker can base a satisfying resolution of the legal dispute. England's traditional procedural system did not conform to this expectation. Over the course of the eighteenth century, however, it came ever more fully to do so.

In order to assess the nature of this change it is necessary to elaborate upon the foregoing definition. Three elements are fundamental to an adversary system. The first is that the decision maker remain neutral and passive during the trial of the case. If the adjudicator becomes an active enquirer, adversary theory holds that the litigants are likely to be relegated to a subordinate role in the case and the fact finder's neutrality likely to be jeopardized. One fur-

10 In an effort to dramatize this preoccupation with pleading, C.H.S. Fifoot examined the first volume of Shower's Reports, covering the reign of William III. He found that 140 of the 265 cases were concerned with matters of procedure and pleading. No other category of legal matters was addressed in more than 30 of the remaining cases. See Cecil Herbert Stuart Fifoot, Lord Mansfield 13 (1936). Fifoot found a similar preoccupation with the niceties of procedure in the first two volumes of Salkeld's Reports from 1689 to 1712. Id.; see also 9 William Searle Holdsworth, A History of English Law 245-46, 279-80 (3d ed. 1944) (summarizing the development of the common law system of procedure from the thirteenth through seventeenth centuries). Langbein clearly was correct when he suggested that one of the primary reasons for this preoccupation was the judicial desire to control the introduction of evidence through pleadings in the absence of an effective set of evidentiary rules. See Langbein II, supra note 3, at 133.

11 Pursuant to the nisi prius system, hearings concerning the facts were subject to removal from the center of legal activity at Westminster and were frequently farmed out to the localities in which they had arisen. See S. Milsom, supra note 9, at 77-79, 414-16. See 3 W. Blackstone, supra note 7, at 311. Fifoot and Milson both saw this as a means of controlling the jury and ensuring that it was asked only the simplest questions. See C. Fifoot, supra note 10, at 61-64; S. Milsom, supra note 9, at 59.

12 See supra note 7.


14 See Langbein II, supra note 3, at 123 ("Over the course of the eighteenth century our criminal procedure underwent its epochal transformation from a predominantly nonadversarial system to an identifiably adversarial one.").

15 See S. Landsman, supra note 14, at 2-5.

17 Jeremy Bentham suggested the nature of the problem:
ther postulate of this first tenet of adversary theory is that the system is likely to favor the use of lay juries because jurors are far less likely than judges to be drawn into the courtroom contest.

The second element of adversarial justice, and an obvious concomitant of the first, is litigant responsibility for the production and quality of the proof upon which the case is to be decided. An adversary system cannot function unless the parties produce the evidence to be considered by the neutral and passive fact-finder. Implicit in such a division of responsibility is the likelihood that a class of skilled advocates will develop. The difficulties inherent in finding, organizing, and presenting persuasive proofs make it likely that inexperienced litigants will seek assistance. Over time, this is likely to result in the growth of a professional bar.

The final major element of an adversary system is an elaborate set of rules to govern the trial and the behavior of the advocates. These are needed to guard the integrity of the process as well as to ensure that cases brought to court are resolved in an expeditious manner. One of the most important consequences of this aspect of adversarial structure is that it creates a demand for some sort of process of review to guarantee that the participants have honored the rules regulating the contest.

By the early nineteenth century, the traditional, non-contentious approach to adjudication had been supplanted in English felony trials by a system with the rudiments of an adversarial process. Party direction and control had replaced judicial enquiry, counsel's

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1 J. BENTHAM, supra note 17, at 463; see also Argersinger v. Hamlin, 407 U.S. 25, 31-33 (1972) (suggesting that the assistance of counsel is required to produce a fair trial); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (stating that U.S. courts historically have emphasized that assistance of counsel essential to a fair trial); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (discussing need of laymen for counsel).

18 Again it was Bentham who neatly described the matter:

Of the occasional admission of a person in the character of an assistant to the party (supposing it a case in which admission may with propriety be given to the party himself) the necessity stands demonstrated by the following causes of infirmity and relative incapacity, under which a party is liable to labour: 1. Infirmity from immaturity of age, or superannuation. 2. Bodily indisposition. 3. Mental imbecility. 4. Inexperience. 5. Natural tardy. 6. Female bashfulness. 7. Lowness of station, in either sex.

role had expanded dramatically, and sophisticated rules to regulate courtroom conduct had been developed.

No one set out to build the adversary system. It was neither part of a grand governmental design nor the scheme of an ingenious legal philosopher. The judges, lawyers, and litigants of eighteenth century England went about their business unaware that they were the instruments of any historical “purpose” or that the product of their labors would be a new system of adjudication. This Article will explore the development of the adversary system between approximately 1700 and 1800. Its main objectives are to analyze a number of changes that resulted in the growth of a contentious approach and to identify some of the influences that may have called forth the adversarial response.

Part II of this Article will trace the growth of the adversary process by examining records describing the criminal prosecutions conducted in London’s Old Bailey criminal court from 1717 to 1797. Analysis of these materials suggests that during the course of the eighteenth century, courtroom procedure in felony and serious misdemeanor cases went through three phases as it grew toward thoroughgoing adversarialism. In the first phase, up until the 1730s, there was little adversarial action of any sort. Judges were in control of the cases that came before them, lawyers were virtually never present, litigants were subordinated to the direction of the court, and few rules of procedure or evidence cabined proceedings. The second phase got under way during the 1730s when parties, at least in some cases, began asserting their independence. In this stage of development litigant and lawyer participation at trial intensified and a variety of evidentiary restrictions were recognized. These developments, however, were confined to a small number of cases. The vast majority of trials remained untouched by adversarial mechanisms. The third phase of development occurred in the last quarter of the eighteenth century when adversary procedure was extended to a substantial portion of all cases. What previously had affected only a small number of trials now governed courtroom proceedings generally. By 1800, adversary procedure predominated.

Part III will seek to identify some of the reasons for these developments. This section argues that the initial movement toward adversarialism was, at least in part, a response to the activities of professional thief catchers who became active at the Old Bailey in the early decades of the eighteenth century. In their efforts to collect the substantial rewards made available by Parliament and others, these men adopted a host of adversarial tactics. They organized and elicited proofs in a manner strikingly similar to that used by
counsel. Their participation in litigation moved judges to permit and, at times even encourage, a more robust defense.

Thief catchers, however, appeared in only a small percentage of Old Bailey cases, and their activities do not seem to have been a particular source of concern after the 1750s. Additional factors are needed to explain the huge growth of contentious practices in the 1770s and beyond. Two such factors were the growing acceptance of litigation during that era as a legitimate means of challenging government action and the apparent reconceptualization, in legal circles, of the trial as an adversarial contest. Each of these will be examined and its relation to the rise of contentious procedure considered.

Part IV will serve as an epilogue addressing the modern significance of the historical process leading to the growth of adversarialism. This final section will argue that the association between contentious methods, procedural fairness, and political liberty in English history warrants the most careful scrutiny of modern proposals designed to curtail adversarial methods. Reforms that fail to take these historical associations into account may threaten the bedrock upon which the American court system is built.

A 1727 engraving of the Justice Hall in the Old Bailey
II
CHANGES IN THE CRIMINAL TRIAL: THE OLD BAILEY EXPERIENCE 1717-1797

A. The Criminal Trial in the 1560s

In 1565 Sir Thomas Smith wrote what has become one of the most widely quoted descriptions of the criminal felony trial of the Tudor era. According to Smith, the trial was a brief and simple affair that began almost immediately after the defendant had agreed or been coerced to submit his case to a jury. The jury impaneled to hear the case comprised previously summoned local citizens. The first twelve men seated constituted the jury unless the defendant challenged one or more. When twelve had been selected, all were sworn and the presentation of proof began.

The case for the prosecution frequently was initiated by a justice of the peace, who read to the court from a written account of his pretrial examination of the defendant and other witnesses. At
the conclusion of this presentation, the witnesses were called upon, one at a time, to provide the court with a narrative version of their experiences. Throughout this recitation process, the witnesses and defendant were subject to disputatious questioning by the judge, jury, and each other. Hence, the main body of the trial often became a freewheeling enquiry aptly described by Smith as an "altercation." Once the judge was satisfied that all relevant information had been presented, he called a halt to the altercation, made whatever closing remarks he thought pertinent, and charged the jury to decide the case. The jury frequently heard evidence in a number of cases before retiring to consider its decision.

B. The Criminal Trial in the 1670s

Reports emanating from the Old Bailey in the 1670s and 1680s sketch a process strikingly similar to that described by Smith more than 100 years before. The same steps were taken to secure the defendant's participation in the proceedings. The notes of the enquiring magistrate were still a regular fixture in prosecutions. As in Smith's day, counsel generally was not involved in the prosecution of cases, and the judge was the primary enquirer. He did most of the questioning, felt free to discuss the merits of the case, and even went so far as to compel jurors to reconsider decisions with which

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2 & 3 Phil & M., ch. 10 (1555).

Smith described the altercation in the following manner:

The Judge first after they be sworn, asketh first the partie robbed, if he knowe the prisoner, and biddeth him looke upon him: he saith yea, the prisoner sometime saith nay. The partie pursuivaunt giveth good ensignes verbi gratia, I knowe thee well enough, thou robbedst me in such a place, thou beatest mee, thou tookest my horse from mee, and my purse, thou hadst then such a coate and such a man in thy companie: the theefe will say no, and so they stand a while in altercation, then he telleth al that he can say: after him likewise all those who were at the apprehension of the prisoner, or who can give any indices or tokens which we call in our language evidence against the malefactor. When the Judge hath heard them say inough, he asketh if they can say any more: if they say no, then he turneth his speeche to the enquest.

T. SMITH, supra note 20, at 99-100.

Green hypothesized that judicial commentary grew out of the judge's involvement in examination. In any event, it was well established by the mid-sixteenth century. See T. GREEN, supra note 3, at 138. Since the judge usually made his views known during his interrogation of the witnesses, there was little need for elaborate closing remarks. See J. COCKBURN, supra note 2, at 129; T. GREEN, supra note 3, at 139. Elaborate summaries and commentary only developed after counsel had come to play a more prominent part in the questioning process in the latter part of the eighteenth century. See J. BEATTIE, supra note 3, at 376.

The following description of the criminal trial in the late seventeenth century is drawn from Langbein I, supra note 3, unless otherwise indicated.
he did not agree. Defendants could not employ counsel in felony cases, and were personally responsible for the presentation of their defense. They could call and examine witnesses, but, in contrast to the prosecution, witnesses offered by the defendant were not permitted to give their testimony under oath. This was particularly important because unsworn testimony was held to be of lesser value than that given under oath and the distinction could serve as the basis for decision. As in Tudor times, few rules appear to have restricted the introduction of evidence.

In all, the felony trial remained a strikingly non-adversarial proceeding. The judge and jury were active examiners who felt themselves responsible for the development of the case. Counsel was virtually never present. Such proofs as were adduced were generally the fruits of the judge’s questioning or the altercation rather than the parties’ efforts. There were few rules to constrain the proceedings and there was virtually no recourse to appellate review.

C. Impediments to Change

The similarity between the criminal process of the 1560s and 1670s should come as no surprise. A number of factors combined to make change in English criminal procedure unlikely. First, the central government had a strong interest in preserving a ferocious and speedy criminal process. The king had virtually no local police forces to maintain order or enforce his decrees. The burden of keeping the peace and doing the king’s bidding fell to the judiciary. To carry out this mission, judicial representatives of the central courts visited the important centers of the realm twice a year. These sessions, called the assizes, were the most concrete manifest-

29 In this era judges felt free to reject verdicts with which they did not agree and to press jurors to redeliberate. See Langbein I, supra note 3, at 291-95. The only limit on judicial power in this regard was the then recently recognized prohibition against punishing jurors for decisions with which the judge did not agree. This rule was announced in Bushel’s Case, 124 Eng. Rep. 1006, 1009 (C. P. 1670). See generally T. Green, supra note 3, at 284-300.

30 See supra note 3. For a detailed discussion of the changing nature of this prohibition during the eighteenth century, see Part II(E)(3).

31 See supra note 6.

32 Langbein provided a striking example of juror scruple about unsworn testimony when he described a 1678 case involving the rape of a small child and the jury’s reticence to use the child’s unsworn evidence. See Langbein I, supra note 3, at 293-95.


34 In Tudor and Stuart times both executive and judicial tasks were a regular part of the workload of the judiciary. See J. Cockburn, supra note 2, at 153-54.

35 For a description of the civil work of the assizes, see 3 W. Blackstone, supra note 7, at 58-59. For a description of their criminal work, see 4 W. Blackstone, supra note 7,
tation of the king's power at the local level and were one of the few realistic means for the national government to make its presence felt in the countryside. The assizes were conducted with pomp and majesty befitting a royal visitation. The judges were expected to provide an intimidating sort of justice that would deter potential malefactors and severely punish those who had breached the king's peace. Any reforms that might undercut judicial power were bound to be viewed as a challenge to royal authority, and thus were slow to develop.

The seriousness of the royal desire to exercise control over the criminal process and the strength of the king's grip on that process are illustrated by the establishment, in Tudor times, of the Star Chamber and similar bodies. These bodies were designed to serve the king's interest by policing the behavior of jurors and witnesses in common law cases, and by providing an alternative forum for the punishment of a range of acts deemed particularly hostile to the monarch.

The Star Chamber and associated fora were even less adversarial than their common law counterpart. Witnesses, including defendants, were examined in camera and under oath by court officials, no jury ever heard evidence or decided on the facts, and there was a presumption of guilt against the defendant. The existence of such bodies, the nature of their procedure, and their use to police other courts suggest the seriousness with which royal authorities...
viewed the operation of the justice mechanism and how jealously they guarded the king's interest in legal proceedings.

A second impediment to change in the criminal process was the virtual absence of lawyers from criminal trials during the sixteenth and seventeenth centuries. Advocates were barred from taking charge of the defense of those accused of felonies.43 Not until 1696 did Parliament begin to dismantle this barrier44 and not until 1836 did it remove all restrictions on the representation of criminal defendants.45 What is more, criminal work held little allure for lawyers. The advocate's highly refined skill as technical pleader was of little use in the criminal case because defendants were restricted to the single plea of "not guilty."46 Of even greater importance, criminal cases were seldom remunerative. Not even the judges, who received sizeable fees in civil litigation, could hope to profit from the criminal docket.47 In these circumstances it is not surprising that criminal cases were left in the hands of judges alone.48 In counsel's absence, there was no one to argue effectively for changes in procedure or to check the authoritarian impulses of the courts.

The criminal process was slow to change for another reason as well. For centuries local magistrates had resolved the great bulk of misdemeanor cases,49 and even in felony proceedings there was a substantial local component in the form of the grand and petty jury. This dispersal of authority to local citizens made the criminal law extremely parochial.50 Much of what happened in court was tied to local tradition and opinion. This, coupled with a deeply engrained desire for local autonomy,51 made the introduction of new ap-

43 See supra note 3.
44 See 7 & 8 Will. 3, ch. 3 (1696) (defense counsel permitted to appear in treason prosecutions).
45 See 6 & 7 Will. 4, ch. 114 (1836).
46 See S. Milsom, supra note 9, at 413-17. But see J. Beattie, supra note 3, at 339 ("several pleas in abatement were allowed").
47 See 2 J. Bentham, supra note 17, at 334 ("In criminal cases, the law had the more pressing exigencies of society for its object, and, for the subjects of its operation, a description of persons in whose purses any considerable quantity of plunderable matter was seldom to be found.").
48 See supra note 3.
50 Blackstone saw this parochial tendency as a serious problem because local jurors were "apt to intermix their prejudices and partialities in the trial of right." 3 W. Blackstone, supra note 7, at 360; see also Keith Wrightson, Two Concepts of Order: Justices, Constables and Jurymen in Seventeenth-Century England, in An Ungovernable People 24-26 (John Brewer & John Styles eds. 1980) [hereinafter An Ungovernable People].
51 The English desire for independence from central authority has been remarked upon by a host of historians. See, e.g., P. Atiyah, supra note 33, at 246-47; Derek Jarrett, England in the Age of Hogarth 36-37 (1974); R. Porter, supra note 49, at 272; L. Stone & J. Stone, supra note 33, at 413.
proaches and ideas quite difficult.

If any part of the justice system seemed resistant to change it was the criminal process. It is, therefore, truly remarkable that in the face of such obstacles criminal procedure was so significantly transformed in the eighteenth century. Such a reformation in the backwater of the legal system, at a minimum, suggests a shift in attitude throughout the system as a whole.

D. A Methodology for Measuring Change

Measuring change in the level of adversariness of court proceedings is not an easy task. What one is really looking for is evidence that the things said and done in the courtroom are more adversarial than they were before. This requires a comparison over time of the way courtroom participants handled matters fundamentally affecting the adversariness of the proceedings, including: the judge’s involvement in interrogation; the parties’ and their representatives’ participation in the presentation of evidence; and the development of forensic rules to govern the offering of proof. The best method to measure change in these areas would be to examine a substantial body of verbatim transcripts of court proceedings over an extended period of time. Unfortunately, no such body of records is known to exist. In the absence of such material it is necessary to rely on other data concerning court proceedings. A source that offers a significant volume of useful information is the Old Bailey Session Papers [hereinafter OBSP]. These reports, of which we have copies dating from at least as early as 1674, were published regularly for almost 250 years and were, during the time relevant to this Article, addressed to lay readers interested in prosecutions in the Old Bailey. The early reports are fragmentary and tend to focus on a few sensational cases. They fail to provide the sort of systematic picture of prosecutions needed for this study. By about 1715, however, the reports display an expanded coverage that provides useful information about a significant body of cases.

52 The focus of a good deal of modern scholarship has been on what transpired in the world of the regular courtroom rather than the rarefied atmosphere of the state trials. It has been suggested that it is in mundane proceedings that the best evidence of lasting systemic change may be found. For insightful commentary on these matters, see J. Beattie, supra note 3, at 24-25; Langbein I, supra note 3, at 264-72.

53 See sources cited supra note 52.

54 Id.

55 For an excellent analysis of the historical value of the OBSP, see Langbein I and Langbein II, supra note 3.

56 See Langbein I, supra note 3, at 268 (The earliest OBSPs were “quite selective, reporting only a few cases of greatest general interest.”).

57 Id. at 270 (“From the later 1710s an ever increasing number of OBSP cases are reported in greater detail, with testimony attributed to individual witnesses and defend-
The post-1715 material provides a seductively detailed picture of criminal court practice in London. There are, however, risks in using the OBSP as the basis for a longitudinal study of criminal court practice. By far the most important is that there is no guarantee of the accuracy or completeness of the reports. They were not official publications, and their main audience was not the legal profession. Professor John Langbein, a pioneer in the use of the OBSP, considered these problems in a recent article. By comparing the OBSP with the detailed trial notebooks of Sir Dudley Ryder, an Old Bailey trial judge of the 1750s, Langbein was able to assess their reliability. As Langbein put it:

The major lesson of our comparison is that Ryder never contradicts the OBSP, which means that the Ryder notes strongly corroborate the OBSP. The generalization that emerges is this: If the OBSP report says something happened, it did; if the OBSP report does not say it happened, it still may have.

While Langbein's findings may not allay all fears about the OBSP, they do provide suitable assurances about the accuracy of its reports for the purposes of this study. A sufficient number of cases appear in adequate detail so that a comparison can be made of cases, although still mostly in compressed summaries. In 1729 the OBSP changed its format and became even more fulsome in its treatment of trials. By the 1790s the reports began to include a substantial volume of courtroom interrogation in question-and-answer form, and by the 1740s the editor appeared to feel it his duty to make some report about almost every case. See Langbein I, supra note 3, at 268-70.

A sufficient number of cases appear in adequate detail so that a comparison can be made of

58 See Langbein II, supra note 3.
59 Id. at 25 (emphasis in the original).
60 Table I in the Appendix is designed to help assess the quality of the OBSP reports in the years studied for the purposes of this Article. The first column identifies the total number of trials said by the OBSP to have been heard during each year. The second column enumerates those trial reports that provide at least rudimentary information about the testimony offered (i.e., witnesses) by each side as well as the outcome of the case. If such information was lacking, the case was taken out of the statistical data base. The third column compares the numbers in the first two columns in percentage terms. As the Table suggests, the reports from the 1722-42 period were extremely selective, giving ground for worry about their trustworthiness. This problem was repeated, albeit on a reduced scale, in 1772 and 1787. A further barometer of trustworthiness has been appended to Table I in the form of the percentage of acquittals arrived at in adequately reported cases. This figure provides something of an extra measure of the typicality of the sample because Beattie, Green, and Langbein have observed that acquittals occurred in about one-third of the cases tried throughout most of the eighteenth century. See J. Beattie, supra note 3, at 410-11; T. Green, supra note 3, at 279; Langbein II, supra note 3, at 43. Using this standard as a rough measure, there is reason to suspect that 1792 provided a dangerously unrepresentative sample, and that 1772 and 1777 also were suspect. All of this suggests that a number of OBSP years give selective reports that are systematically skewed. However, the large number of cases that are adequately reported upon, and the fact that there are 17 sample years in the data base work to reduce these risks, should allay some of these concerns, at least when the materials are used to support anecdotal observations and to identify long-term trends.
their adversariness. For the reasons already enumerated, and because the post-1715 OBSP reports are far more readily accessible than their earlier counterparts, this study begins with cases arising in the second decade of the 1700s and continues until the end of the century. The immense volume of the material encompassed within this period makes it difficult to analyze every case in every year in the relevant period. Therefore, examination focuses on all the cases contained in the reports for every fifth year beginning with 1717 and continuing until 1797. In this way a longitudinal sample has been gathered that is likely to reflect most significant changes while substantially reducing the quantity of material to be examined. Of course, such a survey cannot, with pinpoint accuracy, disclose the exact moment a new practice began. But, given the uncertainties disclosed by Langbein, what is lost does not seem of critical importance.

The materials available from the OBSP paint a rich and detailed picture of criminal litigation during the course of the century. Individual case descriptions range from a few lines to dozens of pages but the majority of cases in the sample years include, at least, some description of the testimony of prosecution witnesses, some reference to the nature of the prisoner’s defense, and the verdict. These fundamental items are regularly augmented by a host of details, including descriptions of testimony, cross-examination, evidentiary objections, and judicial comments. The information contained in each year of OBSP reports, taken as a whole, provides substantial information about a number of adversarial topics, including: (1) the level of judicial involvement in the questioning of witnesses and related issues of judicial authority, (2) the responsibility of the parties for the production and quality of proof, (3) the involvement of counsel in the courtroom contest, and (4) the employment of forensic rules to regulate the presentation of evidence. The reports also shed some light on the reasons for procedural change over the course of the century, a matter that will be considered in Part III.

In addition to a description of courtroom practices, the OBSP provides information about the attitudes of participants in the process and of the editors of the reports. These attitudinal data come from two sources. One is the actual comments of judges, parties, witnesses, lawyers, and jurors. The other is editorial decisions about what to incorporate in the reports, in what detail, and with what sort of accompanying commentary. The first of these two can provide a great deal of information about acceptance of or resist-

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61 Harvester Press Microform Publications of Britain has made the post-1714 OBSP available on microfilm and thereby substantially eased the burden involved in studying such materials.
ance to adversarial methods. One of the nicest examples of this sort of insight comes from the 1737 report of a case involving a man named Thomas Car, who was accused of assault and robbery. The defendant was represented by counsel who vigorously cross-examined the victim concerning his sobriety. At the conclusion of this interrogation a member of the jury protested: "We desire his Lordship would please to ask the Questions that are proper, and that the Man may not be interrupted." This remark suggests that the jurors had not yet become accustomed to robust cross-examination by defense counsel. In conjunction with other evidence, it might lead one to conclude that an adversarial approach to questioning was still viewed with hostility in the 1730s. The second source of attitudinal information, editorial choices about what to report and how to report it, can provide valuable insights about the views held by the editors of the OBSP, and, by extension, the OBSP's readership as well. Changes in reporting style and content are likely to have reflected changed notions about proper or important courtroom activities.

In addition to anecdotal materials, this Article will present a number of rough numerical compilations. These will be used to amplify upon the anecdotal observations. In light of the incompleteness Langbein has discovered in the OBSP records, it is unlikely that any unimpeachable results could be garnered from a sophisticated statistical manipulation of the data. Numerical compilations, however, may serve two very useful purposes. First, they may help confirm the existence of significant long term trends observable in hundreds of cases adjudicated over decades. Second,
they may help identify shifts in editorial sensitivity. In both cases, the numerical data can serve a useful corroborative role and will be so employed.

E. Change During the Course of the Eighteenth Century

The anecdotal and numerical materials disclose a three step process of adversarial development. The first step lasted until the 1730s and was marked by a non-adversarial approach in virtually all cases. Thereafter, a small but significant number of trials began to exhibit adversarial tendencies. In the 1770s and beyond, adversarialism underwent explosive growth and eventually became the dominant means of doing business in the Old Bailey. The subsections that follow track these developments in some detail. Subsection 1 focuses on the decline of judicial activity; subsection 2 documents the growth of party responsibility for the production and quality of proof; subsection 3 examines the growing importance of counsel; and subsection 4 traces the development of evidentiary rules. Each of the last 3 subsections presents a different aspect of the first, in that each traces the decentralization of power and responsibility in the courtroom from the judge to the parties, to counsel, or to an impartial set of rules.

1. Judicial Activity—Decline of the Inquisition

Judicial interrogation of witnesses was a prominent feature of criminal courtroom procedure in Tudor and Stuart times. Such questioning tended to concentrate power in the court's hands, and made it possible for English judges to act like inquisitors. Langbein has suggested that judicial questioning resulted in a process remarkably like that used in modern continental courtrooms.

Judicial inquisition is antithetical to an adversary approach. It maximizes judicial power while holding to a minimum the parties' opportunity to develop the proof. The OBSP documents its decline over the course of the 1700s. This is not to say that as of 1800

Olive Anderson has suggested that, when used with care and in conjunction with other proof, such evidence (though flawed) may be of great use to the historian in identifying "very marked trends, differences in scale, or relationships . . . ." Olive Anderson, Suicide in Victorian and Edwardian England 14 (1987); see also L. Stone & J. Stone, supra note 33, at 7.

See O. Anderson, supra note 66, at 9-40 ("Historical evidence is often valuable indirectly for the light it throws on the situation which brought it into existence, as well as directly for the information it contains." Id. at 14.).

See Langbein I, supra note 3, at 315 ("To the extent that evidence was not adduced spontaneously in the altercation of accuser and accused, it was the trial judge who examined the witnesses and the accused, and it was he who, like the modern Continental presiding judge, dominated the proceedings.").
English judges in the Old Bailey had become passive umpires; rather, it is to suggest that the inquisitorial form of procedure had shrunk in importance and that new approaches, relying more on party-conducted interrogation in an orderly and controlled examination, had arisen. This change shifted responsibility for the development of the case from the court to the litigants and, hence, in the direction of contentious procedure.

a. Judicial Control in the Early Years

In the early years of the eighteenth century, the OBSP tended to describe interrogation as a two step process. The first step was a narrative by the witness; the second, critical questioning by the court. A typical case in this regard involved Mary Stephens, who was charged with assaulting Edward Davis and robbing him of a substantial sum of money. The entire record of this case reads as follows:

Mary Stephens, alias Bird, alias Gilbert, of St. Dunstans Stepney, was indicted for assaulting Edward Davis on the highway, and taking from him 5 Guineas and 14 s. 6 d. in silver, the 13th of November last. The Prisoner [sic] said, An it please your Excellency, I had received the Money at Chelsea-College, and was drinking in a Brandy-shop in Rosemary-lane, having the Guineas in my Phobb and the Silver in my Pocket. The Prisoner came in there, and said she would conduct me to my lodgings, and led me, I don't know where, into a by-place, and there threw me down, and fell upon me, and took my money. Being asked whether it was not the Brandy that threw him down, he reply'd, An it please your Excellency perhaps that was a help. There was no positive evidence that the Prisoner was the Woman, but only the Prosecutor deposed, that she sent one of her Concerns (meaning her Consorts) to him, to offer him 2 Guineas to make it up; and it being about 10 a clock at Night, and his sight perhaps as dark as the season, the Jury acquitted her.

While there is a great deal of information lacking in this report, it does demonstrate the importance of judicial interrogation. The court's question about intoxication cut to the heart of the matter and seems to have provided the basis for acquittal.

This pattern of witness narrative, followed by judicial question-
ing, was apparent in every sort of case in 1717. It was present in a May, 1717, pick-pocket case when “The court putting the question home to the Prosecutor, [asked] whether in truth he did not pick up the Prisoner?” The case crumbled and the defendant was acquitted when the prosecutor, a married man, admitted that not only had he “picked up” the prisoner, but that he had also tried to install her in his home, despite his wife’s continuing presence there. A September, 1717, rape case repeated this pattern when the judge, by his follow-up questioning, exposed the victim’s lengthy delay in informing anyone about the assault thereby, apparently, raising doubts about her veracity.

Other cases manifest this same approach. The questions noted in the 1717 OBSP were generally those of the court, and usually defined the gravemen of the case.

Judicial control over the questioning process was not the only manifestation of the judge’s preeminence in early eighteenth century litigation. Another indication of judicial hegemony was court indulgence in sharp-tongued repartee with witnesses and defendants. Tudor and Stuart tradition countenanced the most sardonic exercise of judicial wit. Behavior of this sort unmistakably as-

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72 Knolls, OBSP (May 1717), at 2.
73 Stevens, OBSP (Sept. 1717), at 6. For the special difficulties faced by rape victims in prosecuting their attackers, see J. Beattie, supra note 3, at 124-27.
74 See, e.g., Fuller, OBSP (Sept. 1717), at 7 (judge closely examined defendant about his claim to have illustrious character witnesses); Powell, OBSP (Sept. 1717), at 7 (judge exposed probable perjury by several of defendant’s witnesses); see also Halle, OBSP (July 1717), at 4 (judge advanced opinion that bastard child could not have been drowned by its mother because no water was found in the child’s lungs—in later testimony a surgeon confirmed this hypothesis).
75 The pattern of judicial interrogation changed little over the next ten years. Again, when questioning was being conducted in response to a witness’s testimony, it was usually the court that pursued the enquiry. Robert Haines was accused of killing Edward Perry with a sword in an evening affray in St. James’s Park. Haines, OBSP (Jan. 1727), at 3. At his January, 1727, trial he presented half a dozen witnesses whose testimony directly conflicted with that of the prosecution’s witnesses. At this point in the proceedings the judge stepped in to get to the bottom of things. As the OBSP put it: “Some of the Evidences for the Prisoner contradicting what had been sworn in favor of the Deceased, the Court thought it necessary to ask the former Evidence some further Questions.” Id. at 4. These questions, and a close examination of the exhibits offered in the case, led to the defendant’s conviction. Similarly, in July, 1727, when Elizabeth Burningham was accused of prematurely returning from transportation “the Court not willing to give Judgment before a just and curious Inspection into the Affair, after a strict Examination found her Not guilty.” Burningham, OBSP (July 1727), at 3. The same pattern appeared in the highway robbery prosecution of Anthony Lutford. During the course of the proceedings it became known that the parties had been intimately acquainted. “This gave the Court an insight into the truth, and occasioned such a strict Enquiry to be made in the Affair, as made it evident that there was no Robbery either designed or committed.” Lutford, OBSP (Aug. 1727), at 6.
76 See J. Cockburn, supra note 2, at 109 (“Judges too, in discharging their routine functions, made their contribution to courtroom drama. Biting sarcasm and a free interpretation of what Chief Justice Dyer bluntly called his power of ‘lawful menace’ were commonplace.”) (footnote omitted).
asserted the superiority of the court over those who came before it and recalled the high-handed judicial style of George Jeffreys and his compatriots. Jeffreys, who served both as Chancellor and high court judge at the end of the Stuart era, was particularly criticized for being "witty upon prisoners at the bar." Early OBSP records show some remnants of this arrogant and caustic tradition. A hint of it may be found in the Stephens case, discussed above, when the court asked the prosecutor whether it was liquor rather than the defendant that threw him down. It is far clearer in the prosecution of John For, and in the case of John Murth and John Wood. In the first of these, the defendant, indicted for stealing, claimed to have found the bag of money in question. The court observed that the defendant "was unfortunately lucky." In the second, Wood claimed that he had simply borrowed a Bible stolen by his co-defendant Murth. "The Court reply'd, that it was indeed a very allowable Action to borrow a Bible, and a good one to read in so good a Book, but it was a bad Action to steal it." In both cases the defendants were convicted. Judicial sarcasm was less apparent in the later decades of the century, although never entirely absent.

Over the course of the century, sarcastic observations increasingly became the province of the barristers, whose part in the interrogative process steadily grew.

Another even clearer demonstration of judicial primacy in the early eighteenth century was the level of deference demanded by the court. A particularly large number of cases addressing this issue may be found in 1727. Some, like the case of Henry Waters, emphasized the traditional right of the court to respectful address and decorum. In Waters, the single prosecution witness, John Ingham, "was caught in several Contradictions, and not only neglected that

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77 G. Keeton, supra note 4, at 156 (quoting the remarks of Henry Booth, a Whig leader of Jeffreys's day). Jeffreys was repeatedly attacked for "not suffering [witnesses and parties] to say in their own way and method, but would interrupt them because they behaved themselves with more gravity than he." Id.; see J. Beattie, supra note 3, at 347-48.

78 For, OBSP (May 1717), at 5.
79 Murth, OBSP (Oct. 1717), at 2.
80 For, OBSP (May 1717), at 5. The judge may have gone even further. The OBSP referred to the defendant's two witnesses in the most sarcastic manner, suggesting they had come to court "as if they had dropp'd from the clouds." The tenor of this remark and the way it was reported suggest that it was first uttered by the court. Id.
81 Murth, OBSP (Oct. 1717), at 2.
82 See, e.g., Mooney, OBSP (Sept. 1742), at 24 (court extremely sarcastic in response to testimony of witnesses on defendant's behalf); Adams, OBSP (June 1772), at 210 (same).
83 For a discussion of lawyers' use of sarcasm and wit, see infra notes 227-33 & 280-99 and accompanying text.
84 Waters, OBSP (Feb. 1727), at 7.
Reverence which is due to the Court, but behaved himself with much Insolence, [and] was taken into Custody.”\textsuperscript{85}

The emphasis on deference reached a good deal further. At its most robust it directly affected the way evidence was to be presented and how cases were to be evaluated. In the case of Ann Rook,\textsuperscript{86} a young woman facing a well-supported charge of private stealing, it led the OBSP’s editor to suggest that it was only because “the Court indulged so far” that the defendant’s witnesses were heard at all.\textsuperscript{87} Anything other than deference was seen as a challenge to the court. The most revealing 1727 case in this regard was that of Margaret Brown,\textsuperscript{88} who was accused of stealing. The editor described this case in the following way:

The Prosecutor was very resolute in her Deposition, and charged the Prisoner with more heat than became her in a Court of Justice; it being the Prosecutor’s Place only to swear to the best of their Knowledge, and that too, with Decorum, Caution, and a calm undisturbed Disposition of Mind, not forward to give their own Opinion, but with reverence submit their own Judgment to that of the Court, who are not to be dictated by a Witness, but informed of the Circumstances relating to the Affair, that Justice may be executed with Ease, and a due Regard shewed to those in Authority.\textsuperscript{89}

Not surprisingly, Margaret Brown was acquitted. The editor’s observations in the Brown case strongly imply that an adversarial or contentious sort of approach had not yet been accepted and that zeal on the part of a litigant was viewed as a breach of decorum likely to result in an adverse decision.

The OBSP’s editor also stressed the importance of proper courtroom etiquette. Cases like that of John Hutton\textsuperscript{90} were used to make this point. In Hutton, the editor took the unusual step of reproducing the case verbatim. The prosecutor’s testimony was peppered with improper forms of address to the court, including “your Majesty” and “your Worship.”\textsuperscript{91} At the end of the case the editor stated “The Reason for writing this Trial directly as it was spoke, is, that others may provide themselves with proper Terms of Speech before they appear at such a Court of Judicature.”\textsuperscript{92}
b. The Shift Away from Judicial Hegemony

By the 1730s, attitudes began to shift concerning judicial interrogation, authority, and dignity. This is not to say that there was a revolution in the handling of cases or that the newer approach, featuring greater party activity, predominated. Rather, it is meant to suggest that the stirrings of change were becoming apparent. In January, 1732, Mary Skittlebank was tried for assaulting and robbing Gerrard Russel. At the end of Russel's testimony the defendant asked, "How many Women did you charge with this Robbery before you charged me?" After the prosecutor answered that he had accused another, the court took up the defendant's question and pressed the issue with some vigor. Following this examination the woman previously accused was produced, as was another witness who had heard the prosecutor make unfounded charges. Mary Skittlebank was acquitted.

From the point of view of developments in litigation, the Skittlebank case suggests a new relationship between the parties and the court, one in which party initiatives in witness production and questioning appear to be more warmly received by the court and are more likely to lead to follow-up judicial interrogation. This approach differs from the traditional in that party interrogation is given credit for triggering the judicial response. The OBSP emphasize this triggering activity, and not just the judicial interrogation. This pattern may not be new, but the sensitivity to it displayed in the records is a departure.

The same sort of approach appeared in the report of the murder trial of Robert Atkinson. In that case the defendant personally cross-examined the key prosecution witness concerning her bias and the sobriety of those involved in the affair. Thereafter, the judge pursued both these issues in detail with a number of other witnesses. The questioning initiated by the defendant and pursued by the judge created sufficient doubt to merit the acquittal of the defendant.

The trial of John Johnson presents a mirror image of this pat-

marked on the occasional inclination of OBSP editors to reproduce cases "for pure comic relief." Langbein II, supra note 3, at 16.

Many cases were still intensely inquisitorial. See, e.g., Vezey, OBSP (Jan. 1732), at 41 (judge extremely active examiner in murder case); Conway, OBSP (Jan. 1732), at 58 (judge aiding questioner in highway robbery case); Bradford, OBSP (April 1732), at 109 (judge primary examiner in case involving death of bastard child).

Skittlebank, OBSP (Jan. 1732), at 63.

Id.

Atkinson, OBSP (Feb. 1732), at 94.

Id. at 95.

Johnson, OBSP (Sept. 1732), at 198.
tern. The following exchange took place before the start of Johnson's prosecution on five counts of highway robbery:

Prisoner. My Lord, I have 2 Witnesses, Gentlemen of very good Credit, to prove I was in another Place when these Robberies were committed; but they cannot come till to Morrow.

Court. Which of the Robberies?

Prisoner. I can't say which in particular.

Court. Then 'tis a mere pretence for putting off your Trial. 9

What is worth noting here is the court's apparent willingness, at the outset, to hear the defendant's claim. It was only when the defendant could not demonstrate that there was any merit to his request that the court rejected it. This openness to party initiatives and emphasis on party responsibility signaled some movement away from the inquisitorial model either in the actual proceedings or in the editor's reporting of them.

At the same time as shared enquiry appeared to be growing, an even more significant phenomenon concerning the relation between the parties and the court was taking place. The OBSP, in the 1730s, noted with increasing regularity the participation of counsel in criminal trials. 10 Where between 1717 and 1727 counsel was said to have participated in no more than three cases a year, in 1732 the number tripled to nine cases, and in 1737 tripled again to 28 cases. The growing presence of counsel at criminal trials led to a significant decentralization of responsibility in litigation and diminution of judicial power. Where counsel was present, the inquisitorial method generally appeared to yield to one allowing counsel an opportunity to examine witnesses and develop proof.

The impact that counsel had on judicial conduct may be seen in the murder prosecution of Peter Noakes. 11 From the testimony of the first witness on, counsel took a leading part in eliciting the evidence. After each witness had made a preliminary statement, counsel questioned on behalf of the prosecution. The defendant responded by personally examining a number of the witnesses offered by his accuser. When the defendant offered his witnesses, the prosecuting counsel cross-examined them. What was developing was an adversarial pattern of party interrogation. By contrast, no

99 Id.
100 Table II infra in the Appendix provides a count of the cases in which the OBSP specifically mentioned the presence of counsel or in which the nature of the proceedings (i.e., highly developed line of cross-examination or extensive legal argument) strongly suggested that a lawyer participated. The Table separately reports cases in which only the defendant was said to have counsel (column 2), no one was said to have counsel (column 3), only the prosecutor was said to have counsel (column 4), or both defendant and prosecutor were said to have counsel (column 5).
101 Noakes, OBSP (Jan. 1732), at 64.
court questioning was noted in Noakes until the ninth prosecution witness, and the court never appeared to pursue any independent lines of enquiry.

The pattern of an active counsel and a relatively less active court repeated itself in a number of other cases. It was, however, by no means the only approach depicted in the records. In the highway robbery trial of Daniel Tipping, despite the fact that counsel prosecuted the case, the court took a very active part in the interrogation. This was especially apparent in the court's close examination of an accomplice whose credibility was open to doubt. In Tipping, the court seemed to act as a counterweight to prosecuting counsel. This sort of judicial behavior, protective of an unrepresented litigant's interests, is by no means fully adversarial, but it is a departure from judicial inquisition. The judges ever more frequently were playing a reactive part in proceedings and responding to counsel's initiatives.

c. The Growth of Litigant Independence.

As midcentury approached, counsel became more assertive. A dramatic illustration of the new aggressiveness may be found in the case of John Lamb and three others accused, in an October, 1747 trial, of entering the vault of a church in the Parish of St. Andrew at Holborn and breaking open caskets in order to steal their lead liners. Counsel were present on both sides in this hotly-contested matter, and the court appeared content to allow them to handle the case. Things, however, took a dramatic turn during the cross-examination of the third prosecution witness, Richard Dew. Defense counsel suggested to Dew that the defendants might have been authorized to cut up the coffins by highly placed church officials. The following dialogue then ensued between the court and defense counsel:

Court. Do you believe the Bishop of London would grant a Faculty to cut Coffins to pieces? Sure this is monstrous Behavior, to throw Dirt on a Gentleman without any Sort of Proof.
Council for the Prisoner. I must follow my Instructions, and will not go from them.
Court. Let your Instructions be what they will, a Gentleman is not

\[102\] See, e.g., Tapper, OBSP (Feb. 1732), at 82; Langford, OBSP (Feb. 1732), at 86.
\[103\] Tipping, OBSP (July 1732), at 160.
\[104\] This same reactive pattern was evident in the murder trial of Edward Dalton and others. Dalton, OBSP (July 1732), at 160. That case involved a particularly gruesome killing of a man confined in the stocks. The court repeatedly enquired about the credibility and accuracy of witnesses offered by the prosecuting lawyer. It is interesting to note that in both Tipping and Dalton the court's interventions did not lead to acquittal.
\[105\] Lamb, OBSP (Oct. 1747), at 280.
to be aspers'd without Proof. When you prove it I will believe it.\textsuperscript{106}

Defense counsel's reaction to the court's criticism is extremely revealing. Unwilling to defer to the judge, he stood his ground. He insisted on adhering to the theory and questions ("Instructions") provided him by the defendant or, more likely, by the defendant's solicitor. That a lawyer versed in the ways of the courts could, in this setting, feel such a response warranted is the clearest demonstration of a break with the days when the court was the primary enquirer and "a due Regard [was to] be shewed to those in Authority."\textsuperscript{107} This new assertiveness, however, had its cost. In \textit{Lamb}: 

The Court, in summing up the Evidence to the Jury, observed to them, among other Things, That if any Thing could aggravate the Guilt of the Prisoners, it was their endeavouring to throw Dirt upon an innocent Man, who bore as good a Character as any one of his Function, or as any Gentleman in \textit{England}. But as it generally happens to a Man of Honour, when falsely accused, there was not the least Proof to support these unjust Reflections.\textsuperscript{108}

The notion that litigants could be held responsible to produce proof also was growing in this era.\textsuperscript{109} The judicially managed inquisition was giving way to an expectation that the parties would provide persuasive evidence. When Thomas Parks\textsuperscript{110} and four others were tried for burglary in January, 1747, the court took pains to emphasize the defendants' duties in the case. The court told the prisoners:

When you were examined before the Justice of the Peace in \textit{December}, you knew the Charge against you, about two o'Clock in the Morning etc., it would have been very material if you could have brought Persons of your Family to prove that you were every Night at Home, or that you always kept good Hours.\textsuperscript{111}

The defendants were acquitted despite the absence of this proof, but only because they were able to demonstrate their excellent reputations and provide an alternative explanation for the evidence against them.

The trend continued in cases like that of Hannah Perry\textsuperscript{112} in May, 1762. The defendant was charged with stealing a watch and other property belonging to Margaret Boyd, a widow with whom she

\textsuperscript{106} Id. at 284.
\textsuperscript{107} Brown, OBSP (Aug. 1727), at 3.
\textsuperscript{108} Lamb, OBSP (Oct. 1747), at 285. Two of the four defendants were convicted.
\textsuperscript{109} This issue will be examined in some detail in Part II (E)(2).
\textsuperscript{110} Parks, OBSP (Jan. 1747), at 50.
\textsuperscript{111} Id. at 52.
\textsuperscript{112} Perry, OBSP (May 1762), at 106.
roomed. The prosecutor’s case include some rather persuasive proof that the defendant had pawned the watch. Perry denied the accusation and claimed that others had access to the stolen goods. She went on to assert that Boyd’s neighbor, Mrs. Knox, when told that Boyd had claimed the watch was missing had said “she did not believe her.”113 It was then disclosed that Mrs. Knox was present in court and the following dialogue took place:

_Court._ You may call her if you please.
_Prisoner._ She may sell her soul if she chooses it. You may examine her if you think proper.
_Court._ If you desire it, we will examine her.
_Prisoner._ Then examine her.114

Not surprisingly, Knox failed to support Hannah Perry’s story, and Perry was convicted. That the court gave Perry the choice whether to call this witness and insisted that she exercise it demonstrates significant movement away from a model in which a court would arrogate to itself the calling and questioning of witnesses.115

By the 1770s, strikingly adversarial contests were taking place in the Old Bailey in ever greater numbers. The court assumed a truly neutral and passive posture while the parties toiled over the evidence. The court’s main function in such cases was to guard the integrity of the process. A case that exemplifies this trend is that of William Dodd,116 accused of forgery in 1777. Dodd was a Doctor of Laws who had close ties to the Earl of Chesterfield, having once been the Earl’s tutor. Faced with financial ruin, it appears that Dodd forged the Earl’s signature to a bond for a large sum of money. Dodd was represented at his trial by three barristers who opened the proceedings with a sharp challenge to the indictment. The thrust of their argument was that the indictment had been procured “through polluted channels” because the testimony of Lewis Robertson, another “principle” in the forgery, had been relied upon to persuade the grand jury.117 Faced with this strong and seemingly novel challenge to the proceeding, the judges118 indicated to defense counsel that the trial might be adjourned so that all the High

113 Id. at 107.
114 Id.
115 This point may be somewhat less compelling than it first appears because the prosecutor already had made a solid case. The court may simply have desired to underscore for the jury the weakness of the defendant’s claim.
116 Dodd, OBSP (Feb. 1777), at 94.
117 Id. at 95. The defendant’s counsel complained about Robertson’s illegal transfer from jail as well as the impropriety of his appearing before the grand jury.
118 As was not infrequently the case in hotly contested matters with famous defendants, a panel of judges heard counsel’s arguments. These included Mr. Justice Gould of the Court of Common Pleas, Mr. Justice Willes of the King’s Bench, and Mr. Baron Perryn of the Court of Exchequer. Despite the collegial nature of the bench in this, and
Court judges could be consulted on the defendant's challenge or, in the alternative, the defendant could choose to proceed with the trial and reserve the question for review in the event there was an adverse verdict. When counsel sought the court's guidance with respect to this procedural problem, the judges stated that they could not render "advice" to parties but only could adjudicate legal questions properly brought before them. The court made a conscious effort to maintain a formally neutral position between the contestants.

The defendant chose to proceed to trial and counsel on each side forcefully directed the enquiry. After a lengthy opening, the prosecution presented each of its 11 witnesses in turn. Their testimony was given in response to counsel's questions and at the end of direct examination each witness was vigorously cross-examined. It was not until after the testimony of the eighth prosecution witness that a court interjection was noted. This occurred as counsel for the prosecution was re-examining one of the first witnesses, Mr. Manley. The exchange went as follows:

_Counsel for the Prosecutor._ Tell the Court and the gentlemen of the jury, when it was you first saw Dr. Dodd?

[Manley.] Shall I mention what passed with Lord Chesterfield first?

_Court._ I think it will save time to let Mr. Manley tell his story.

[Counsel for the Prosecutor.] You went to Lord Chesterfield?

[Manley.] I did.

_Counsel for the Prisoner._ Mr. Manley knows very well what is evidence, and therefore I desire he will not enter into any other particulars.

_Court._ He is going to give evidence of what he has referred to already, and therefore he may go on without interruption.

Here the court suggested that a narrative, rather than tightly constricted direct examination, might prove beneficial. That the court would make its suggestion in such a deferential way implies a substantial shift in responsibility for the management of courtroom proceedings. Even more interesting is defense counsel's almost immediate insistence on the enforcement of evidentiary restraints with respect to Mr. Manley's testimony. The court's somewhat testy reply nicely illustrates the conflicts inherent in a system in which counsel has substantial power over the operation of the courtroom through the manipulation of rules of evidence. Shortly after this

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119 Dodd, OBSP (Feb. 1777), at 102 & 106.
120 Id. at 112.
121 Bentham suggested, I believe correctly, that the "exclusionary rules" of evidence
first objection the defendant's lawyers renewed their evidentiary challenge to Mr. Manley's testimony and were rebuffed.122 They had, however, made their point, because within moments the court cut Mr. Manley's narrative short with the remark: "That is not evidence most certainly."123 And, when Mr. Manley again strayed into territory forbidden by the evidence rules, the court cut him off with the instruction: "What passed between you and Mr. Robertson does not go to affect the prisoner at the bar."124 Later even counsel for the Crown began to warn witnesses about evidentiary restrictions concerning out-of-court conversations.125 These exchanges displayed the give-and-take of an adversarial contest, presided over by the court but managed by the parties.

In the 1770s and beyond, cases like Dodd were still the exception. However, the growing involvement of counsel126 and stricter adherence to rules of evidence127 clearly signaled that change was under way. The movement is perhaps best summarized by the court's remark in the theft prosecution of Mary Smith128 in 1782. There suspicious testimony by the victim's husband led jurors to ask the court to enquire if he "was guilty of leaving his wife."129 The court refused to ask the question, despite its potential usefulness, apparently because it transgressed the court's notion of the bounds of relevance. The judge declared that the Old Bailey was "not a court of inquisition."130 The days of unfettered judicial examination were drawing to a close. The old procedure was being replaced by a more orderly party-managed enquiry that relied on the litigants to question within a framework provided by binding rules of evidence.

2. Growth of Party Responsibility for the Production and Quality of Proof

As judicial direction and control over proceedings diminished during the course of the eighteenth century, the role of the parties

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122 Dodd, OBSP (Feb. 1777), at 113.
123 Id.
124 Id.
125 Id. at 115.
126 The huge jump in counsel's participation seemed to occur in the 1780s. See Table II infra in the Appendix.
127 This question will be examined in greater detail infra in Part II(E)(4).
128 Smith, OBSP (April 1782), at 364.
129 Id. at 365.
130 Id.
and their representatives grew. One of the most conspicuous indicators of increased party involvement was their expanding responsibility for the production of evidence, primarily through the testimony of witnesses. This shift in responsibility had two aspects. On the one hand, it encompassed a widening of the parties' right to choose the evidence to be considered. On the other, it placed the responsibility for non-production ever more squarely on their shoulders. This two-fold shift was fundamentally adversarial in nature, moving Old Bailey proceedings away from a judge-directed inquisition toward a party-controlled contest.

The cases of the period from 1717 to 1727 were, to all appearances, dominated by active judges rather than litigants. There was little for the parties to do. It appeared that judges asked most of the questions and forcefully directed the proceedings. Defendants who offered witnesses might expect the court's "indulgence" in having them heard, but could not expect to have any real say concerning the course or content of the proceedings. If a party (prosecutor or prisoner) pressed a case with too much "heat," his or her efforts were likely to be condemned and end in an adverse judgment.

a. Parties Begin to Play a Larger Role

In the 1730s, cases began to appear with a greater regularity which emphasized the party role in the process. A number of these focused on the increased burden assumed by an active litigant. John Theobalds was accused of highway robbery and prosecuted in April, 1732. At his trial Theobalds, "an Attorney of the Common Pleas," moved for the separation of the witnesses against him.

Prisoner. I beg the Witnesses may be examin'd a-part.

Court. It shall be so; but if they agree in their Evidence, 'twill go the harder with you.

Prisoner. Then I desire they may remain.

Court. No, let them go out, and be call'd in one by one.

Theobalds had the right to request the sequestration of the prosecution's witnesses, but serious consequences might attach to the exercise of that right. Theobalds's exchange with the court illustrates a shift toward litigant responsibility for case management, albeit at a substantial cost.

The movement toward party participation was accelerated by the judiciary. Courts increasingly asked parties to provide evidentiary support for their allegations. Defendants were criticized if they

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131 See Rook, OBSP (May 1727), at 2.
132 See Brown, OBSP (Aug. 1727), at 3.
133 Theobalds, OBSP (April 1732), at 117.
134 Id. at 118.
chose to "villify" a prosecutor's character without "any witnesses to invalidate his Evidence." Similarly, if defendants claimed an alibi, they were told "Call your witnesses to prove it." Prosecutors too were told that they had an obligation to prove their cases. When David Goddin prosecuted Thomas Fay for stealing deer skins he offered, among others, James Pellisent as a witness. After Pellisent gave the briefest of statements, Goddin complained that the court had not interrogated the witness. The court replied "What would you have me ask him? 'tis incumbent upon you to show [that the deer skins] were your's, and that you lost them."

When defendants claimed that their access to witnesses was being impeded the court frequently showed great solicitude. The Johnson case of 1732, discussed above, demonstrates the court's apparent willingness to respond to meritorious claims about absent witnesses. This pattern also was apparent in the cases of Charles Rogers and William Kitchinman. In the former of these, the defendant claimed that he had no money and therefore could not subpoena those who knew his character. The court sent out a messenger to seek the defendant's witnesses. Only when the messenger returned and reported "there were no such Persons to be found" was the defendant tried and convicted. In the latter case, the court postponed the trial twice in order to allow the defendant time to secure the attendance of his witnesses. In the end, the defendant produced but a single witness, his sister, and was convicted.

The court's willingness to give defendants every opportunity to present their proof, even in circumstances that might warrant suspicion, illustrates an increased concern about party participation.

Insistence upon the production of witnesses grew in another context as well. Around mid-century the courts routinely began enforcing a rule that the prosecutor be prohibited from using a defendant's admission if it were made because of the prosecutor's threat or promise. When out-of-court interrogation had yielded

135 See Beck, OBSP (April 1732), at 104; Sutton, OBSP (Dec. 1736), at 24.
136 See Osborn, OBSP (May 1732), at 132; Debell, OBSP (April 1737), at 92; Leng, OBSP (July 1737), at 147.
137 Fay, OBSP (April 1737), at 84.
138 Id. at 85 ("I do know them Skin which be here, I have bye them of Mr. Pyke.")
139 Id. The court was not mentioned by name in Goddin's remarks but was clearly their object.
140 Id.
141 Johnson, OBSP (Sept. 1732), at 198. See supra note 98 and accompanying text.
142 Rogers, OBSP (May 1737), at 131.
143 Kitchinman, OBSP (Sept. 1737), at 165.
144 Rogers, OBSP (May 1737), at 133.
145 Kitchinman, OBSP (Sept. 1737), at 166.
damaging admissions, judges would enquire into the origins of proffered statements. If pressure tactics had been used the tainted evidence was ruled out of the case and, frequently, the defendant was acquitted. Undoubtedly, this coerced confession rule was concerned with the protection of defendants from untoward pressure. But it also suggests an increased readiness to make the prosecution shoulder its own burden of proof rather than prove its case out of the defendant's mouth.

In the same era the question of the burden of proof became a topic of dispute between barristers representing contending litigants. Such disputes were a signal that the parties were fully cognizant of increased expectations that they produce persuasive evidence. In the smuggling trial of Thomas Fuller, defense counsel challenged several witnesses because of their willingness to give unsupported opinions that the defendant's saddle bags contained contraband items. These challenges eventually led to a confrontation between defense counsel and the Solicitor-General, who was one of the lawyers prosecuting the case:

_Council._ [Defense] Canst thou tell, Friend, What is in my Hat?
_Wiseman._ [Witness] There is something in it. There is Paper in it.
_Council._ Is there nothing else?
_Wiseman._ I can't tell.
_Council._ Thou canst just as well tell, What was in those Casks, as what is in my Hat. There might be Tobacco in the Bags. Or thou canst not tell, but there might be Vinegar or Verjuice in the Casks.
_Solicitor-General._ You must show it was Verjuice.
_Council for the Defendant._ I think otherwise.
_Solicitor-General._ That you don't.

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146 See, e.g., Parsons, OBSP (July 1742), at 3; Shirley, OBSP (July 1742), at 6; Walden, OBSP (April 1747), at 124. Beattie found that, in Surry, judges were showing heightened sensitivity to confessions by 1740. See J. Beattie, _supra_ note 3, at 365.

147 Other concerns were also at work, including a fear of false confessions, a desire to protect defendants from unscrupulous prosecutors interested in rewards, and an inclination to insist upon honorable dealing in the criminal justice system. As to the latter two of these, see Walden, OBSP (April 1747), at 124. There the court attacked a witness who had falsely promised a defendant immunity from prosecution in the following terms: "What, to swear by our Maker, that if a Man will discover, you will discharge him; then to tell him you could not do it, but to bring him here for the Reward... you did a very ill thing, to make an Oath and then to break it." _Id._ at 125. Langbein suggested that special concern about confessions grew out of the "crown witness" system that encouraged accomplices to inform against their comrades, thereby purchasing their own freedom. See Langbein II, _supra_ note 3, at 103-04.

148 Fuller, OBSP (Oct. 1747), at 270.

149 Verjuice is "[t]he acid juice of green or unripe grapes, crab-apples, or other sour fruit, pressed and formed into a liquor." _12 Oxford English Dictionary_ 131 (1961) (12 vols.).

150 Fuller, OBSP (Oct. 1747), at 271.
The clash here, over who had the burden of proving the contents of
the casks, nicely illustrates the shift of focus from the judge to the
parties in the trial process. That the importance of the burden was
so clearly understood and so sharply fought over suggests a new
view of what was required of litigants in the courtroom.

b. The Increasing Party Burden

With the passage of time, judges became ever more insistent
that parties substantiate their claims. This may be seen in a series of
1762 cases. Morris Delaney\textsuperscript{151} was accused of stealing a number of
items from Thomas Combe’s house. Combe’s proof was far from
overwhelming. He said he had charged the defendant because of
information that Delaney had been seen “lurking about the street”
in Combe’s neighborhood.\textsuperscript{152} Combe had little more to add apart
from a description of Delaney’s arrest. At the conclusion of this tes-
timony the court questioned Combe as follows:

\begin{quote}
\begin{center}
\textbf{[Court.]} Was he searched at the constable’s house?
\textit{Combes.}\textsuperscript{153} Yes.
\textbf{[Court.]} Did you find anything of your property upon him?
\textit{Combes.} Nothing at all.
\textbf{[Court.]} Then you charge him upon suspicion only?
\textit{Combes.} Yes, my Lord.\textsuperscript{154}
\end{center}
\end{quote}

From all appearances, Delaney was none too honorable a fellow (he
was detained on another charge immediately following the verdict in
this case). There were some grounds to suspect him of the crime,
including the fact that when he was arrested he had in his possession
tools that might be used to break open a house. The court, how-
ever, chose to highlight the weakness of the prosecution’s proof and
Delaney was acquitted.

In the same month the court\textsuperscript{155} was even more sharply critical
of the quality of proof offered by prosecutors in two cases brought
against Elizabeth Butson\textsuperscript{156} for stealing items from two silversmiths’
shops. At the conclusion of the first case the court challenged the

\begin{footnotes}
\footnotenumbers
\footnotetext{151}{Delaney, OBSP (Feb. 1762), at 60.}
\footnotetext{152}{\textit{Id.}}
\footnotetext{153}{The OBSP used this alternative spelling in the text, though “Combe” was used
in the case heading.}
\footnotetext{154}{Delaney, OBSP (Feb. 1762), at 60.}
\footnotetext{155}{In the 1760s the OBSP often provided a code for identifying the judge who pre-
sided in each case. The judge who tried Delaney, see supra notes 151-54 and accompa-
ning text, was Sir Richard Adams. The judge in the Butson case, see infra notes 156-58 and
accompanying text, was Sir William Moreton. Thus, the views expressed were not those
of a single judge. For the applicable judicial identity code, see OBSP (Dec. 1761), at 2.
For a brief discussion of judicial identity codes in general, see Langbein II, supra note 3,
at 15.}
\footnotetext{156}{Butson, OBSP (Feb. 1762), at 72.}
\end{footnotes}
prosecutor: "So then, Madam, you form your opinion, and swear to her having taken the ring (which you did not see) merely from your having lost it, and never finding it since." The defendant was acquitted. When Butson was prosecuted for a second time on similar evidence the court went even further. The OBSP says the "Court desired the prosecutor to be more cautious in forming his conclusions." The burden of producing evidence might be cast upon defendants as well as prosecutors. The 1762 case of Hannah Perry already has been discussed. There the court compelled the defendant to make a choice about calling what might prove to be a critical witness. The court's insistence that the prisoner make the decision demonstrated an increased expectation that the parties would be responsible for designating the proof to be considered. Defendants were put to a similar choice in later cases as well.

In this era litigants, especially defendants, seemed inclined to discuss openly their need for witnesses and the problems they faced because they had none. Mary Kite was prosecuted for perjury. It was claimed that she had falsely accused a customs officer of taking indecent liberties when he searched her upon her arrival from Hamburg. In her defense she said:

I petitioned for my clothes, and could never get an answer. They all put me to defiance, because I had no witnesses. He [the customs officer] said he could have witnesses, and I could have none.

I have no witnesses of the bad usage he gave me . . . .

Kite's feelings were echoed in a series of later cases. All of these displayed a growing awareness of the need to present witnesses and the severe disadvantages of not having any.

c. Witness Production

A count of the number of witnesses mentioned in the OBSP during every fifth year, from 1717 to 1797, suggests that, at least on the prosecution side, witness production grew significantly during

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157 Id.
158 Id. at 73.
159 Perry, OBSP (May 1762), at 106. See supra notes 112-15 and accompanying text.
160 See, e.g., Elliott, OBSP (Dec. 1786), at 82 (court gave defendant the option of either calling or not calling his father, to whom defendant allegedly gave stolen meat); Lightowler, OBSP (July 1792), at 307 (defendant chose not to call as a witness the clerk who allegedly read the contents of his confession to him).
161 Kite, OBSP (April 1762), at 103.
162 Id. at 104.
163 See Barrington, OBSP (Jan. 1777), at 52; Bishop, OBSP (Jan. 1782), at 128; Ingram, OBSP (Jan. 1782), at 129; Tauton, OBSP (Jan. 1782), at 129; Turner, OBSP (Jan. 1782), at 131.
the course of the century. The figures concerning this change must be treated with caution. The early reports are so terse that it is hard to know whether they are even close to complete. What is more, the early reports often used summary words in describing witness production. This practice necessitated the use of estimates in making the count. The fact that reports in the 1750s were still incomplete with regard to a number of items of interest compounded the difficulties with the count. Yet the data appearing in Table III are suggestive. They display a chronological pattern that roughly tracks transitions noted in the anecdotal materials, as well as at least one major developmental shift noted by other scholars.

The OBSP indicate that in the first era, from 1717 to 1727, prosecutors made relatively little effort to produce witnesses. This comports with the high level of judicial activity and low level of counsel involvement apparent in that period. The early pattern seems to have been modified in the 1730s, when the percentage of cases reported to have three or more witnesses increased appreciably. The numbers remain rather stable until 1787 when a substantial upsurge in witness production occurred. This second change is consistent with the rising involvement of counsel and heightened contentiousness noted by the OBSP in the last decades of the century.

While it is important not to read too much into these data, at a minimum they show an increased sensitivity on the part of the

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164 Tables III and IV in the Appendix record, for each sample year, the number of witnesses called in each case for which there was an adequate OBSP report. Table III focuses on the production of prosecution witnesses and groups cases into four categories: 1 or 2 witnesses (column 1), 3-5 witnesses (column 2), 6-9 witnesses (column 3), 10 or more witnesses (column 4). Table IV examines the production of witnesses by defendants in five categories: no witnesses (column 1), 1 or 2 witnesses (column 2), 3-5 witnesses (column 3), 6-9 witnesses (column 4), 10 or more witnesses (column 5). Beneath each column total is recorded its percentage of the total number of cases heard and adequately reported in the sample year. On the prosecution side, the trend was clearly towards greater witness production.

165 The words used included: "some," "several," "many," and "a great number." These, and similar phrases, were used almost exclusively to describe witnesses produced by the defendant to vouch for his character. Their use was generally confined to the sample years before midcentury. In making numerical calculations, a fixed number was assigned to each phrase and used whenever that phrase appeared in the records.

166 See Langbein II, supra note 3, at 25 (failure to disclose presence of counsel).

167 The anecdotal materials show pronounced changes in the 1730s and the 1780s with respect to judicial practices and lawyer participation. This pattern is mirrored in the prosecution witness figures.

168 Both Beattie and Langbein have argued that the 1730s was a time of important change primarily because of the influx of counsel. See J. Beattie, supra note 3, at 356-57; Langbein I, supra note 3, at 307.

169 The year 1737 presents something of an anomaly. As Table I indicates, its sample included only 30 percent of all cases tried. It may, therefore, be unrepresentative.
OBSP’s editors to the prosecution’s production of witnesses and, by implication, an increased interest in such matters on the part of the OBSP’s readership. On the assumption that they bear some relationship to the numbers of witnesses actually heard, they show prosecutors’ growing efforts to produce persuasive presentations by increasing the number of witnesses they offered. The figures for the defense, set out in Table IV, do not display a similar pattern. This ought to serve as an additional caution against reading too much into any of the data. The difference may, however, be explained by other factors, including the possibility that unintentionally inflated estimates of early defense witness production were used in the effort to compensate for the OBSP's imprecise language, or that the poverty of defendants throughout the century discouraged them from employing the procedures necessary to ensure the presence of witnesses.

d. Case Preparation

The rising tide of adversarial feeling in litigation also led to more careful case preparation during the last third of the 1700s. An example of this may be found in the case of Mary Reaudolf, a servant who was prosecuted for stealing from her master, Robert Viner. Upon discovering that someone in his household was pilfering cash, Viner went to Sir John Fielding for advice. Fielding suggested that he set a trap with marked money. Viner did so, and when the money was taken he applied for a search warrant. During the ensuing search the marked coins were found on the defendant. These were then “sealed up” by the magistrate and delivered to a constable to be held for trial. At the hearing all this was proven, the coins were produced, and the defendant was convicted. What is particularly remarkable in this process is the care the prosecutor was instructed to use in preparing his case and gathering the necessary evidence.

One further step taken in the eighteenth century that enhanced party control over the proof-presenting process was the courts’ recognition that, in many circumstances, parties had the right to choose not to call witnesses who might have relevant information. Implicit was judicial acceptance of the proposition that the parties were free to design and execute their own contentious trial strategy. In several cases between 1787 and 1797 a prosecutorial choice not to call witnesses who appeared on the indictment was considered. William

170 See supra note 165.
171 Reaudolf, OBSP (June 1767), at 205.
172 Id.
Whiteway was accused of attempted murder. After presenting three witnesses counsel for the prosecution informed the court that he would not call for any further testimony. Defense counsel William Garrow, one of the finest criminal lawyers of the day, immediately requested that the court "call all the witnesses that are on the back of the indictment." The court, without apparent hesitation, responded "Yes, I shall; call James Wilkins." What is noteworthy here is that prosecuting counsel was not held responsible to produce witnesses like Wilkins. It was up to defense counsel to ask that they be called, and up to the court to call them.

This authority over case content was far more explicitly laid out during the stealing prosecution of James Wilson. There, when prosecuting counsel, Mr. Const, informed the court that he was not going to call the accomplice whose testimony had formed the basis for the indictment, defense counsel, Mr. Knowlys, protested. Their exchange with the court went as follows:

*Mr. Knowlys.* This, I believe, is the first instance where the Crown has received any person as an informer (from whom the case originated), and made that person a witness for the purpose of prosecution, and withheld on the trial, the examination of that witness.

*Court.* I don't know whether it ever has been so before, but I always dread to hear the evidence of an accomplice, for he comes in such a suspicious situation, generally shifting the guilt off his own shoulders upon another; and I never find fault with any Counsel for the prosecution, when an accomplice is not called; for his evidence is worth nothing of itself, nor is it to be taken into consideration, unless it is corroborated by other evidence.

*Mr. Knowlys.* That evidence upon his examination, which they have made use of to fix the guilt upon the man, I assert, would prove the case to be of a different description to that now given; as he is upon the back of the bill, I would make use of him; and I think it not candid to withhold him.

*Court.* I will call him, and anybody shall examine him, as the man is upon the back of the bill; I make it a rule to call everybody, for I have known instances in which a single witness has said that which has acquitted the prisoner; but when there are Counsel they know best whether their case is proved, and I leave it to them.

*Mr. Const.* It is a novel doctrine indeed, that the Counsel for the prisoner shall say in what manner the Counsel for the prosecution shall conduct his case, it is entirely unprecedented; he being a sus-

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173 Whiteway, OBSP (Oct. 1787), at 1108.
174 For a brief discussion of Garrow's career, see infra notes 328-39 and accompanying text.
175 Whiteway, OBSP (Oct. 1787), at 1113.
176 Wilson, OBSP (Nov. 1796), at 60.
picious person and concerned in the robbery, I determined not to call him, as I found the fact proved without him; and if I thought I had conducted myself uncandidly, I should be very sorry, but when I have a case, full, complete and convincing, I am not obliged to call a witness to contradict the witnesses already produced, under the idea of promoting justice; and therefore I am to use my discretion whether I shall call a witness or not, whom I am suspicious of, when I have called those upon whom I can depend. Mr. Knowlys. This being the case, it comes entirely upon us, he has been made their witness, and has been thought proper to contribute to the purposes of justice, and having made him their witness, now an idea has occurred to them, that he will alter the case, that witness is withheld; I would therefore call him on the part of the prisoner.

Court. Let him be called.\textsuperscript{177}

Both the court's recognition of counsel's right to decide on the witnesses to be offered and Mr. Const's insistence on that prerogative demonstrate the establishment of truly contentious procedure.

3. Involvement of Counsel in the Courtroom Contest

An examination of the number of Old Bailey cases in which counsel was said to have appeared during the course of the eighteenth century discloses the same three stage pattern of development observed in judicial activity and prosecutorial witness production. Table II indicates that in the early period, from 1717 to 1727, lawyers were said to be present in no more than three Old Bailey cases in any year analyzed. While this does not necessarily mean that advocates appeared in only three cases in each of those years,\textsuperscript{178} it does signal a very low level of legal participation in the cases tried and little interest in the exploits of counsel by the editor, and perhaps readers, of the OBSP. In the absence of counsel, the judge obviously managed proceedings and adversarial developments were few.

The picture changed rapidly in the 1730s. The number of appearances by counsel noted in the records tripled twice in ten years. After that transition, things seemed to stabilize until the 1780s when, in a remarkable upsurge in reported activity, appearances by counsel again increased three-fold. In the last twenty years of the century, lawyers were reported to have appeared in from 100 to 200 cases annually. They played some part in no less than 20 percent of all cases and in some years were involved in almost half of all trials.

\textsuperscript{177} Id. at 63-64.

\textsuperscript{178} See supra note 166 and accompanying text.
a. The Early Period: 1717 - 1727

It is virtually impossible to generalize about the role of counsel based upon the tiny sample of six cases available from the early period (1717-1727). Three of the six early cases were misdemeanors in which none of the restrictive rules concerning felony litigation applied. These cases are, therefore, of limited assistance in providing information about procedure in the Old Bailey's regular felony caseload. What lawyers seemed to do in their few reported appearances, both misdemeanor and felony, was to press legal arguments on a variety of technical points and occasionally engage in cross-examination. Both these tasks were to become mainstays of the lawyer's function in later times and were to be used by counsel as a means of guiding or controlling litigation. In the early years, however, both functions seemed to have been narrowly circumscribed. The general impression made by these cases is that counsel was an adjunct to the proceedings and his activities were not critical to the development of the proof.

b. Transition: The 1730s

In the 1730s, counsel appeared to take a far more significant part in Old Bailey proceedings. Their presence on behalf of both prosecutors and prisoners was noted with increasing frequency. The apparent influx of lawyers on the defense side was particularly interesting because limitations on a prisoner's use of counsel were still in effect. The courts appear to have reinterpreted these limits not as a total ban but simply as a prohibition of speeches, observations, or arguments about the facts. Defense counsel could interrogate witnesses, argue points of law, and seek enforcement of the rules of evidence. These options were increasingly exploited.

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179 See Howel, OBSP (Feb. 1717), at 5; Panting, OBSP (Sept. 1717), at 2; MacCabe, OBSP (Feb. 1722), at 6. For one possible explanation of the anomaly that allowed counsel to appear without restriction in misdemeanor cases, see Langbein I, supra note 3, at 308.

180 See Howel, OBSP (Feb. 1717), at 5 (In this seditious libel case counsel "did not at all go about to justify any one of the seditious and scandalous Passages contained in the Libel: but only to argue against the Libel's being found upon the Prisoner, being a Publication according to law."); Vincent, OBSP (Dec. 1721), at 3 (Defense counsel successfully pressed the argument that an adjudication in another court had a binding effect.).

181 See MacCabe, OBSP (Feb. 1722), at 7.

182 See supra note 3.

183 The rule was succinctly summarized by the court in Russen, OBSP (Oct. 1777), at 374:

Your counsel are not at liberty to state any matter of fact; they are permitted to examine your witnesses; and they are here to speak to any matters of law that may arise; but if your defence arises out of a matter of fact, you must yourself state it to me and the jury.
1. **Counsel Interrogation of Adverse Witnesses**

Over the course of the century, counsel most particularly developed the art of interrogating adverse witnesses. Because defense counsel's role was limited in other regards, it is not surprising that barristers defending those accused of felonies focused their attention on cross-examination, a mechanism that offered the broadest latitude for the development of persuasive proof with a minimum of restrictions. Through cross-examination, defense counsel could present his theory of the case, refute an opponent's claims, develop favorable proof, discredit opposing witnesses, and generally advance his client's position before the jury. In the 1730s, the process of exploiting cross-examination for all these ends grew significantly.

A nice example of all this appeared in the murder prosecution of John Tapper.\(^{184}\) There the critical prosecution witness was Joseph Rohan. On direct examination, he told of a dispute between the defendant and the victim which led to a fatal brawl. He then was cross-examined as follows:

- **Council.** You had all been drinking had ye not?
  - **Rohan.** Yes.
- **Coun.** And were you not all got Drunk?
  - **Rohan.** No.
- **Coun.** Was not you Drunk?
  - **Rohan.** No, I tell ye; why sure I am not to be persuaded that I was Drunk.
- **Coun.** Have you ever seen the Prisoner and the Deceased a drinking together before this Accident?
  - **Rohan.** Yes, but they were always a quarrelling.
- **Coun.** How far was you off when the Deceas'd receiv'd the Wound?
  - **Rohan.** About three Yards; but I did not see it given.
- **Coun.** Was not the Deceas'd a paring his Nails just before this happen'd?
  - **Rohan.** I don't know.
- **Coun.** Did you hear no mention of a Whetstone?
  - **Rohan.** Not as I remember.\(^{185}\)

Counsel later offered witnesses to substantiate the factual assertions implicit in his questions about drinking, nail paring, and a whetstone. The interrogation of Rohan was more than a challenge to the witness's credibility; it was a way for the defendant to advance his theory of the case and to set the stage for his witnesses. Their testimony, when coupled with this cross-examination, persuaded the jury to acquit.

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\(^{184}\) *Tapper, OBSP* (Feb. 1732), at 82.
\(^{185}\) *Id.* at 83.
Cross-examination had become a sufficiently effective tool that defense counsel appeared to rely on it alone in a number of cases. In the rape prosecution of a defendant referred to only as L-1 H-y, a sharp examination of the victim and the introduction of a letter from the victim's agent apparently soliciting a monetary "overture" from the defendant were sufficient not only to secure an acquittal but to persuade the court to award the defendant a copy of his indictment. The latter step paved the way for a tort action by the defendant against the prosecutor and was a strong signal of the court's disapproval of the victim's conduct. In other cases as well, cross-examination played a decisive role. The volume of reports concerning cross-examination grew significantly in the 1730s, and became a regular fixture in cases where counsel was present.

As already noted, in the early years of the eighteenth century vestiges of the tradition of sharp-tongued judicial interrogation might still be found. Accompanying the increase in counsel's participation in litigation, and especially the intensification of cross-examination, came an amplified acerbity by the advocates. Where once it was the judges who made caustic remarks, it was now the cross-examining lawyers who were sarcastic interrogators. This rising tide of sarcasm and wit was part of a more general increase in the forcefulness of counsel's advocacy. Examples of this aggressive, at times pugnacious, style are scattered throughout the reports from the 1730s. When John Ashford was accused of sodomy, the prosecuting barrister sharply cross-examined the prisoner's witnesses. After a particularly heated exchange with one female witness, counsel tried to belittle her testimony with the sarcastic taunt: "Why[...] did he ever Kiss you?" Counsel's barb was to no avail as the defendant was acquitted. A similar exchange took place in the case of Thomas Winston when prosecuting counsel denigrated a witness's testimony with the dismissive comment "Then you may buy stolen Goods and subject your self to a Prosecution." Again, despite counsel's remark, the jury decided in the defendant's favor.

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186 L-1 H-y, OBSP (Sept. 1737), at 194.
187 Id.
188 See, e.g., Runnington, OBSP (Sept. 1737), at 192 (defendant's cross-examination revealed validity of his claim that he was improperly interfered with by victim); Walkwood, OBSP (April 1737), at 98 (cross-examination highlighted flaws in prosecution witness's story).
189 See, e.g., Ashford, OBSP (Sept. 1732), at 217; Winston, OBSP (Dec. 1736), at 4; Ryan, OBSP (Jan. 1736), at 47; Bullock, OBSP (July 1737), at 142.
190 See supra notes 78-82 and accompanying text.
191 Ashford, OBSP (Sept. 1732), at 217.
192 Id. at 219.
194 Id. at 7.
The same tactic was employed, albeit with greater success, by defense counsel in the previously mentioned rape prosecution of L-1 H-y. There a question about a witness’s frequent visits to the defendant “to see for Overtures” effectively undermined his testimony.

2. Counsels’ Use of the Evidentiary Objection

The evidentiary objection constituted a second tool used with increasing regularity by counsel in the 1730s. During this decade, the OBSP reported a growing number of instances in which barristers used objections as an instrument of advocacy. Two examples may help to illustrate this trend.

In the first, Mary Sommers was accused of bigamy. Her counsel opened by challenging the validity of the prosecution on the theory that the text of the bigamy statute only referred to men marrying while “having a Wife still living.” The court deferred ruling on this point. Prosecuting counsel then attempted to establish the first marriage. After a hard-fought interrogation of the minister who claimed to have married the defendant to her first husband and a searching examination of the documentary evidence produced, defense counsel declared:

\[
I \text{ take an Exception to the Establishment of the Marriage: 'Tis not sufficient in Cases of this Nature to prove a Cohabitation: They must give Evidence of an actual Marriage; all the Proof they can give, is this Fleet-Register, which ought to have no Weight at all. I submit it, whether they have established the first Marriage.}
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The court sustained the defendant’s objection and she was acquitted. In Sommers, counsel coupled a number of technical legal arguments concerning authentication with common sense assertions about the reliability of evidence to persuade the court to make a determinative ruling in the defendant’s favor. Advocates clearly had begun to harness evidentiary rules as a means of controlling the trial and dictating the content of the presentation.

The second illustration of this proposition is drawn from an-
other bigamy prosecution, that of Henry Lyford. There the defendant's lawyer objected that the second wife was the "best evidence" of the second marriage and, hence, it was improper to prove the marriage by any other evidence. Prosecuting counsel belittled this objection as novel and it was disregarded. Counsel for the prisoner next tried to render the testimony of a prosecution witness invalid by claiming that he had no personal recollection of the marriage but was simply repeating what was stated in his written records. Again counsel was rebuffed. His third challenge was again based on the best evidence notion and argued at great length. Prosecuting counsel's response was most revealing. He said: "My Brother has no Evidence to give in Behalf of his Client, and so he has only a mind to give him a Speech." The prosecutor's assertion seemed well founded as the defendant chose to offer no evidence on his own behalf. He was convicted. In this case the advocate turned to the rules of evidence as the only available avenue in an otherwise hopeless situation. Evidentiary objections had clearly become a part of the lawyer's strategic arsenal to be used to gain tactical advantage.

Lyford illustrates not only the growing use of evidentiary rules as an instrument of advocacy, but the intensifying zeal of counsel on a client's behalf. Despite finding his client in a seemingly hopeless position, defense counsel attempted to use evidentiary claims as a means of avoiding conviction. Counsel's willingness "to give [his client] a Speech" showed his close identification with the cause and readiness to use whatever resources might come to hand to secure a positive result. Lyford presents a remarkable contrast with counsel's declaration in the Howels case, in 1717, that he "did not at all go about to justify" his client's conduct and was only willing to argue a technical legal point. Counsel's growing devotion to his clients may be glimpsed in a number of other cases as well, and seems to indicate the stirrings of adversarial notions of loyalty and zeal.

3. Reactions to Counsels' Activities

Reactions to counsel's activities in the 1730s were what might
be expected in a transitional period. The involvement of an advocate on one side or the other frequently had the effect of drawing the court into the contest on behalf of the unrepresented party. A number of cases in 1732 seemed to reflect this judicial reaction. During the counsel-conducted prosecution of Daniel Tipping, the court went to great lengths in interrogating both the accomplice who testified for the prosecution and his brother-in-law. While accomplices were routinely examined by the court in this era, the care taken in Tipping reflected a heightened desire to ensure the integrity of the proceedings in a case prosecuted by a lawyer. The same may be said of the court's rigorous examination of William Curtis, the young man who accused John Ashford of sodomy. Again, although judicial enquiry was a fixture in sex crime cases, the court seemed to act with special caution in response to the efforts of a prosecuting advocate. Finally, the same pattern was evident in the murder prosecution of Edward Dalton and two others accused of beating to death a man confined in the stocks. The court was quick to examine the witnesses offered by prosecuting counsel in order to gauge the merit of the testimony presented.

The jury's reaction to the new advocacy was not entirely hospitable. The best evidence of what many jurors may have felt in the face of zealous legal representation came in the case of Thomas Car. There defense counsel did a splendid job of challenging the testimony of the alleged victim of a robbery. Counsel's cross-examination demonstrated that the victim was intoxicated at the time of the crime and behaved in a suspicious manner afterwards. The jury, however, took umbrage at counsel's efforts and one of their number declared: "We desire that his Lordship would please to ask the Questions that are proper, and that the Man may not be interrupted." From this statement it may be surmised that the jurors had not as yet become entirely comfortable with the rigors of aggressive cross-examination pursued by an adversarial advocate.

c. A Time of Growing Importance: 1740 - 1780

1. The Growing Power of Cross-Examination

Despite resistance, lawyers had, by the 1740s, come to play an important part in many cases heard in the Old Bailey. Counsel's

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207 Tipping, OBSP (July 1732), at 160.
208 Ashford, OBSP (Sept. 1732), at 217.
209 Dalton, OBSP (Sept. 1732), at 219.
210 Car, OBSP (Sept. 1732), at 204.
211 Id.
212 The jurors' reaction in Car could, of course, have been an anomaly or a response to counsel's excesses. Nothing in the text, however, suggests that the witness was abused.
right to vigorously press cross-examination generally was acknowledged. In July, 1742, James Annesley213 and Joseph Redding were prosecuted for a murder arising out of a dispute about fishing rights. One of the witnesses called by the defense was Richard Chester who was asked to repeat what the key prosecution witness had told him shortly after the killing. On cross-examination Mr. Brown asked Chester “whether the Prisoner at the Bar [Redding] is not married to your Daughter-in-Law.”214 Chester asked the judge whether he had to answer such a question with its imputations of favoritism and bias. The court responded: “The Relation is very small, but if they insist on their Question, you must answer it.”215 The court’s ruling plainly emphasized counsel’s right to pursue cross-examination. The cross-examination of Richard Dew during the 1747 prosecution of John Lamb216 and others for stealing lead from graves affirmed even more dramatically counsel’s authority to interrogate. As described above,217 defense counsel and the judge clashed bitterly because during his cross-examination counsel suggested that high ranking church officials might have authorized the defendants’ scheme. Despite the judge’s stern warning counsel pressed his examination, declaring: “I must follow my Instructions, and will not go from them.”218 That the judge could not silence counsel indicates the growing breadth of the power to interrogate.

The right to cross-examine was recognized in cases from the 1740s to the end of the century. One further example should suffice. John Tyrrell219 was an apothecary charged with perjury because of certain assertions he made during the murder trial of Mrs. Jane Sibson.220 At Tyrrell’s trial, Robert Want, the solicitor who had represented Mrs. Sibson, was called to testify. He described part of Tyrrell’s cross-examination at the Sibson trial. “He [Tyrrell] never gave a direct answer for a considerable time, even to that Mr. Baron Adams [the judge] said to Serjeant Davy [counsel for Mrs. Sibson], Brother why do you press him? You see he will not give

213 Annesley, OBSP (July 1742), at 1. (This case was separately printed verbatim, apparently because of Annesley's noble lineage and great expectations.). In later litigation Annesley proved that he was the rightful heir to a great estate and that his uncle had sought to usurp his place. For an excellent analysis of the ethical questions raised by this whole affair, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 3-10 (1988).
214 Annesley, OBSP (July 1742), at 25.
215 Id.
216 Lamb, OBSP (Oct. 1747), at 280.
217 See supra text accompanying notes 105-08.
218 Lamb, OBSP (Oct. 1747), at 284.
219 Tyrrell, OBSP (Sept. 1762), at 171.
220 Sibson, OBSP (May 1762), at 117.
you an answer." Despite this observation by the judge, Serjeant Davy did continue to press Tyrrell, eventually forcing him into what was later viewed as a perjurious remark. The judge's intercession did not deter counsel from pressing a reluctant witness. The broad scope accorded the right to cross-examine is readily apparent.

Quite often counsel exploited the latitude allowed on cross-examination to launch sharp attacks on witnesses. When James Tempest accused Jane Perindine of stealing from his shop, defense counsel suggested that the shopkeeper's assistant had made a bargain of which he was unaware. Tempest doggedly refused to admit this possibility and eventually counsel undertook an attack on Tempest that implied he had willfully suppressed evidence. Counsel in an apparent reference to the possibility of perjury warned the shopkeeper: "I have several Witnesses that the Boy [assistant] said she [the defendant] had cheapened the Candlesticks." The jury was persuaded of the prosecutor's bad faith and Perindine was acquitted. Similarly, when Stephen Gosling accused Peter Tickner of being a smuggler, Tickner's counsel, in a deft bit of cross-examination, demonstrated the prosecutor's ignorance concerning smuggling, his curiously selective memory about the date in question, his bias against the defendant because of a lawsuit between them, and his constant insistence that the defendant make payment on an alleged debt. Despite the dubious character of the defendant, "[t]he Jury could not credit Gosling's evidence, therefore the Prisoner was acquitted of this Indictment." And so the cases went with counsel vigorously pressing opposing witnesses.

Sarcasm was much in evidence. When defense counsel encountered an intoxicated prosecuting witness in the case of Michael Cassody and Christopher Broaders, he did not hesitate to exploit the issue.

Council. When you went from the Bedford Arms I suppose you was not sober?
Scott. [the witness] I was about half seas over.
Council. What, worse than you are now?
Scott. Very like so.

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221 Tyrrell, OBSP (Sept. 1762), at 172.
222 Perindine, OBSP (Feb. 1746), at 114.
223 Id. at 115.
224 Tickner, OBSP (Oct. 1747), at 262.
225 Id. Tickner was held on another charge at the conclusion of this prosecution and appeared to be associated with a notorious band of smugglers who operated in the Hawkhurst area of Kent.
226 Tickner, OBSP (Oct. 1747), at 266.
227 Cassody, OBSP (Dec. 1766), at 29.
228 Id.
Later counsel drove the point home by telling Scott: "I'll give you a good piece of advice, never to get drunk anymore, then you will never lose your things that way again."\textsuperscript{229} Similarly, in the case of Thomas Caverner,\textsuperscript{230} when the prosecutor referred to the time of the robbery as a "blessed day," defense counsel immediately shot back: "Oh, it was a blessed day indeed!"\textsuperscript{231} Lawyers engaged in cross-examination appeared, ever more frequently, to be inclined to provoke combative exchanges with witnesses. In the rape prosecution of Ralph Cutler\textsuperscript{232} this bruising and nasty style of attack was used by counsel to undermine the victim's credibility. The grilling went on for more than five double-column pages in the OBSP. Just one brief excerpt should suffice to convey the tenor of this slashing style of interrogation.

\begin{quote}
[\textit{Counsel.}] At about what time did you set off from Merlin's cave to go home?
[\textit{Mary Bradley, the victim.}] Between twelve and one.
[\textit{Counsel.}] You told us you parted with your company in Cold Bath Fields?
[\textit{Mary Bradley.}] Yes.
[\textit{Counsel.}] Whereabouts did Mr. Cutler propose to give you a glass of wine?
[\textit{Mary Bradley.}] About Holborn.
[\textit{Counsel.}] You refused that?
[\textit{Mary Bradley.}] Yes.
[\textit{Counsel.}] You thought it I suppose a very impudent application of Mr. Cutler to you?
[\textit{Mary Bradley.}] Yes, I thought it rude.
[\textit{Counsel.}] How did it happen afterwards that you suffered Mr. Cutler to walk home with you after this?
[\textit{Mary Bradley.}] He politely asked me to let him see me home.
[\textit{Counsel.}] Then his politeness had cured this insult in asking you before to go in and drink a pint of wine . . . ?\textsuperscript{233}
\end{quote}

Counsel unmercifully hammered at Mrs. Bradley and the witness she offered to support her claim. The jury acquitted the defendant without deliberation after advising the judge that no summing up of the facts was necessary. In examinations like those in \textit{Cutler}, counsel gave free reign to partisan views about the witnesses and the facts. Civility and restraint eroded while contentious advocacy intensified.

\textsuperscript{229} \textit{Id.} at 30.
\textsuperscript{230} Caverner, OBSP (Jan. 1772), at 93-94.
\textsuperscript{231} \textit{Id.} at 94.
\textsuperscript{232} Cutler, OBSP (Sept. 1777), at 321.
\textsuperscript{233} \textit{Id.} at 324.
2. Counsels' Zealous Advocacy

Counsel's zeal and loyalty to clients were more readily apparent in all sorts of activities during the period from 1740 to 1780. When the barrister in the Lamb case\cite{234} stood his ground by insisting on following his instructions even in the face of intense judicial hostility, he was clearly declaring his special loyalty to his client. This sort of devotion was apparent in other settings as well. It was the sort of devotion that led counsel in one case to declare in his opening that a defendant's scheme "is as wicked a one as ever appeared,"\cite{235} even though the evidence eventually appeared dubious and the jury acquitted. It was also the sort of devotion that led to scenes like that described in the prosecution of Israel Walker:\cite{236}

There were Counsel employ'd against him, who began to expiate upon his Wickedness; as marrying several Women with three or four hundred Pounds Fortune and ruining them. But the Court refus'd hearing the Counsel, as the offense the Prisoner was then charg'd with came within the Limits of the Act of Grace.\cite{237}

This loyal and zealous attitude also led to more combative exchanges between opposing counsel. The trend was nicely exemplified in the case of Thomas Fuller,\cite{238} who was accused of smuggling. As indicated in the preceding discussion of this case, counsel for the defense challenged a witness for claiming to know what was in sealed saddle bags. This provoked the Solicitor-General, one of those prosecuting the case, to challenge defense counsel in the following manner:

\begin{quote}
Solicitor-General. You must show it was Verjuice.
Council for the Defendant. I think otherwise.
Solicitor-General. That you don't.\cite{239}
\end{quote}

The sharpness of the exchange here intimates zeal on both advocates' parts and a determination to fight the case vigorously.

3. Evidentiary Matters

One of the weapons counsel turned to with increasing frequency in hard-fought contests was the rules of evidence. By the 1770s, cases like that of William Dodd\cite{240} were a common occurrence. There, even before the opening of the trial, defense counsel used an evidentiary claim in an effort to quash the indictment. After

\begin{footnotes}
\item[234] Lamb, OBSP (Oct. 1747), at 280.
\item[235] Stabock, OBSP (June 1747), at 189.
\item[236] Walker, OBSP (July 1747), at 203.
\item[237] Id.
\item[238] Fuller, OBSP (Oct. 1747), at 270. See supra notes 148-50 and accompanying text.
\item[239] Id. at 271.
\item[240] Dodd, OBSP (Feb. 1777), at 94.
\end{footnotes}
the trial began, counsel challenged the introduction of prejudicial materials with repeated evidentiary objections, and sought to have various statements excluded as hearsay. Defense counsel declared his commitment to the strictest enforcement of the rules.  

[Y]our Lordships would not permit any incompetent or illegal evidence to go before [a] Jury, however immaterial, because it is impossible for your lordships ever to say what degree of influence a piece of immaterial evidence might have upon the mind of any person whatsoever; it would be your lordships duty, and I am sure would be the conduct of the Court upon such an occasion to take care that the Jury should hear no such evidence.241

Counsels' adversarial devotion was also reflected in increased evidence of careful trial preparation. A substantial number of cases in the 1740s and beyond indicate that lawyers had participated in a range of critical pretrial activities. Richard Hughes242 was accused of forgery and fraud. During cross-examination, his lawyer began to enquire about events that had preceded the alleged forgery. He complained about the absence of certain records and was challenged by Crown counsel who reminded him: "We have brought the book you gave us notice to bring."243 The point here was that those representing the defendant244 had analyzed the evidence and demanded documentary proof from the prosecution.

A similar situation was disclosed when James Brownrigg,245 his wife, and his son were tried for the murder of a young girl who was their servant. The case involved atrocious mistreatment and was presented verbatim in the OBSP. At one point during cross-examination by defense counsel a question arose about the location of hooks used to restrain the victim while she was beaten. Counsel for the Crown interjected: "I saw them [the hooks] there two or three days ago."246 Again, it is clear that careful preparation had taken place, including a visit to the crime scene.

One final example of this energetic approach to pretrial preparation appeared in the case of William Davis,247 who was accused of robbing the mail. The prosecution gathered 39 witnesses and a raft of documentary evidence in its painstaking trial preparation. Counsel presented proof that traced a number of the purloined letters

241 Id. at 97.
242 Hughes, OBSP (Feb. 1757), at 95.
243 Id. at 96.
244 A solicitor might have been responsible for the request. On the role of solicitors, see infra notes 248-55. On the difficulty of obtaining information about the solicitor's role in forensic activities, see Langbein II, supra note 3, at 127-29 n.511.
245 Brownrigg, OBSP (Sept. 1767), at 258.
246 Id. at 265.
247 Davis, OBSP (Dec. 1771), at 16.
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from their authors’ pens through a host of intermediate postal stations to the moment of the robbery. This case displayed the lawyer’s readiness to address complex questions of proof with an unstinting commitment of energy and resources.

4. The Part Played by Solicitors

Adversarial preparation was not the exclusive province of the barristers who tried cases in the Old Bailey. Indeed, evidence suggests that the solicitors, who in the modern, bifurcated, English system are responsible for case investigation, played an important part in the shift to a more contentious procedure. In the homicide trial of James Annesley, one of the witnesses called by the defendant was John Paterson. He testified that he had appeared as “Attorney” for Annesley and in that capacity had attended the coroner’s inquest in the case. Of his role at the inquest he said: “I had not Time to enquire into the Fact, and prepare for Mr. Annesley’s Defence, I could do him but little Service more, than by Cross-examining the Witnesses for the Crown, and making Observations on their Evidence.” Plainly, the attorney’s methods of operation incorporated the classic tools of adversarial advocacy, cross-examination and case preparation. Paterson’s commitment to his client’s cause was apparent both in his remarks and his preparation of the case.

During the third quarter of the eighteenth century witnesses regularly referred to the fact that they had been discovered or contacted by lawyers investigating cases. Perhaps the best picture of what these investigators did was provided by Solicitor Robert Want during his testimony in John Tyrrell’s case. When asked how he could remember so precisely what the defendant had said at the prior murder trial of Mrs. Sibson, he answered “I’ll tell you why I can: I examined all the witnesses myself, separately and apart, in order to prepare for that trial.” Solicitors, through their interviews and subsequent drafting of questions to be asked by coun-

248 The division between barristers and solicitors was already clearly established in the eighteenth century. See Robert Robson, The Attorney in Eighteenth-Century England 1 (1959). As Beattie and Langbein noted, well before mid-century there was evidence of solicitor involvement in the preparation of cases for trial at the Old Bailey. See J. Beattie, supra note 3, at 278; Langbein II, supra note 3, at 127-29 n. 511.

249 Annesley, OBSP (July 1742), at I.

250 Id. at 25. Paterson’s remarks are direct evidence that solicitors were involved in the preparation of criminal cases for trial. See supra note 248.

251 At the beginning of his testimony, Paterson apologized to the court for appearing as a witness on his client’s behalf but then added: “I do it because, in an Affair of so great Consequence to him, I think he has a right to my Evidence. . . .” Id.

252 See, e.g., Ashley, OBSP (April 1752), at 148; White, OBSP (Feb. 1762), at 47.

253 Tyrrell, OBSP (Sept. 1762), at 171. See supra notes 219-21 and accompanying text.

254 Id.
were clearly contributing to the adversarial preparation of cases.

5. *The Expansion of Counsels’ Role*

During this period counsel were not content to abide by restrictions on their advocacy. They used the tools at their disposal to expand their part in the trial process. For example, defense counsel made repeated efforts to address the jury on the merits and thereby override traditional constraints on argument. In the previously discussed *Annesley* case:

Mr. *Hume Campbell*, of Council for the Prisoners, said, that although he knew by the Course of the Court at the *Old Bailey*, he was not at Liberty to observe upon the Prosecutor’s Evidence, yet he apprehended that for the Ease of the Court, he might just open the Nature of the Defense, without making any Observations upon it.257

This sort of intermediate step obviously led to a wider role for counsel. Lawyers also transformed arguments on points of law into opportunities to plead defendants’ cases. Such was the situation in the *Tickner* litigation when at the end of a hotly contested smuggling prosecution defense counsel argued as follows:

This Act of Parliament is against those that are arm’d with Fire-Arms, in order to be aiding and assisting in running and carrying away uncustomeed Goods. This is laid to be uncustomeed Goods. For my part, I don’t know what uncustomeed Goods are. Here’s nothing appears that these are any goods. Here’s carrying something in Bags: Because Smugglers carry Tea in Oilskin Bags, it therefore must be Tea. The Attorney General takes Notice of this extraordinary Point of Law, and submits it to the Court. This Evidence given to the Court and Jury is not sufficient to maintain the Indictment.259

Here factual merits and legal issues were blended and defense counsel used the confluence to advocate on his client’s behalf. Counsel were quick to seize on other opportunities as well. When the defendant claimed that illness rendered him “entirely incapable” of arguing, counsel was allowed to argue on his behalf.260 And when a

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255 Want indicated in his testimony in the *Tyrrell* case that a number of the questions asked in court “were stated particularly in the brief, and asked from the brief.” *Id.*
256 Annesley, OBSP (July 1742), at 1.
257 *Id.* at 19. For other efforts by defense counsel to expand their role, see J. BEAT- TIE, supra note 3, at 361.
258 *Tickner*, OBSP (Oct. 1747), at 262.
259 *Id.* at 265 (the page is marked “256,” but in light of the surrounding pagination, this was clearly a typographical error).
260 Davis, OBSP (Dec. 1771), at 25.
client's statement was unclear, counsel might jump in to clarify matters.\footnote{261} Pressure by counsel to expand the range of advocacy was continuous.

In response to the growing availability and participation of counsel, defendants, in increasing numbers, chose to make no statement of their own to the court but to put their cases entirely in their lawyer's hands. Their refrain was "I leave it to my counsel."\footnote{262} When parties were unrepresented they tended to complain about their disadvantage. William Bird\footnote{263} was the keeper of an overnight lock-up called the Round-House in St. Martin's Lane. One sweltering evening in July he apparently allowed the cells to become overcrowded and several people died due to the ghastly conditions. As his case was about to begin he complained to the court: "It's hard I can have no Council; Serjeant Hayward is out of Town; Serjeant Wynne is out of Town; Mr. Benny and Mr. Theed desired to be excused. Mr. Glanville has given his Brief to one Mr. Spiltimber and he has returned it."\footnote{264} Bird's lament suggests the esteem in which counsel was coming to be held, especially by those, like Bird, who had substantial contact with the justice system.

A far more poignant illustration of the same point is to be found in the case of James Morris,\footnote{265} whom Mary Shortney claimed had raped her. Finding herself without funds to prosecute the action, Mrs. Shortney and her husband put an announcement in the \textit{Public Advertiser} seeking contributions to help finance the litigation. The announcement read, in part:

\begin{quote}
To the truly charitable and humane friends of and enemies to the violators of virtue.

An unhappy gentlewoman whose husband being under unavoidable misfortunes, was necessitated to be continually on the
\end{quote}

\footnote{261} See Vestenberg, OBSP (April 1782), at 184. (Counsel in this forgery case declared: "My Lord, it may be proper to explain what is meant, where he desires no notice should be taken of his going to Holland for fear some disagreeable consequences should ensue." \textit{Id.} at 193). Bolland, OBSP (Feb. 1772), at 133.

\footnote{262} See, e.g., Brezeau, OBSP (Jan. 1752), at 63 ("The rest I leave to management of my counsel"); White, OBSP (Jan. 1762), at 56; Trout, OBSP (Dec. 1766), at 12; Smith, OBSP (Jan. 1772), at 97; Bolland, OBSP (Feb. 1772), at 126.

\footnote{263} Bird, OBSP (Sept. 1742), at 42.

\footnote{264} \textit{Id.} Bird was a particulary unsavory defendant and counsel's refusal is not surprising. It does, however, suggest the limits of the "cab rank" principle in the middle of the eighteenth century. For modern discussions of English counsel's obligation to serve whoever seeks to employ him, see W.W. BOULTON, A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES 6 (5th ed. 1975) ("Counsel is bound to accept any brief in the Courts in which he professes to practise at a proper professional fee . . . "); Rondel v. Worsley [1967] 3 All ER 993, 998 (H. L. 1967) (same). Modern observers, however, have found that the rule is "substantially a myth." \textit{See} JOHN A. FLOOD, BARRISTERS' CLERKS, THE LAW'S MIDDLEMEN 80 (1983).

\footnote{265} Morris, OBSP (April 1757), at 120.
foot amongst her friends endeavouring to extricate him, was way-
laid by a base and notorious villain, who under pretence of assist-
ing her husband, inveigled her into his power, and cruelly used
and ravish’d her . . . . This (now) unhappy couple, having nothing
to back them in this melancholy prosecution, but the justness of
their resentment, fear, that it is absolutely necessary for them to
have proper council at the trial, to minutely examine his witnesses
(as they are told he has a great many prepared) have it not in their
present abilities to fee council (as he too well knows and boasts of)
unless charitably aided . . . .266

Although Shortney and her husband were held in contempt of court
for causing the publication of a piece that might "tend to prejudice a
question depending in judgment,"267 they did manage to obtain
counsel. The defendant Morris was, however, acquitted and the vic-
tim's husband jailed on the contempt charge. That the Shortneys
would go to such lengths to secure the assistance of counsel amply
demonstrates the rising value placed on legal assistance. In more
mundane cases, as well, litigants routinely voiced the desire for legal
assistance.268 The importance of representation now was widely
recognized.

d. Preeminence: 1780-1800

The trends to greater lawyer activity and aggressiveness were
accentuated in the last twenty years of the eighteenth century as the
OBSP noted a huge jump in the number of cases involving counsel.
With this new influx of lawyers came a palpable increase in the con-
tentiousness of proceedings. Cross-examination became ever
sharper and more important. There can be no better introduction
to this era than a review of a number of its classic cross-
examinations.

1. The Full Flowering of the Art of Cross-Examination

William Phillis269 was accused of having used one of the oldest
confidence schemes in the world to steal Thomas Clarke's money.
The victim claimed that Phillis had tricked him into paying a large

266 Id. at 119. On the difficulty of successfully prosecuting a rape case, see J. Beattie, supra note 3, at 124-27.

267 Morris, OBSP (April 1757), at 119. Bentham may have had this case in mind
when he argued that parties ought to be allowed to advertise to raise funds to help
defray the cost of litigation. See 4 J. Bentham, supra note 17, at 620-21.

268 See, e.g., Armstrong, OBSP (May 1777), at 217 ("As I have no counsel will your
Lordship please to hear what I have to say?"); Downes, OBSP (June 1777), at 242 ("I did
expect a counsel to plead for me and some of my friends here, but there are none of
them here."); Cook, OBSP (July 1777), at 258-59 ("I am quite unprovided with attorney
or counsel; I hope to find lenity from the court . . . .").

269 Phillis, OBSP (April 1782), at 339.
sum as security on a "diamond" ring the two had "found" while walking in the street. After Clarke paid the money the defendant allegedly absconded, leaving the victim with a worthless glass ring. When Clarke had finished telling the court his story, Phillis asked: "Is counsellor Fielding in court, I was told that the bill was thrown out." Fielding was not available but, on the spur of the moment, another barrister, Mr. Sylvester, volunteered to handle the case. His cross-examination of Thomas Clarke went as follows:

[Sylvester.] You thought this purse was a good thing, did you not?
[Clarke.] I could not tell what it was.
[Sylvester.] You cried halves at first?
[Clarke.] Yes.
[Sylvester.] You know you had no right to it?
[Clarke.] Certainly.
[Sylvester.] Then you knew somebody else had had a right to it, you thought it was lost by somebody?
[Clarke.] I knew it was not the man's property.
[Sylvester.] It was a third person's?
[Clarke.] Yes.
[Sylvester.] With what conscience would you think of defrauding the man of it?
[Clarke.] I did not know who it did belong to.
[Sylvester.] But you might have advertised it?
[Clarke.] Yes.
[Sylvester.] Then you were both rogues alike, you both agreed to cheat a third person?
[Clarke.] Begging your pardon I had no such meaning.

[Sylvester.] What are you?
[Clarke.] A gardener.
[Sylvester.] Where do you live?
[Clarke.] At Isleworth.
[Sylvester.] That is not far from London, you know what tricks are?
[Clarke.] I come to London sometimes three times a week, sometimes four.
[Sylvester.] To Covent-garden market?
[Clarke.] To Newgate-market.
[Sylvester.] Still better?
[Clarke.] I sell my own property.

270 Id. at 340.
271 When the victim and defendant saw the purse containing the ring lying in the street, both stooped to pick it up. The victim immediately claimed that he should share half of whatever they had found. This confidence game preys on the all too human inclination to find profit in another's loss. Shakespeare remarked on it in Measure for Measure in Angelo's speech, declaring: "The jewel that we find, we stoop and take't." (Act II, Scene i). A very similar confidence game was used by the hustlers in David Mamet's film, House of Games.
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[Sylvester.] And other people's sometimes?
[Clarke.] Not without it is to oblige a friend.
[Sylvester.] Oh to oblige a friend you would sell other people's property sometimes, you have been in this way of life some years?
[Clarke.] Forty years and upwards.
[Sylvester.] Aye, and coming to Newgate-market three or four times a week, and yet never met with such a thing before?
[Clarke.] He was a clever looking man.
[Sylvester.] Why you are a clever looking man?
[Clarke.] I am not half so handsome as he was, to look at.
[Sylvester.] If he had brought the money you would have returned the ring?
[Clarke.] Certainly, Sir...272

This unrehearsed and unbrieved interrogation is a model of adversarial efficacy. It denigrated the victim in the eyes of the jury, emphasized his complicity in a shady scheme, subtly argued that the victim was responsible for his own predicament, and invited the jury to conclude that the incident did not warrant a criminal penalty. Sylvester was able to do all this at a moment's notice. What is more, the jury was persuaded by his effort and acquitted Phillis.

Cross-examination skills of this sort were much in evidence during the last twenty years of the 1700s. Two further examples should suffice to demonstrate the high level of forensic art achieved by counsel. John Knowles273 and John May were accused of burglary. The key witness against them was their accomplice, Henry Hart. He was closely cross-examined concerning his criminal exploits, his immediate return to a life of crime after serving a sentence for a felony conviction, and his strong desire to avoid execution even if it meant giving damning evidence against his former comrades.274 He was so

272 Phillis, OBSP (April 1782), at 340-41.
273 Knowles, OBSP (Feb. 1782), at 213.
274 Defense counsel's cross-examination of Hart went as follows:
[Hart.] I was three years and seven months upon the hulks, it was the first time.
[Defense Counsel.] How soon did you take to this course?
[Hart.] I cannot tell.
[Defense Counsel.] How many days might it be?
[Hart.] It might be November or December.
[Defense Counsel.] Not begin directly?
[Hart.] No; I had two guineas and a half to spend, Mr. Campbell gave me; I worked at my business a little, at a glass maker's; I have not been tried here above once or twice.
[Defense Counsel.] You cannot tell really?
[Hart.] Am I obliged to tell it.
[Defense Counsel.] Tell the truth if you can?
[Hart.] I was never cast but once; I was tried upon another wrong affair; I was took up in Park Street for this robbery, in the middle of the street I was seen coming out of a house, I thought it the best way to give evidence
thoroughly discredited that although Knowles and May appeared guilty they were acquitted.

This outcome so shocked prosecuting counsel and the court that in a second, related burglary trial, both counsel and the judge went to extraordinary lengths to ensure conviction. In the second case, after Hart was cross-examined, a number of witnesses were recalled to the stand to corroborate those parts of his story amenable to such support. The court then spent the entirety of a long closing reviewing Hart’s evidence and the basis upon which Knowles and May might be convicted despite the criminal and untrustworthy character of their chief accuser. The two defendants were found guilty, but when Hart was called as a witness in a later case on the same day, the editor of the OBSP described the lasting impact of the Knowles proceedings:

Mr. Silvester [defendant’s counsel] objected to the testimony of Hart, Mr. Mingay [prosecuting counsel] informed the court of what had passed in the morning respecting Hart, Mr. Silvester objected to it. Mr. Recorder [the judge] said he would receive the evidence subject to the objection and reserve it for the opinion of the judges. Mr. Mingay then said he would not call him.

The original examination had driven Hart from the courtroom permanently.

The trial of George Stevens and James Day for burglary provides another example of outstanding cross-examination. There one of the foremost counsel of the era, William Garrow, questioned Elizabeth Mason about her claim to have received stolen goods from the defendants.

when I was taken up and my life in danger, May, Knowles, and Munday, and Best there, and myself.

[Defense Counsel.] This was just three weeks after you came out?

[Hart.] It was a week after Christmas; none of the property was found upon me; about three weeks or a month after the robbery was committed I was taken up; I never gave no information before this. I cannot guess how many robberies I have been concerned in during the three weeks, I believe but three or four, which I am to appear to.

[Defense Counsel.] You understand you cannot be tried for this?

[Hart.] If I make my evidence good I believe I am safe.

[Defense Counsel.] You understand by swearing against those men, your life is safe?

[Hart.] Yes, surely.

[Defense Counsel.] You don’t mean to begin again?

[Hart.] No; not to go any more.

Knowles, OBSP (Feb. 1782), at 215.

275 Id. at 217.

276 Verrier, OBSP (Feb. 1782), at 245.

277 Id. at 249.

278 Stevens, OBSP (Dec. 1786), at 141.
Mr. Garrow. You deal wonderfully in alias's, how many names have you besides Mason?

[Mason.] No more.

[Garrow.] Have you always told the same story?

[Mason.] I have.

[Garrow.] That you swear positively.

[Mason.] Yes.

[Garrow.] And that is as true as anything else you have been saying?

[Mason.] Yes.

[Garrow.] I believe they were wicked enough, these officers that disturbed you, to take you to the Justice's?

[Mason.] They took me there; I told the Justice as near as I could.

[Garrow.] Then you was examined the second time, and you told him the same story?

[Mason.] Yes.

[Garrow.] Now upon your oath, the first and second time did not you say that Stevens knew nothing of the matter?

[Mason.] I said no such thing; I never swore any such thing neither on the first or second examination.

[Garrow.] You know Mr. Lucy?

[Mason.] Yes.

Lucy. She said, if Stevens did not bring them there, she did not know how they came?

[Mason.] I did not say that; I did not know Stevens; I said, that the first time that Stevens was in my house, I did not know that he brought the property.

[Garrow.] They did bring it?

[Mason.] I told the Justice that at the first examination.

Court. I shall lay every word that she says out of the case.\footnote{279 Id. at 144.}

Again the effectiveness of the examination in serving a variety of goals is apparent. It forcefully attacked the witness's credibility. It also drove her into an ever tighter corner with respect to her prior statements. It used impeaching materials to the most telling effect. Finally, it welded all this together into an interrogation that cried out for the exclusion of her testimony.

2. The Cruelty of Examination

These three cases are but the tiniest sample of the flowering of the art of cross-examination during the late eighteenth century. The skill and intensity of the interrogations is striking. The forensic style of the era was marked by another characteristic as well. Not only was it contentious and clever, it was cruel as well. One gets some hint of this in Garrow's assault on Elizabeth Mason. His open-
ing question about aliases was a sharp jab. It was followed by the 
insulting sarcasm of the question: "I believe they were wicked 

enough, these officers that disturbed you, to take you to the 

justice's?" The coup de grace was the appearance of Lucy, who 
undermined the witness's claims about what she previously had said. 

Garrow was out to destroy Mrs. Mason's credibility and succeeded. 

This sort of examination reveals the lawyer's willingness in the late 

1700s to adopt brutal and nasty tactics to advance a client's cause. 

The Old Bailey was well on its way to becoming a slaughterhouse of 

reputations.\(^{280}\)

Examples of heightened rancor in cross-examination abound. 

Patrick Kenny claimed that he had been robbed of a guinea by Mathew Mathison\(^ {281}\) while the two were drinking in a pub. Defense 
counsel's second question set the tone for the interrogation.

Why then that was the first time you contradicted yourself and 
allowing for the country where you come from, you have told a 
good story indeed, and varied very considerably in it; you said, in 
the first instance, you pulled out seven and that he wanted a 
guinea of a particular date, and then you said you had seven re-

maining in your hand, and that you missed a guinea after you had 
taken the silver in change for the gold?\(^ {282}\)

Not only was Kenny immediately called a liar, his Irish heritage was 
denigrated as well. It is not surprising that Kenny almost immedi-
ately lost his composure and declared: "You will have no more 
from me than what I have given to my lord; I have been examined as 

much as any gentleman can, and I don't chuse to answer improper 

questions."\(^ {283}\) Kenny had played into counsel's hands. The judge 
reacted negatively to his declaration and counsel became even more 
strident. Counsel's closing remark sums up the tone of the whole 
affair. He declared: "If the jury give as little credit to you as I do, 
they will not mind what you say."\(^ {284}\) Evidently they agreed and ac-
quitted the defendant.

Counsel's barbs might be focused on any oddity in the witness's

\(^{280}\) A number of acute observers decried this acerbic methodology. In discussing 
the need to limit provocative interrogations by counsel Bentham declared:

For one occasion in which, under the spur of the injury, the injured wit-
ness has presented himself to my conception as overstepping the limits of 
a just defence,—ten, twenty, or twice twenty, have occurred in which the 

witness has been suffering, without resistance and without remedy, as 

well as without just cause, under the torture inflicted on him by the op-

pression and insolence of an adverse advocate.

2 J. Bentham, supra note 17, at 86-87 n.*.

\(^{281}\) Mathison, OBSP (Dec. 1781), at 57.

\(^{282}\) Id. at 58.

\(^{283}\) Id.

\(^{284}\) Id. at 59.
character, demeanor, or physical appearance. The real objective seems to have been to provoke or unsettle, thereby gaining an advantage before the jury. When John Marshall and John Ball were prosecuted for highway robbery, one of the witnesses against them was John Orange. Garrow, for the defense, employed his usual combative style of questioning. After opening with a remark belittling an observation made by the witness, he said: “I observe you wear false curls, do you pull them off when you go to bed?” This sort of attention to the appearance of the witness could only have been intended to demean and upset.

Most frequently counsel’s attacks focused on the witness’s character. This was the case in the Knowles litigation in which Henry Hart was discredited. Sometimes the subject of examination was expanded to include even the witness’s spouse. Such was the case in the prosecution of Richard McGowing and Michael Scandling. There, Garrow not only attacked the victim’s reputation but that of his wife as well, probing relentlessly concerning her indictment in relation to a robbery. The witness was moved to declare: “I will tell you, gentlemen of the jury, if a man has been guilty once of a fault, he is always guilty . . . .” In a similar vein, in the case of Ann Kelby, defense counsel, Mr. Alley, repeatedly dwelled upon the fact that the victim’s husband had been abroad for years and she was living with another man. At one point Alley, with notable sarcasm, said to the victim: “Don’t be affected, madam, because, if you live in an honourable way, as an honourable woman, nothing can be attached to you which is not true . . . .”

It should come as no surprise that this brutal sort of examination provoked a strong reaction from its targets. Patrick Kenny’s angry refusal to stand further questioning was not an infrequent response. Counsel and witness, in many cases, became adversaries in a brutal verbal duel. Perhaps the clearest examples of this contentious struggle were to be seen when counsel clashed with witnesses involved in law enforcement. John Morgan and a number of others were charged with counterfeiting. The first witness against them was John Clark, a man who had, for many years, been involved in pursuing criminals. On direct examination he claimed to “have been employed for the Mint thirteen years.” Defense counsel

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286 Id. at 239.
287 McGowing, OBSP (July 1792), at 322.
288 Id. at 323.
289 Kelby, OBSP (Nov. 1796), at 49.
290 Id. at 50.
291 Morgan, OBSP (Jan. 1782), at 146.
292 Id.
and Clark had the following exchange on cross-examination:

[Defense Counsel.] It has been said, you have been employed thirteen years by the mint; I wish the jury to understand, who you are; are you not one of the officers at Bow-street?

[Clark.] Yes.

[Defense Counsel.] Do not you expect some share of the reward?

[Clark.] As much as you do with your brief, sir, for the conviction; this is an imputation thrown on me, which I do not deserve, I will appeal to the Court, and Recorder, who knows me; I am perhaps worth as much money as you are.

Court. Whatever the operation of the question may be, is for the judgment of the jury; the question is certainly a proper one; whether there is a reward, and do you expect a part of it; your being entitled to it, is no sort of imputation upon your conduct, it is a proper question; the jury have a right to know the circumstance in which a witness stands.293

Although Clark's combative response may have been nothing more than an expression of his anger, it was more likely to have been the tactical ploy of a seasoned veteran witness out to neutralize a barrister's cross-examination. In this case it succeeded, as counsel asked no further questions about rewards and the like.

A similar clash took place during the burglary prosecution of Robert Horseley.294 There Garrow squared off against another experienced thief catcher, Julius Lyon. From the prior evidence it appeared that Lyon had taken great pains to prepare other prosecution witnesses for trial and had informed them of the possibility of a reward. Garrow attacked:

[Garrow.] Upon your oath, do not you prosecute this young man for the reward?

[Lyon.] I will answer you all legal questions; I do not wish for any reward, but if there is any reward to be given, I expect it.

[Garrow.] Have you talked to any people about the reward?

[Lyon.] I talked to a good many people; you know young beginners want to learn; you know you called me a sucking thief-taker the other day.

[Garrow.] Young beginners, sucking thief-takers want to learn a little, do they?

[Lyon.] So you said.

[Garrow.] What do you say to learning girls?

[Lyon.] I do not deal with little girls.

[Garrow.] Have you had any particular conversations about the reward for this young man?

293 Id. at 147-48.

294 Horseley, OBSP (Dec. 1786), at 100.
[Lyon.] No more than what was said in open company; other people instructed me what to do.

[Garrow.] You gave instructions to indict this man?

[Lyon.] I got the instructions made out.

[Garrow.] Was you so good as to instruct any body else about it?

[Lyon.] I did not know.

[Garrow.] Then of course you did not?

[Lyon.] No, I did not, that I swear positively.

[Garrow.] You never told any body, that if he was sworn to positively, there would be a reward?

[Lyon.] No, never in my life.

[Garrow.] You never told any body if the locks were broke there would be a reward?

[Lyon.] I did not.

[Garrow.] Did you ever tell any body, that unless the locks were broke there would be no reward?

[Lyon.] I do not know that I did.

[Garrow.] If such a thing had happened this morning you would have remembered it?

[Lyon.] I do not know but I should.295

Again the duel-like quality of the examination is striking. Lyon’s answers were carefully couched and evasive. He and Garrow were locked in a stylized form of combat.

This sort of give-and-take might be acceptable with professional witnesses who could take care of themselves, but, with many others, it led to strong protests. In the first instance these might come from the witnesses themselves. The trial of John Elliott296 for the shooting of Mary Boydell was an unusual case because Elliott, an apothecary, claimed to be in the grips of insanity when he acted. One of the witnesses on his behalf was John O’Donnell, another apothecary. Garrow prosecuted the case and had the following exchange with the witness:

[Garrow.] He [Elliott] gave directions for bleeding and blistering and taking proper care of his patients?

[O’Donnell.] In that respect I saw no insanity, but in particular points the man was always insane.

[Garrow.] How many of them [patients] might he have poisoned in the course of that six months?

[O’Donnell.] I do not know that he poisoned any.

[Garrow.] Then during the six months he was visiting?

[O’Donnell.] He was getting into his own back parlour standing and swearing, and d—n-g like a madman, and had every appearance of a madman; in short he was a madman.

[Garrow.] But during this time he was a mad apothecary, attending

295 Id. at 107-08.
296 Elliott, OBSP (July 1787), at 810.
his patients in partnership with you, and taking care of his patients?

[O'Donnell.] Men are partially insane.

[Garrow.] And that does not make them worse apothecaries perhaps?

[O'Donnell.] Perhaps not.

[Garrow.] Then I am sure I will not ask you another question.

Court. I am a little at a loss what to understand from you.

[O'Donnell.] I have been so bullied; witnesses should be examined with candor, and not put out of temper, and out of their senses, so as not to be able to understand what they say.297

O'Donnell's complaint and the court's intervention were predictable responses to the intensely adversarial approach of the period.

Counsel's zeal also caused participants other than the witness or judge to react. When Garrow used his cunning cross-examination to undermine the story of a youthful witness in the case of Edward Cox298 he provoked the ire of the jury. One of their number interjected:

Jury. We consider it only as the evidence of a child, Mr. Garrow, and you should not try to draw things from him.

Mr. Garrow. There was no intention to draw anything from him but what is the truth; you do me great injustice to suppose me capable of doing any such thing; but it is my duty, and the duty of everyone else, to get at the fact: however, gentlemen, it is in your hands, and much good may come of it.299

The jurors' evident recognition of Garrow's methods and willingness to intervene suggest the concern the adversarial approach was capable of generating.

3. Counsels' Dominance.

Such concerns notwithstanding, advocates became the dominant courtroom force in the last twenty years of the eighteenth century. They exerted ever more control over most aspects of the trial. It had been the tradition at the Old Bailey that both counsel and the defendant were free to question opposing witnesses. In the latter half of the century, more and more frequently defendants left the task to their counsel alone.300 In the 1780s cases started to appear in which counsel chided or praised his client for contributing. This implied a new relationship in which counsel was expected to handle such matters while the client's contributions were treated as excep-

297 Id. at 823.
298 Cox, OBSP (Jan. 1792), at 83.
299 Id. at 84.
300 See supra note 262 and accompanying text.
tional. In 1782 John Graham and his wife Jane were tried for fraudulently altering a bank note. During the cross-examination of a printer who had supplied the defendants with equipment that might be used to commit such a crime, Graham sought to challenge an identification, declaring: "We were particularly pointed out to him." His counsel immediately responded: "Mr. Graham do you chuse to leave your defence to me or not?" Plainly, counsel was instructing his client not to interfere in the examination. The Graham case is not typical, but it does seem to indicate a shift in attitudes about courtroom participation.

The mirror image of Graham is presented in Richard Lightowler’s forgery prosecution. There the defendant made an issue of whether his recorded confession was read over to him. Eventually, one of the Bow Street officers involved in the prosecution offered to send for a fellow officer to corroborate his claim that the confession had been read. The defendant responded: "I have no desire [that the officer be called], I do not think it would serve me." Lightowler’s counsel then declared: "There is no harm in your suggestion of the question at all." This solicitous response was clearly meant to allay any fears the defendant might have had about raising issues in his own defense, as well as to suggest to the jury that the defendant’s failure of proof should not be used against him. That counsel should have thought such a comment useful again indicates that there had been a change in expectations about a defendant contributing to an interrogation.

During this era the lawyer’s control over other aspects of the trial grew as well. James Barnard was tried for stealing a bank note. He produced a large number of witnesses to vouch for his good character. After eight had testified the court declared: "It is impossible to say more than has been said to his character." De-

301 Graham, OBSP (Sept. 1782), at 510.
302 Id. at 516.
303 Id.
304 Graham also is unusual because both the defendants’ solicitor and counsel refused to call certain witnesses despite their clients’ request that they do so. After the verdict had been rendered in the case, the two lawyers had an extremely candid discussion of the matter with the judge in open court. Id. at 521.
305 Lightowler, OBSP (July 1792), at 307.
306 Id. at 310.
307 Id.
308 The case of Francis Parr, OBSP (Jan. 1787), at 212, provides further evidence of such a shift. There, when the defendant began to read a prepared statement, counsel interrupted him and said: "Hand it here first that we may see if it is proper to be read." Id. at 221. Counsel obviously thought it proper to attempt to exercise some control over his client’s remarks in this context.
309 Barnard, OBSP (Dec. 1786), at 85.
310 Id. at 86.
spite the court's observation, defense counsel proceeded to offer three more character witnesses. Counsel seems to have felt sufficiently in command to disregard the court's express wish. An even more dramatic assertion of a similar sort took place during the trial of James Wilson, who was accused of the theft of military stores from the Tower of London. At the conclusion of the prosecution's case, Mr. Const informed the court that he would not be calling the accomplice. This triggered the argument reproduced above. Near the end of that dispute, Mr. Const declared: "It is a novel doctrine indeed, that the Counsel for the prisoner shall say in what manner the Counsel for the prosecution shall conduct his case . . . . I am not obliged to call a witness to contradict the witnesses already produced . . . . I am to use my discretion . . . ." Const's statement and the judge's apparent endorsement of it cede almost total control of the evidentiary process to partisan counsel whose objective was to present the most persuasive and consistent case.

One final area in which counsel appeared to assert greater authority was application of the rules of evidence. In the Graham case, prosecuting counsel attempted to show that Mrs. Graham had issued a second forgery almost identical to the one that was the subject of the prosecution. The offer of this "other crimes" evidence led to the following exchange:

Prisoner's Counsel. I submit to your lordships, whether that question can be asked.

Court. Why do you ask the question Mr. Howarth?

[Mr. Horwarth, Prosecuting Counsel.] [S]he was paid by a fifty pound bank bill, which I shall produce to you.

Court. We have considered of it, and it is not evidence, the case must rest here, upon this being a forged bill; she may have issued other forged bills, and may not have issued this.

Here prosecuting counsel provided little basis to support the admission of the evidence and the court seemed to find that it had vir-

311 Wilson, OBSP (Nov. 1796), at 60.
312 See supra notes 176-77 and accompanying text.
313 Wilson, OBSP (Nov. 1796), at 64.
314 Graham, OBSP (Sept. 1782), at 510.
315 Writing early in the nineteenth century, S.M. Phillipps set out in classic form the rule restraining the introduction of material from other crimes: "[I]n a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offense at another time and with another person, and that he had a tendency to such practices, ought not to be received in evidence." S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 143 (3d ed. 1817) (citation omitted).
316 Graham, OBSP (Sept. 1782), at 520.
317 Prosecuting counsel may have had stronger arguments available. Phillipps noted that "on an indictment for uttering a bank note, knowing it to be forged, proof that the prisoner had passed other forged notes of the same kind, is evidence that he knew the note in question to be forged." S. PHILLIPPS, supra note 315, at 143.
tually no alternative but to prohibit its introduction. Defense counsel's well crafted objection yielded significant tactical advantage.

Counsel were often sensitive to the critical evidence issues in their cases and made strategic choices in light of them. In opening remarks they might warn jurors about an opponent's impending objection. In close cases the critical battles often were fought in terms of the rules of evidence. This was the situation in the case of Richard Ramsbottom, who was accused of forging a dead marine's will. The trial was marked by a series of evidence disputes. At the outset, the prosecution offered the will and sought to authenticate it with a book of minutes produced by the probate court clerk. The judge only acceded to this proposal after a lengthy examination by defense counsel. The testimony of the prosecution's next witness was cut short because of a hearsay objection. The third witness produced a record of marine enlistments that was only admitted after an elaborate enquiry concerning authenticity. The testimony of another prosecution witness was cut short by application of the hearsay rule, and the witness after that was challenged because of her alleged interest in the dead marine's estate. She only was allowed to testify when it was shown she had released her interest. The struggle continued, punctuated by questions about authentication and wrangles about the hearsay rule. In the end, despite a major prosecution effort including a multiplicity of exhibits and the testimony of 15 witnesses, the defendant was acquitted. In no small measure this was due to defense counsel's obdurate struggle to enforce the evidence rules.

Garrow nicely summarized defense counsel's conception of the rules of evidence during his representation of Thomas Reilly and Abraham Davis. He declared: "The King cannot break down, or infringe, or invade any one of the rules of evidence; he has no prerogative to say that innocence shall not be protected." According to Garrow, it was the lawyer who wielded the protective power of the rules, and such protection was as fundamental a right as any established when the Stuart assertion of the royal prerogative was rejected in 1688. The rules were now being depicted as an established and inalienable part of defense counsel's arsenal.

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318 See, e.g., Levy, OBSP (Oct. 1782), at 670-71. (Prosecuting counsel in his opening remarks declared: "I take it for granted, an objection will be made by Mr. Sylvester of counsel for the prisoner . . .").
319 Ramsbottom, OBSP (Sept. 1787), at 911.
320 Reilly, OBSP (Sept. 1787), at 1062.
321 Id. at 1073.
322 Quite clearly, Garrow was suggesting that curtailment of the evidence rules would interfere with the law in the same way that the Stuart exercise of the prerogative
Adversarial advocates clashed ever more vigorously with each other in these contentious times. The sharpness of the conflict between counsel was most clearly visible during cases like the prosecution of William Priddle and a number of others for conspiring to procure the improper conviction of George Crossley on a charge of perjury. Among counsel for the defendants was the illustrious Thomas Erskine, generally agreed to be one of the greatest barristers of all time. Confronted with such an august opponent, counsel for the prosecution (Silvester, Fielding and Garrow) chose a strategy that attempted to neutralize Erskine's eloquence. Mr. Silvester in his opening remarks discussed his opponent's talent at length:

[W]hat becomes of my friend's able speech? You will admire his talents; you will say, pity so much ingenuity should be exerted in behalf of men so undeserving; pity it is that his great abilities are not employed on the other side, to bring these men to justice; if they had, he would have made us all shudder at their iniquity; and we should have sat down, lamenting, that such men ever existed, and that the Court had it not in their power to inflict a more exemplary punishment on such atrocious offenders . . . .

Gentlemen, if the evidence comes up to but half of what I have opened, you will not let the able harangue of my learned and eloquent friend, Mr. Erskine, outweigh the testimony of so many witnesses.

The sharpness of the tone and forcefulness of the attack here are unmistakable. Eventually, Erskine responded in kind with a lengthy statement filling more than eight double columned pages in the OBSP. When Erskine began to question witnesses on the defendants' behalf, prosecution counsel fought him every step of the way with evidentiary objections and the like. In their closing the prosecuting lawyers repeated their warnings about Erskine's eloquence. In the end they were able to persuade the jury to convict. Overcoming Erskine, however, clearly was an important step towards winning the verdict.

4. The Trial Advocate as Virtuoso

The Priddle case provides a variety of other insights into the

\[\text{power had. For a discussion of the prerogative question, see J. Cockburn, supra note 2, at 252-59; Havighurst I, supra note 8.}
\text{Priddle, OBSP (April 1787), at 580.}
\text{On Erskine's preeminence, see P. Devlin, supra note 14, at 121; Dictionary of National Biography 853 (1968) (22 vols.).}
\text{Priddle, OBSP (April 1787), at 587.}
\text{ld. at 603-11.}\]
growth of adversarial advocacy during the late eighteenth century. Both the editor of the OBSP and the lawyers who tried the case were preoccupied with the fame of the lead counsel for the defense. It was, in all probability, this that moved the editor to provide a verbatim report of the proceedings and this that dictated prosecuting counsel's tactics. The 1780s and 1790s saw the rise of the trial advocate as virtuoso performer whose words and exploits were to be savored. A stylistic change of great symbolic significance occurred in the late 1780s when the OBSP began regularly listing the names of counsel appearing in each case. The lawyers had become important in their own right rather than as adjuncts to the process. Their doings were reported in increasing detail, and it was their adversarial achievements as questioners and strategists that began to be the center of attention in the OBSP. This was also, in all likelihood, the reason for the detailed reporting of the Phillis case, which was an unremarkable proceeding save for a brilliant spur-of-moment cross-examination. The attention paid to this sort of performance is powerful evidence of a growing appreciation of contentious procedure.

Erskine was perceived as a full-fledged courtroom star by the time he appeared in the Priddle case in 1787. Because of the general anonymity of the records until the 1780s, it is not possible through the OBSP to trace his rise to greatness. The session papers provide a far more detailed picture, however, of the rise to fame of another lawyer who appeared in the Priddle case, William Garrow. In that case Garrow served as junior counsel and handled the least important tasks, like the recitation ("opening") of the indictment. Yet during 1787, Garrow was an incredibly busy criminal lawyer. His presence was noted in more than two dozen cases, and his job in almost all of them was to defend men and women charged with felonies. This he did with impressive zeal and vigor. His was the biting cross-examination in the Stevens case that led to the discrediting of Elizabeth Mason, his the pugnacious challenge to the bewigged witness in the Marshall case, his the bullying intimidation of John O'Donnell, the apothecary, in the Elliott case, and his the verbal duel with Lyons, the thief-catcher, in the Horseley case. He more

327 Phillis, OBSP (April 1782), at 339. See supra notes 269-72 and accompanying text.
328 Stevens, OBSP (Dec. 1786), at 141. See supra notes 278-79 and accompanying text.
330 Elliott, OBSP (July 1787), at 810 (here Garrow appeared on behalf of the prosecution). See supra notes 296-97 and accompanying text.
331 Horseley, OBSP (Dec. 1786), at 100. See supra notes 294-95 and accompanying text. Repeat appearances by advocates were clearly nothing new in the Old Bailey.
than any other lawyer mentioned in the OBSP pursued the adversarial style that featured sharp attacks on witnesses. The slashing cross-examination was his trademark and although it sometimes provoked an angry response from a witness or even a juror, as in the Cox case, he wielded it, as well as the other tools of advocacy, with great success.

By 1792 Garrow was appearing in a more senior capacity. Approximately half his cases were now for the prosecution. This shift from predominantly defense work to a more balanced load perhaps bespeaks an increase in prestige and expanded opportunities for employment by wealthy prosecutors. This new clientele included the Bank of England in the Gortley case and the government in the Hubbard case. Garrow remained the sharp-tongued and clever advocate in these cases. Although this sometimes got him into trouble, his enthusiasm for the battle remained undiminished.

The 1797 OBSP materials provide a glimpse of Garrow at the zenith of his powers. In the case of Launcelot Knowles, Garrow was the senior prosecuting barrister. Knowles was charged with falsely claiming the ability to obtain pardons for criminals in return for the payment of certain fees. Knowles said he was able to arrange these pardons because of his influence with highly placed individuals including the Duke of Portland, then the “head of the Administration.” The Duke and a number of other illustrious witnesses appeared to deny the defendant’s claims. Garrow here, in essence, proceeded on the Duke’s behalf, and it may be conjectured that he was called into the case to ensure the most vigorous prosecution. When defense counsel made his remarks upon the evidence (as he was entitled to do because this was a misdemeanor case) he accorded Garrow the highest accolade. He cautioned the jury:

Unfortunately for the prisoner at the bar, it has fell to my lot to defend him upon this occasion, opposed to one at least, or two of my learned friends, who, in this Court, for many, many years, have practised with honour to themselves and advantage to the public; men who have conducted prosecutions, and conducted defenses

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Langbein noted multiple appearances by at least two lawyers before Sir Dudley Ryder in the 1750s. See Langbein II, supra note 3, at 23-24 n.80.

Cox, OBSP (Jan. 1792), at 83. See supra notes 298-99 and accompanying text. Bentham singled out Garrow for his sharp-tongued approach to a child witness. See 5 J. BENTHAM, supra note 17, at 156.

Gortley, OBSP (June 1792), at 281 (Garrow served as junior to another barrister here).

Hubbard, OBSP (March 1792), at 181 (Garrow was lead counsel in this riot/murder prosecution.).

In addition to the cases already cited, see Cluer, OBSP (Dec. 1791), at 7.

Knowles, OBSP (Jan. 1797), at 89.

Id.
too with equal honour to themselves and to the public, and have had more experience considerably than the person who now has the honour of addressing you; but satisfied I am, that notwithstanding I have powerful opponents, notwithstanding my learned friend has been able to excite your attention, and to raise your passions against the prisoner at the bar, you will, as honest citizens, not give a verdict against the prisoner, from any eloquence that may have belonged to my learned friend. 338

This is the very sort of speech that had been used in an effort to blunt the impact of Erskine's eloquence in the Priddle case. Here it was employed against Garrow.

Garrow brought to the Knowles case unwavering zeal on his client's behalf. He went so far as to interrupt his opponent's remarks to emphatically reiterate his frustration that this misdemeanor prosecution was not "such a case that [the defendant] could be hanged for." 339 Garrow's rise to the top of his profession was the clearest demonstration that adversarial attitudes and methods had come to dominate the courtroom. Garrow was the archetype of the contentious advocate, zealous on his client's behalf and merciless to his opponents. That such a man had reached so lofty a position is powerful proof that the contentious spirit had triumphed.

4. The Employment of Forensic Rules to Regulate the Presentation of Proof—The Hearsay Rule

The preceding section noted that Old Bailey lawyers ever more frequently used the rules of evidence as a tool in their efforts to control the litigation process. For the purposes of that analysis, the rules were treated as a fixed and unchanging instrumentality which lawyers might use to advance contentious objectives rather than as a mutable factor affecting the adversarial climate of the adjudicatory system. In the present section the focus will be somewhat different; the object of attention will be the changing nature of the rules, in particular the rule prohibiting the use of hearsay, and the effect of change on the adversariness of the courtroom environment.

It has been said that the rule prohibiting the use of hearsay is intimately associated with an adversarial approach to litigation. 340

338 Id. at 92. On Garrow's career, see 7 DICTIONARY OF NATIONAL BIOGRAPHY 907-08 (1968) (22 vols.) ("Garrow was a consumate advocate. Remarkable alike for his acuteness and tact, he was unrivalled in the art of cross-examination.").

339 Id. at 93.

Hearsay evidence is that which incorporates in a courtroom presentation words written or spoken on a prior occasion by a person unavailable for present examination. It asks the trier of fact to believe that what was previously said or written is true. When such words are used in court there is no way for an opposing party to cross-examine the out-of-court speaker and thus no chance to examine his or her reliability. By banning the use of much out-of-court material, the hearsay rule compels more live testimony and increases opportunities for adversarial scrutiny. Because of the hearsay rule’s direct link to cross-examination it, in itself, may be used as a barometer of adversarial change. The stricter the enforcement of the hearsay rule, the more adversarial the proceedings are likely to be, all else being equal.

a. The Loose Treatment of Hearsay in the Early Years

In the first three sample years of the century (1717, 1722 and 1727), hearsay evidence appears to have been treated very loosely indeed. Both verbal and written materials were used with very little restraint. When Mrs. Welsted found some of her things missing she suspected her servant, Bithia Mitchel. "[U]pon inquiry [she] found some of them sold to a Chandler Woman, who bought them of the Prisoner’s Mother." This information appeared to have been presented at trial by the victim rather than the chandler woman and falls into the classic hearsay pattern of out-of-court statements introduced to prove the truth of what they assert—in this case that the defendant’s mother had sold some of the stolen items.

The pattern was repeated throughout the era. In the case of Christopher Atkinson it was claimed that the defendant had beaten Alice Peak to death. The second witness against Atkinson was Mrs. Hart. She testified "[t]hat the Deceased told her, that the Prisoner threw her down a pair of Stairs in his own House . . . [t]hat the Deceased said, the Prisoner stampt on her Belly in the Coach, and that she laid her Death to him." Again the testimony was based upon out-of-court words and seems to have been received without objection.

341 The hearsay definition here employed is the “simplified one” used in the Federal Rules of Evidence. See Fed. R. Evid. 801. It only treats as hearsay out-of-court statements or acts intended as assertions. In the early nineteenth century, the English courts appeared to adopt a more expansive test that treated a broader range of conduct as hearsay. This broader rule was given classical expression in Wright v. Tatham, 7 Eng. Rep. 559 (H.L. 1838) (act of letter writing offered to show writer’s state of mind held to be hearsay).
342 Mitchel, OBSP (Nov. 1716), at 2.
343 Id.
344 Atkinson, OBSP (Dec. 1721), at 2.
345 Id.
Letters and other writings were used in the same manner. When Thomas Panting was accused of filing down gold coins so that the filings might be separately sold for a profit, he denied the charge and claimed that he was pursuing honest business on behalf of a gentleman living in Beesley, Gloucestershire. One of the prosecution's witnesses was allowed to testify that "he sent to the Minister of the Place and received from him two Letters which were produced in Court: The Import of which was, that he had made very diligent Inquiry, and that there was no such Person there." The unhesitating use of hearsay here was perhaps even more significant than in the preceding cases because counsel prosecuted the action and appeared to have carefully assembled the evidence. It would seem that not even counsel was particularly concerned about potential hearsay problems in this era.

The reasons for significant reliance on hearsay are not hard to trace. Quite frequently, as in the Atkinson case, hearsay was used because there was no other readily available source of information. Necessity provided a motive for the introduction of hearsay in situations other than the death of a critical witness. One 1722 rape case involved an assault upon a five year old who apparently was unable or incompetent to testify. If her assailant were to be prosecuted, the child's out-of-court remarks had to be utilized. To all appearances they were and the defendant was convicted. Hearsay might prove useful in less dramatic situations as well. It might help explain, for example, how the prosecutor had come to suspect the defendant or provide a substitute for the testimony of a witness rendered unavailable because of his or her pecuniary interest in the proceedings.

The use of hearsay in all these circumstances deprived the opposing party of any opportunity to conduct cross-examination. Participants in Old Bailey proceedings apparently grasped the dangerous potential of using untested materials to convict defendants. Butler Fox was accused of robbing Sir Edward Lawrence. Arrayed against him were a number of witnesses including Jonathan Wild who would, in a few short years, be exposed as the mastermind of a series of criminal schemes including the framing of innocent men. In Fox's case, Wild "depos'd that when the prisoner was...

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346 Panting, OBSP (Sept. 1717), at 2.
347 Id.
348 Booty, OBSP (May 1722), at 6.
349 See, e.g., Brockelsby, OBSP (July 1722), at 6.
350 See, e.g., Rhodes, OBSP (Dec. 1726), at 7.
351 Fox, OBSP (Jan. 1722), at 4.
352 For a discussion of the career of Jonathan Wild, see infra note 391. On his activities in the Old Bailey, see infra notes 392-405 and accompanying text.
taken, his Wife said, This is your Friend Hawkins's doing." This sort of inculpatory hearsay statement could be incredibly damning and was virtually immune to effective refutation. For schemes like those of the mercenary and cunning Wild, lax hearsay rules were made to order.\(^{354}\)

b. Tentative Changes in the 1730s

In the 1730s, courts began to develop hearsay rules that excluded untested material or that required the party offering it to demonstrate its particular reliability. Developments in this area were sporadic. In any given year, cases sensitive to a particular hearsay issue might be found immediately preceding reports failing to identify an almost identical hearsay problem. Alternatively, one sort of hearsay might be successfully challenged in a case, while other sorts might be admitted without question in the same proceeding. There are a number of explanations for these variations. First, in any developing area of the law, accurate identification of a problem is only likely to be managed by the more skilled and sophisticated judges and lawyers. Since Old Bailey cases were handled by a number of different judges and advocates, fluctuations are to be expected. Further, both the OBSP and other materials suggest that the hearsay problem was not seen in the eighteenth century as a single issue but rather as a series of discrete questions about different sorts of statements made in different circumstances.\(^{355}\) This division made it virtually inevitable that there would be a diversity of results in different settings.

Despite these difficulties, rules proscribing hearsay did grow. A heightened sensitivity was signaled by cases like that of George Mason,\(^{356}\) who was accused of highway robbery. During the prisoner's defense the following exchange took place:

*Prisoner.* I and two more were drinking at the Cow's Face when the

\(^{353}\) Fox, OBSP (Jan. 1722), at 4.

\(^{354}\) It should be noted that Fox was acquitted. Judges and juries often showed caution in cases when thief catchers were involved and hearsay was relied upon. See J. Beat-tie, *supra* note 3, at 52-53. For other cases of acquittal, see, e.g., Mitchel, OBSP (Nov. 1716), at 2; Atkinson, OBSP (Dec. 1721), at 2. Convictions, however, were not infrequent. See, e.g., Wright, OBSP (Dec. 1721), at 8; James, OBSP (Feb. 1722), at 8. The problems posed by the testimony of accomplices and those seeking rewards inspired the development of prudential guidelines counselling acquittal where there was no independent confirmation of the claims of interested witnesses. See L. MacNally, *supra* note 6, at 195-99; S. Phillipps, *supra* note 315, at 30-35 ("though accomplices are received as witnesses, their testimony ought to be received by a jury with a sober degree of jealousy and caution." Id. at 31); Langbein II, *supra* note 3, at 96-103.

\(^{355}\) See 5 J. Wigmore, *supra* note 340, at 20-28 (hearsay treated differently depending on whether original statement was made under oath or whether hearsay was used to confirm or corroborate other evidence).

\(^{356}\) Mason, OBSP (Dec. 1731), at 13.
Prosecutrix came in Drunk, and would have pawn'd a pair of Stays for some Liquor, for she said she had no Money (tho' now she swears that I robb'd her of 2 s,) But neither Mrs. Fowler, who keeps the House, nor her Man, would let her have any more.

Richard Mason, the Prisoner's Brother. The Man at the Cow's Face told me the same thing.

Abraham Mason. And he told me.

Anthony Dennison. And me too.

The Constable. And the same Man told me, that the Woman pull'd out 2 s that the Prisoner and his two Companions were three notorious Rogues, and that he would draw them no more drink, but turn'd 'em out of Doors, for he would not have a Disturbance in his House.

The Court. What was said by the Man or the Woman at the Cow's Face is no Evidence on either side, except they were here to swear it themselves.357

The judge's instruction here redirected the focus of the proceedings to in-court testimony rather than hearsay materials.

Most of the early hearsay rulings came about when judges acted sua sponte rather than in response to party objections. Such was the situation in Mason and in the case of William Flemming.358 In the latter, when two of the defendant's witnesses wanted to repeat what a man named Cartwright had said about the offering of bribes to frame the defendant, the court cut them off. The judge declared: "What they said is no Evidence, they should have been here to have sworn it."359 The same thing happened in the case of Colonel Francis Fuller,360 where the court stopped a surgeon from repeating the out-of-court observation of a barber that the deceased victim's blood seemed "fizy."361 The Fuller case, however, illustrates how much hearsay was still beyond notice or objection. Words from the deceased were quoted by at least two witnesses without objection.362

357 Id. at 14.
358 Flemming, OBSP (Sept. 1732), at 215.
359 Id. at 217.
360 Fuller, OBSP (Sept. 1737), at 179.
361 Id. at 184.
362 Id. at 180 (One of the witnesses, Edward Richards, testified as follows: "I shook hands with [the deceased], and told him, I was heartily glad to see him. Oh! says he . . . I am a dead Man; for the Blows that Colonel Fuller gave me, has occasioned my Death."); id. at 185 (The other witness, Serjeant Gage, declared: "[The deceased] told me he had had so many Falls, that he believed he had bruised or broken something within him . . . ").

In the factual context of the case, it is clear that neither of the above statements was made with a belief in impending death. Neither, therefore, satisfied the classical requirements of the dying declaration exception to the hearsay rule. As delineated in a later OBSP case, a dying witness's statement was not to be admitted if he did "not apprehend himself to be in danger, when he [did], from the awful circumstances it [was] supposed he [would] speak the truth, and nothing but the truth." Dignam, OBSP (May 1777), at
Similarly, the coroner quoted, without restraint, from the out-of-court declarations of several surgeons (who later testified), as well as from an anonymous letter of accusation. Finally, one of the physicians who examined the body of the deceased was asked by counsel to relate a conversation he had had with a corporal in the dead man's military detachment. This statement also was admitted without objection.

c. The Solidifying of the Hearsay Rule

Over time, courts gradually grew more circumspect about hearsay. A common refrain of trial judges, from the middle of the century on, was that the witnesses should limit themselves to what they knew personally. The court made an effort to confine the victim of a theft in this manner in the Symonds case. The judge said: "You don't know any thing particularly, whether this House was locked or fastened, but as you have been told." The same was true in the case of Jane Stabock, when the judge said to the prosecuting witness: "Then all you know of your own Knowledge is, that you lost Money at several Times out of your Till; do you know any Thing of your own Knowledge against the Prisoner at the Bar . . . ?" With the passage of the years, the pace of such questioning quickened. The equivalence between such questions and worries about hearsay was made particularly clear in the case of Samuel Drybutter. There, when one of the prosecution's witnesses made a questionable assertion he was immediately asked: "Do you know this of your own knowledge, or by hear-say?"

As an alternative to enquiry about personal knowledge, courts and counsel moved with increasing frequency to bar witnesses from...
reciting hearsay material. This prophylactic approach may be seen in some early cases like Fuller. Over time it too grew in frequency and importance. This development signified that judges and lawyers alike were becoming more adept at identifying hearsay and keeping it away from the jury.

The growing level of sophistication about hearsay led to disputes between counsel and the court about the application of the rule. A notable example occurred in the forgery prosecution of Dr. William Dodd. The hearsay question arose when Mr. Manley, a key prosecution witness, sought to narrate a conversation he had engaged in with the prosecutor, Lord Chesterfield. The court was in favor of giving Manley latitude, but defense counsel objected: "Mr. Manley knows very well what is evidence, and therefore I desire he will not enter into any other particulars." The court dismissed counsel's objection and desired that the witness be allowed to "go on without interruption." The testimony resumed and immediately Manley launched into a detailed description of his conversation with Chesterfield. Counsel objected again.

Counsel for the Prisoner. This is, my Lord, what passed in conversation with Mr. Manley and other persons in the absence of Dr. Dodd, your lordship knows it is not admissible evidence against the prisoner.

Court. Lord Chesterfield has been already examined as an evidence. They may ask the question of Lord Chesterfield, whether, when the bond was offered by Mr. Manley, he disowned it: this is in the course of the narrative; I shall not sum this up to the jury; but when they bring Dr. Dodd present it will be evidence.

Counsel here made it clear that there was a serious hearsay problem. The court understood the claim but, because of the availability of Lord Chesterfield, saw the matter as trivial since Chesterfield could easily be recalled to the stand to confirm the fact that he had disowned the bond. Yet the court conceded counsel's correctness and, in a gesture familiar to practitioners in modern adversarial

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372 See, e.g., Stevens, OBSP (April 1752), at 130 (The editor of the OBSP said of the victim: "[S]he not being with her husband [who had gathered certain information and related it to her] could not be admitted to give evidence of hearsay."); Ethridge, OBSP (Feb. 1767), at 117-18 (The court and a witness named Hodges engaged in the following dialogue: "Court. 'Then you know no more than what she told you.' Hodges. 'No, no more.' Court. 'That is not proper evidence.'"); Weil, OBSP (December 1771), at 34 (The court refused to allow a defendant to read from a document to substantiate his alibi.); Jones, OBSP (Sept. 1772), at 360 (The court advised a witness: "[D]on't say a word of what Jones said of Sunderland when he was not there.").

373 Dodd, OBSP (Feb. 1777), at 94.

374 Id. at 112.

375 Id.

376 Id. at 113.
courts, promised to take steps to insure that the jury would not place excessive reliance on this hearsay information.

Still, counsel had done more than gain a technical victory. He had sensitized the court to the problem inherent in much of Manley's testimony. When Manley resumed his evidence with another damaging hearsay recital the court immediately cut him off declaring: "That is not evidence most certainly."\textsuperscript{377} Manley returned to his story but the court now was on its guard and when he approached further hearsay revelations the court brought him up short with the instruction: "What passed between you and Mr. Robertson does not go to affect the prisoner at the bar."\textsuperscript{378} Defense counsel had won his point. He had convinced the court of the hearsay danger and gotten an increasingly vigorous response. Here it was not the court's choice, but counsel's tenacious argument that changed the tenor of the proceedings and erected a barrier to second-hand evidence.

The opposite might also occur and a skillful advocate might cleverly skirt the hearsay barrier. William Carter\textsuperscript{379} was accused of having drowned his wife, Elizabeth. He was a brutish husband who had frequently abused her. In defending Carter, Garrow sought to show that Elizabeth had drowned herself. The first witness called by the defense was Ann Sherwood. Garrow obtained her opinion that Mrs. Carter "was low spirited, and rather melancholy."\textsuperscript{380} He then asked her: "Had you at any time any conversation with [Elizabeth Carter], with respect to her situation?"\textsuperscript{381} Before the witness could provide details of the conversation the court intervened declaring: "I do not think that conversation is evidence; it must be evidence both ways or none; it would not be evidence against the prisoner."\textsuperscript{382} Here the court on its own motion sought to block what might be classified as hearsay. The court's view would appear to have been based on the notion that the wife's out-of-court words communicated her intention to kill herself and that the use of such words to prove her suicide would be hearsay.\textsuperscript{383} Garrow was undeterred by the court's ruling. His next question to Sherwood returned to the issue of low spirits as he asked: "Have you at any time had conversations with her, leading you to form that opinion?"\textsuperscript{384}

\textsuperscript{377} Id.
\textsuperscript{378} Id.
\textsuperscript{379} Carter, OBSP (July 1787), at 869.
\textsuperscript{380} Id. at 877.
\textsuperscript{381} Id.
\textsuperscript{382} Id.
\textsuperscript{384} Carter, OBSP (July 1787), at 877.
He followed that up with others that developed the link between the witness’s assessment of the victim’s mental state and the victim’s remarks. Eventually, Garrow succeeded in getting Sherwood to support her opinion by quoting the dead woman’s belief that “she would make away with herself.” Garrow cleverly avoided the hearsay barrier by emphasizing the witness’s evaluation of Mrs. Carter’s state of mind rather than the truth of her threats to take her life. Carter was acquitted and, although the judge accepted the verdict, he sharply criticized the defendant for “the brutality of his character and conduct.” A sophisticated manipulation of the hearsay rule was used to win a case for a most unsympathetic defendant. The rules had become part and parcel of the adversarial contest.

During the course of the 1700s, judges came to recognize the dangers of hearsay. The problem was met by the eventual development of a rather strict rule of exclusion. That rule became ever more formal, and both counsel and the court were increasingly likely to insist on its enforcement. The hearsay rule generally worked to compel the production of live testimony. In this way it increased the opportunities for contentious examination. It also served as a tool that counsel might manipulate in pursuing a client’s interests. As with the other aspects of adversarial development charted in this section, the growth of the hearsay rule came in three stages. In the earliest years of the century there was little concern about the use of out-of-court words. By the 1730s, the rudiments of the hearsay rule were established and at least sporadically applied. By the closing decades of the century a more sophisticated rule had been developed and was being applied in a constantly broadening range of cases.

III

Factors Contributing to the Development of the Adversarial Method

A. Thief Catchers

1. Thief Catchers in Their Heyday

The rise of contentious procedure undoubtedly was associated with the historical and intellectual changes that swept English society in the seventeenth and eighteenth centuries. In subsections B and C below, several of those changes and their relation to adversarial reform will be considered. The present subsection, however, will analyze a cause internal to Old Bailey proceedings that appears...
to have spurred early adversarial development. In 1692, Parliament enacted perhaps the first criminal statute permanently establishing a reward for the apprehension of a specified class of felons. The legislation focused on highway robbers and offered the very considerable sum of £40 for their capture and conviction. The establishment of such bounties and the promise of other rewards by government bodies and private individuals created substantial incentives for the development of a cadre of professional thief catchers. These men made it their business to capture and prosecute criminals for pay. What the OBSP demonstrates about them is that they were wise not only in the ways of the street, but of the courtroom as well.

From the earliest days of the sample, thief catchers could be seen at work. Perhaps the best introduction to their efforts is a brief examination of the activities of one of the most notorious of their number, Jonathan Wild. Although he would be executed three years later, and was involved in a variety of criminal schemes including the framing of innocent men, in 1722 Wild appeared the preeminent thief catcher. Four cases that typified his approach to criminal prosecution were the two trials of Butler Fox and those of James Wright and John James.

In the first of two highway robbery prosecutions, Fox was accused of accosting Sir Edward Lawrence. Sir Edward opened the

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387 See 2 Leon Radzinowicz, A History of English Criminal Law and Its Administration From 1750 at 57 (1948-1968) (5 vols.). This first piece of legislation was 4 W. & M., c. 8 (1692). Both Beattie and Langbein provide fine brief summaries concerning the reward system in general. See J. Beattie, supra note 3, at 50-54; Langbein II, supra note 3, at 106-14.

388 See 2 L. Radzinowicz, supra note 387, at 57-68 (detailed discussion of the range of Parliamentary rewards available to thief catchers).

389 Id. at 83-137.

390 For a computation of the vast sums spent on statutory rewards at the end of the eighteenth century, see 2 L. Radzinowicz, supra note 387, at 68-72. For a detailing of the serious impact of the reward system on “police officers,” see id. at 235-84. For a similar analysis concerning private thief catchers, see id. at 307-46.

391 See Gerald Howson, It Takes a Thief: The Life and Times of Jonathan Wild 3-7 (1987). Wild’s notoriety was widespread and long lived. He provided the inspiration for Gay’s The Beggar’s Opera, Defoe’s Moll Flanders, and Fielding’s Jonathan Wild. Radzinowicz understated Wild’s importance as a thief catcher but did note his claim to have been responsible for the capital conviction of more than 70 defendants. See 2 L. Radzinowicz, supra note 387, at 54 n.5.

392 Fox, OBSP (Dec. 1721), at 6; Fox, OBSP (Jan. 1722), at 7. It is clear that these two cases involved the same defendant because of the identical cast of characters and overlapping stories presented.

393 Wright, OBSP (Dec. 1721), at 8.

394 James, OBSP (Feb. 1722), at 6.
testimony with a brief description of the robbery, which he said was committed by two disguised highwaymen whom he could not identify. The victim was followed to the stand by William Hawkins, who claimed to have been Fox's accomplice in the holdup. Hawkins had been arrested when he tried to sell some of the things taken in the robbery and, apparently in return for immunity, had agreed to testify against his alleged companion. The next witness for the prosecution was Edward Carter, who claimed that the defendant and Hawkins had come to his house with items taken during the robbery. Then a man named Norris testified that the defendant had hired a horse from him and returned it under suspicious circumstances. Finally, it was Jonathan Wild's turn. He "deposed, that on Hawkin's information, going to the Prisoners House he found him there. That the Prisoner's Wife then said to her Husband. Ay you Rogue! this is your Friend Hawkin's doing." The defendant denied the charge and said that his only association with Hawkins was the acceptance of certain goods in payment for a debt. He offered a great number of character witnesses and was acquitted. He was, however, remanded to custody pending resolution of another charge.

Fox's second trial was held in January of 1722. He was accused of the highway robbery of John Gunn. Again the victim opened the testimony by describing the robbery but not the robbers. Again the victim's testimony was followed by that of the alleged accomplice, Hawkins. After Hawkins's accusations a man named Porringer testified that he saw Fox and Hawkins together on the day of the robbery. Norris appeared for a second time to repeat his story about the hiring and return of a horse. Once again Wild was the final prosecution witness. He reiterated what he had said in the earlier trial about Fox's wife's incriminating words. Again the defendant put on witnesses to his good character. He also attacked Hawkins as having a grudge against him. The jury found Fox not guilty for a second time.

James Wright was tried for highway robbery in December, 1721. The first witness against him was the victim Samuel Towers, who said three disguised men had robbed him. Once again the informer, William Hawkins, was the second witness. He said that he, Wright, and a third man had all participated in the robbery of Towers. The now familiar Norris testified that the defendant along with

395 "Both the authorities and private prosecutors actively sought the cooperation of accomplices as the most likely means of apprehending and convicting offenders. What was offered was usually described as a pardon. But in fact . . . accomplices were most often in practice granted immunity from prosecution." J. Bie, supra note 3, at 366-67 (citation omitted); see Langbein II, supra note 3, at 84-91.
396 Fox, OBSP (Dec. 1721), at 6.
397 Wright, OBSP (Dec. 1721), at 8.
Hawkins had hired horses from him. Arthur Turner supported Norris's claims by testifying that the defendant and his associate had "put up their Horses in his Stables." Jonathan Wild then appeared and repeated an incriminating conversation he had allegedly had with the defendant and Hawkins concerning a pair of pistols. The final prosecution witness was T. Askew who said that when Wright was arrested he declared: "That Rogue Hawkins!—I expect no other than to be ty'd up." Wright denied the charges and said Hawkins was lying to save his own life. He apparently had no witnesses to offer and was found guilty.

The last of this quartet of prosecutions involved John James and two others who were accused of the highway robbery of Elizabeth Knowles. The victim testified that she was assaulted on the street by a group of unknown assailants and her possessions stolen. She said that she went to Jonathan Wild for help and that he had captured the defendants. Thomas Eades then testified that he along with the three defendants had robbed Knowles. Jonathan Wild then described the arrest of the defendants and their admissions of guilt. Two of the defendants offered token opposition at trial. The third, Henry Avery, however, presented a strong case with respect to his character. He was acquitted while the others were condemned.

As may be glimpsed in the foregoing descriptions, Wild's work often followed a rather precise pattern. He concentrated his efforts on defendants charged with highway robbery, an offense with a clear statutory authorization for rewards. In all the cases, the testimony fell into a well-organized and predictable pattern. The pattern was to present a bona fide victim, couple his or her charges with the testimony of an accomplice, and corroborate the accomplice's tale, insofar as possible, with evidence from Wild and his associates. The cases are striking in their reluctance to rely on externally verifiable facts. Instead they emphasized confessions, admissions, and hearsay. Always at the center of these proceedings stood Wild himself. His testimony in each of the four cases was the final link in the chain of proof, the evidence that brought the charge home to the defendant. Although he was a witness, Wild seemed, in each of these cases, to serve an extra function. He was the advocate wise in the ways of the underworld, whose remarks were supposed to persuade the jury.

When compared with run-of-the-mill prosecutions from 1722, Wild's seem more tightly organized and offer a larger number of witnesses. Despite their organization, or perhaps in reaction to

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398 Id. This sort of team effort, with several thief catchers testifying in the same case, occurred throughout the century. See J. Beattie, supra note 3, at 56-57.
399 Wright, OBSP (Dec. 1721), at 8.
400 James, OBSP (Feb. 1722), at 6.
these cases were treated with some suspicion, and acquittals were frequent.

Wild's special brand of advocacy may be seen even more clearly in a pair of 1722 cases in which he appeared on the defendant's behalf. The first of these involved John Duvall and Mary Bright, who were accused of the theft of a number of items from Dorothy Molony's house. The defendants claimed that the charges arose out of a family dispute about the ownership of certain land. They offered three witnesses to prove that the case had been instigated by Mr. Molony, whose out-of-court statements were frequently quoted by the witnesses. At the conclusion of this evidence, Wild appeared as the fourth, and final, defense witness. He declared "that Molony was a prisoner last Sessions, on suspicion of putting off Counterfeit Money." The defendants were acquitted. The organization of this case, with its corroboration of the defendants' claims by witnesses quoting Molony's out-of-court admissions and its carefully orchestrated attack on his character, replicates the focused and forceful advocacy of Wild's efforts on behalf of prosecutors.

Perhaps even more revealing was Wild's role in the case of Charles Johns and James Bradshaw, who were accused of theft. The prosecution hinged on the testimony of the victim, Elizabeth Howard, and her lodger, Mary Floyd. The defendants presented a strong alibi and proof that the victim had accused someone else of the crime. This led the court to carefully examine Elizabeth Howard's background. It appeared that she ran a bawdy house and that Mary Floyd was a prostitute. At the moment these facts were revealed Jonathan Wild took Mary Floyd "by the Arm, and looking wishfully in her Face; said, he had an Information against her, for picking a Gentleman's Pocket of a Watch; then the Gentleman was sent for, but happening not to be at home, she was set at liberty again."

Wild appeared in these cases, as well as the prosecutions, as both witness and advocate, watching proceedings and jumping in with crucial information at the most opportune moment. He advanced his courtroom goals by providing useful testimony and by stage managing the proceedings. Such a combination was open to

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401 As noted with respect to the cases of Brown, OBSP (Aug. 1727), at 3, see supra note 132 and accompanying text, and Car, OBSP (Oct. 1737), at 204, see supra notes 210-12 and accompanying text, sharp advocacy quite frequently provoked a negative response from jurors in cases adjudicated in the early part of the eighteenth century.
402 Duvall, OBSP (April 1722), at 3.
403 Id.
404 Johns, OBSP (May 1722), at 7.
405 Id.
serious abuse.\footnote{406} It allowed an entirely self-interested individual to run litigation for profit, while free of the constraints imposed on counsel. Wild had at his disposal a variety of sources of evidence to frame his cases including hearsay materials and the corroborative contributions of his assistants. It should come as no surprise that in these circumstances false accusations were fabricated to convict innocent men.

2. Reforms Introduced to Curb Thief Catcher Abuses

After Wild’s exposure, judges and jurors became more sensitive to the risks posed by the thief catcher system. Concern about corrupt thief catcher practices echoed throughout the OBSP during the rest of the century, especially during the 1730s. This heightened level of concern may have been one of the most important reasons for the courtroom changes that began to take place at that time. One finds support for this proposition in cases like that of Charles Patrick\footnote{407} and William Meeds, who were tried for the offense of highway robbery. As was so often the case, the key prosecution witness was their alleged accomplice, George Sutton. During his testimony, Sutton said he had been seized by three thief catchers who, without consulting a justice of the peace, took his “Information in Writing.”\footnote{408} The court found this procedure highly objectionable, declaring:

Those People ought not to take upon them to prepare and draw up Informations, and to settle among themselves whatever they design the Informist shall swear before a Justice, or in this Court. Informations are to be taken before a proper Magistrate that the Publick may be satisfied, that no unfair Practices have been made use of.\footnote{409}

The judge’s insistence on formal and impartial procedure describes the direction in which court reform was to move. This theme was to be reiterated in a substantial number of later cases as the courts be-

\footnote{406}{William David Evans, one of the most insightful early nineteenth-century analysts of evidentiary questions, said of such evidence:

The suspicion of fabrication rises highest, when the witness is one of those inferior retainers of the law, who are commonly attendant upon courts of judicature, who have a cunning acuteness in the observation of its proceedings, and who, from their occupation, are frequently in the habits of swearing to facts, in their own nature liable to misrepresentation, and placed beyond the reach of detection or contradiction.}

\footnote{407}{Patrick, OBSP (Sept. 1732), at 185.}

\footnote{408}{Id. at 186.}

\footnote{409}{Id.}
gan to insist on procedural integrity.\textsuperscript{410}

Although judicial concern could be kindled in an appropriate case, during the course of the 1700s it was defendants who ever more vigorously argued that their captors had behaved improperly. Prisoners made this into an adversarial issue and the anchor of their defense in a substantial number of criminal prosecutions. This is what William Fleming\textsuperscript{411} did in his 1732 prosecution for highway robbery. He went one step further and coupled his claim with the offer of evidence tending to show that "Jo. Williams the Thief-Catcher"\textsuperscript{412} had tried to frame him. The evidence, however, was based on hearsay, and the court excluded it. Flemming was convicted.

Defendant's complaints, however, often succeeded when there was solid evidence to support them. Such was the situation in the case of James Page.\textsuperscript{413} There the defendant provided witnesses to show that suggestive tactics had been used to secure his identification. This testimony, coupled with a number of witnesses to his good character, led to Page's acquittal.

As counsel began to participate in a larger number of cases, they pursued the issue of thief catcher behavior with particular energy. It came to serve as one of the central themes of cross-examination. This was typified by the sharp interrogation of John Clark, a member of the Bow Street thief catchers' organization, in the case of John Morgan.\textsuperscript{414} Counsel for the defense took pains to point out Clark's association with Bow Street and his interest in a reward. Despite Clark's protest, the court found such examination to be en-

\textsuperscript{410} See, e.g., Buck, OBSP (Sept. 1722), at 210 (improper behavior of part-time "lawyer" led court to order his arrest); Wager, OBSP (Dec. 1736), at 14 (accomplice's accusation that thief catchers tried to get him to incriminate an innocent man led to their arrest); Page, OBSP (April 1742), at 78 (court re-examined key prosecution witness after doubts about his veracity were raised); Dennis, OBSP (June 1747), at 160 (court ordered prosecutor to send for witness who could corroborate her story); Boswell, OBSP (July 1767), at 251 (court took constable to task for failure "to wait till there was a greater certainty").

\textsuperscript{411} Flemming, OBSP (Sept. 1732), at 215.

\textsuperscript{412} Id. at 216.

\textsuperscript{413} Page, OBSP (April 1742), at 78.

\textsuperscript{414} Morgan, OBSP (Jan. 1782), at 146. Beattie remarked upon defense counsel's special willingness to exploit this issue. See J. Beattie, supra note 3, at 58. Beattie also quoted Colquhoun's famous statement on the matter:

[It] is obvious that the Counsel for all prisoners, whose offences entitle the prosecutor and officers to a reward, generally endeavor to impress upon the minds of the jury an idea that witnesses who have a pecuniary interest in the conviction of any offender standing upon trial, are not, on all occasions, deserving of full credit, unless strongly corroborated by other evidences; and thus it is that many notorious offenders often escape justice.

\textbf{Patrick Colquhoun, A Treatise on the Police of the Metropolis 222} (2d ed. 1796) (\textit{quoted in J. Beattie, supra note 3, at 374}).
Similarly, in the case of Peter Verrier and William Harding, counsel repeatedly emphasized improprieties in the identification and witness preparation procedures utilized by the professional thief catchers who organized the case. These matters, and an apparent excess of prosecutorial zeal, led the jury to acquit.

Some of the most dramatic clashes between counsel and witnesses came in the context of the examination of thief catchers. When Garrow and Julius Lyon squared off during Robert Horseley's trial for burglary it was clear that two professionals, thief catcher and barrister, were working their way over familiar ground. The same was true in the burglary prosecution of Richard Notely and the highway robbery trial of John Wheeler. In the latter, Garrow decried the manipulations of a thief catcher who behaved like a cunning "lawyer" in framing an exaggerated indictment. The defendant was acquitted.

All these attacks on thief catchers and reward seekers led to the creation of a series of procedural protections for defendants. Foremost among them was the latitude given defendants, and later their counsel, to challenge the dubious activities and practices of professional prosecutors. The thief catcher problem was, in all likelihood, one of the most important reasons for the expansion of the role of counsel in the Old Bailey during the early part of the century. With the passage of the Treason Act in 1696 Parliament had acknowledged, at least tacitly, the value of counsel to those faced with serious charges and carefully orchestrated prosecutions. It was only natural in light of that legislation for the courts to allow defendants not only to press their cases with increased vigor, but to employ counsel to do it for them.

Besides encouraging adversarial enquiry as a means of safeguarding defendants' rights, the courts took a number of other steps as well. These included a willingness to place perjurious prosecutors in jail for their lies, an insistence on the avoidance of suggestive behavior at identifications, a willingness to check on the

415 This exchange is reproduced in the text accompanying note 293 supra.
416 Verrier, OBSP (Feb. 1782), at 245.
417 Horseley, OBSP (Dec. 1786), at 100.
418 Notely, OBSP (Jan. 1787), at 300.
419 Wheeler, OBSP (April 1787), at 564.
420 Id. at 566.
421 7 & 8 Will. 3, c. 3 § 1 (1696). For an excellent brief discussion of the events leading up to the passage of this act, see Langbein I, supra note 3, at 307-10. I am indebted to John Beattie for first bringing this point to my attention.
422 See, e.g., Holms, OBSP (Sept. 1732), at 191; Sharp, OBSP (Sept. 1732), at 194.
423 See, e.g., Warner, OBSP (Dec. 1741), at 4 (jurors enquired: "Was there a mix'd Company when Blackburn picked them out at the Gatehouse?"); Verrier, OBSP (Feb. 1782), at 245.
reputations of those pressing claims that might garner rewards, and a keen interest in the production of witnesses who could corroborate important facets of the prosecutor's story.

While the activities of thief catchers were far from the only spur to reform, they were a very potent one. The need for methods to counterbalance the risks created by the reward system and unchecked bounty hunters must have been clear to Old Bailey judges and jurors alike. It was to be expected that in response to this danger defendants would be granted greater adversarial latitude in pressing their claims or in using counsel to do so on their behalf.

It should be noted, however, that the number of cases involving thief catchers was probably not large. The procedural and evidentiary activity manifest in Wild's cases in the 1720s was distinctly atypical. While the employment of procedural protections and counsel might have seemed useful in a number of cases, it does not appear that thief catchers, on their own, forced courts to embrace thoroughgoing adversarialism in anything like a majority of the cases tried. Moreover, the fears generated by thief catcher misconduct seemed to fade over the course of the century. The last great thief catcher scandal occurred in the 1750s, when Stephen M'Daniel and his gang were proven to have procured the improper conviction of a number of innocent defendants. Thereafter, "blood money conspiracies" do not seem to have been a particular worry until the second decade of the nineteenth century. To understand the second surge in contentious procedure, beginning in the 1770s, factors besides thief catching must be explored.

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424 See, e.g., Mooney, OBSP (Sept. 1742), at 25 ("The jury asked what Mr. Goodwin was, because there is a Reward in this Case.").
425 See, e.g., Dennis, OBSP (June 1747), at 160.
426 For a description of the M'Daniel case and a subsequent police scandal in 1816, see 2 L. Radzinowicz, supra note 387, at 326-46.
A caricature of John Wilkes produced by Hogarth.

B. Reform Movements of the 1760s and 1770s

The decision of a number of social reformers to use legal proceedings to challenge objectionable institutions may have significantly encouraged the rise of adversary procedure in the second half of the eighteenth century. This choice of tactics spawned a flood of cases concerning such matters as freedom of speech, the adequacy of political representation, the abolition of slavery, and the validity of imprisonment for debt. The difficulty of these questions and the new-found legal assertiveness of those pressing for change heightened contentiousness in the courts. The upsurge in reformist litigation also provided a number of lawyers with the opportunity to
refine adversarial skills that were then applied in other settings, including the criminal courts.

At the outset it should be noted that long before the middle of the eighteenth century English citizens were using the courts in efforts to vindicate their rights or to blunt the attempts of the government to impose its will upon them. Courtroom contests like that involving the prosecution of seven bishops of the Church of England for seditious libel played a critical part in the fall of James II.427 The bishops' acquittal by a Middlesex jury has been described as nothing less than "the opening phase of the Glorious Revolution."428 After the accession of William and Mary, new and better judges were appointed,429 Parliament sought to encourage judicial neutrality by adopting the Act of Settlement,430 and judges themselves began to behave in a more restrained and fairminded manner.431 As a result, litigants ever more frequently called upon the courts to adjudicate difficult questions of political rights.432

In the first half of the eighteenth century, however, litigation generally was used only as a last resort by those contesting the actions of the rich and powerful. A fine example of this pattern was

427 Seven Bishops' Case, 12 St. Tr. 183 (1638). For a detailed description of the events leading up to the trial and the arguments presented at the hearing itself, see G. Keeton, supra note 4, at 434-44. For excellent analyses of the jury procedure and libel issues raised in the case, see T. Green, supra note 3, at 262-63 and Philip Hamburger, The Development of the Law of Seditious Libel and the Control of the Press, 37 Stan. L. Rev. 661, 709-13 (1986). For an interesting discussion of the technical question about handwriting authentication that arose during the trial, see 2 L. MacNally, supra note 6, at 397-402.

428 G. Keeton, supra note 4, at 434.

429 See C. Fifoot, supra note 10, at 15 (Chief Justice Holt, in particular, was "[f]rugal," "upright," and independent); G. Keeton, supra note 4, at 114 ("[T]he separation of the law from the prosecution of political quarrels gradually induced in the judiciary that attitude of dispassionate detachment which is still one of its most striking characteristics.").

430 Act of Settlement, 12 & 13 Will. 3, ch. 2 (1701); see J. Cockburn, supra note 2, at 259-61.


432 See, e.g., Ashby v. White, 87 Eng. Rep. 810 (K.B. 1703). In a hotly contested election in 1700, Ashby was denied an opportunity to vote despite his apparent qualification to do so. In response he commenced an action in Common Pleas seeking damages for the infringement of his rights. Although the majority ruled to the contrary, Chief Justice Holt argued that Ashby had a right to vote and that, since his right was an incident of property ownership, its denial entitled him to damages as would the invasion of any other property right. Id. at 813-17. This novel analysis was adopted by the House of Lords after a spirited debate reiterative of Holt's arguments. See William L. Sachse, Lord Somers: A Political Portrait 224-25 (1975). Ashby projected the judiciary into an area of bitterly fought political contests and made the court an arbiter of fundamental rights. Id.
provided by E.P. Thompson in his book, *Whigs and Hunters*.\(^433\) Thompson studied the efforts of small land holders and forest dwellers to resist the attempts of Whig magnates to seize or enclose forest lands in the 1710s and 1720s. He found that the principle tactic of the forest dwellers was the organization of fraternal bands to physically oppose the depredations of the large landowners. Court cases arose only when other means of redress failed or when the forest dwellers faced criminal prosecution because of their acts of resistance. While those of modest means were frequently able to hold their own in judicial proceedings,\(^434\) the courtroom was not their forum of choice.

1. *The Reform Efforts of John Wilkes*

In the 1760s, this pattern began to change. Perhaps the single most important agent of change was John Wilkes. By birth, Wilkes stood little above the middle class and, throughout his remarkable career, described himself as the champion of the middling sort.\(^435\) His followers were, in large measure, drawn from that segment of society. Wilkite agitation was spearheaded by a group called the Society of the Supporters of the Bill of Rights [hereinafter SSBR]. One in every ten members of the SSBR was a lawyer, a great many others were printers, and the rest were businessmen of modest means.\(^436\) This group of activists pursued a number of different issues, all, at least initially, concerned with Wilkes's conflicts with the government. The political issues he pressed and the methods he employed captured the imagination and allegiance of thousands though his personal conduct was not above reproach.\(^437\) The Wilkites repeatedly chose the judicial forum as the battleground for

\(^{433}\) See Edward Palmer Thompson, *Whigs and Hunters* (1975). My discussion of the forest disputes is based on Thompson's work.

\(^{434}\) See, e.g., id. at 136 (tenants successful at Winchester Assizes on question of cutting beech trees); id. at 51 (grand jury refused to indict local landowner accused of interfering with red deer in Windsor); id. at 79 (despite vigorous prosecution, many defendants were acquitted in criminal proceedings at Wallingford).


\(^{437}\) See B. Schilling, supra note 436, at 130 (Schilling said of Wilkes that he "was a man of lurid personal morality, a member of the Medmenham brotherhood and a part-taker of its secret debaucheries, personally ugly, foolishly extravagant and ostentatious in his behavior."). In light of more recent scholarship like that of Rude and Brewer, these remarks appear excessive. *But see* Hogarth's caricature reproduced supra.
their contests with the government and sought legal solutions to their political problems. They were perhaps the first political crusaders to initiate judicial campaigns as a strategy for achieving their reformist goals.

Wilkes's initial confrontation with the government came in April, 1763. At that time he was serving as a member of Parliament and publishing a political paper called the North Briton. The paper was violently opposed to government policy and was peppered with innuendos about official misdeeds. The government sought a basis to prosecute and, when North Briton Number 45 was published, government counsel thought they had found it. Number 45 arguably contained a charge that the king had lied about peace proposals concerning the then ongoing war with France. This allegation served as the basis for a charge of seditious libel. Within three days of the paper's publication, a general warrant had been issued for the arrest of its publishers, including Wilkes, and the seizure of their personal papers.

Wilkes was swiftly incarcerated and preparations made for his prosecution. He and his supporters, however, lost little time in counterattacking. Within a week of the issuance of the warrant Wilkes's counsel, Sergeant Glynn, had commenced a habeas corpus proceeding seeking his release. From the outset of the struggle the Wilkites cast the battle as one concerning the fundamental right of citizens to speak. In his address to the court considering his habeas corpus petition, Wilkes set out what he considered to be at stake in the proceedings he had initiated to challenge his detention. He claimed that it was nothing less than "the liberty of all peers and gentlemen, and, what touches me more sensibly, that of all the middling and inferior set of people, who stand most in need of protection." The quality of Wilkes's legal strategy was superlative, a number of persuasive legal arguments were presented on his behalf, and the forum was carefully chosen to insure the greatest judicial receptivity. Wilkes won the case on a rather technical point,
but his supporters greeted his liberation as a tremendous victory.

If the North Briton affair had involved nothing more, it would not have been very different from a number of other prosecutions in which the government suffered defeat. The extraordinary aspect of the case, however, was that Wilkes was not content with his initial victory. Claiming false arrest, trespass, and theft of personal papers he, along with a group of printers, sued a number of government officials. In precedent-setting decisions Wilkes\(^4\) and the publishers\(^4\) recovered damages from Parliament's messengers, secretaries, and even Lord Halifax, for false arrest. Wilkes was awarded the remarkable sum of £1,000. The Wilkites pressed the campaign even further, attacking the general warrants used to seize Wilkes's papers. In *Entick v. Carrington*,\(^4\) the sympathetic Chief Justice of Common Pleas, Lord Camden, held that general warrants were unlawful. This ruling was later affirmed by Mansfield, no political friend of the Wilkites.\(^4\) Through their legal effort, Wilkes and his supporters had not only managed to defeat the government's prosecution but to expand freedom of the press and restrain broadcast searches and seizures based on general warrants.

Wilkes did not fare as well in his next confrontation with the government. In 1764 Parliament commenced another seditious libel prosecution against him, this time for the publication of a biting and perhaps obscene satire aimed at Alexander Pope and entitled "Essay on Woman."\(^4\) Leaving little to chance, the government secreted the key witness against Wilkes and moved swiftly to obtain a parliamentary determination that the challenged publication was libelous and should be burned. Seeing no hope for success, or perhaps showing uncharacteristic faint-heartedness, Wilkes fled into exile in France. As punishment for his flight, Wilkes was declared an outlaw, liable to incarceration should he return. He was at the same time expelled from Parliament.

Despite the threat of imprisonment, Wilkes returned to London in 1767 and, in an audacious maneuver, declared his candidacy both for Mayor of the city and a seat in the House of Commons. He cam-

\(^4\) Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763). Atiyah suggested that these cases were a turning point in the history of English liberty. See P. Atiyah, *supra* note 33, at 14.
\(^4\) 95 Eng. Rep. 807 (C.P. 1765).
\(^4\) Unless otherwise noted, my analysis of the "Essay on Woman" affair, including Wilkes's subsequent exile from and return to England, is based upon G. Rude, *supra* note 435, at 32-73. The specific object of this satire was Alexander Pope's *Essay on Man* (1733).
paigned as the candidate of the middling sort, and won a place in Parliament. The agitation surrounding his campaign gave the government pause about pursuing his outlawry. Wilkes, however, forced the government’s hand by surrendering to King’s Bench, and eventually Lord Mansfield ordered him jailed. After reviewing Wilkes’s case, Mansfield ruled on obscure and questionable grounds that the outlawry was invalid.\footnote{See Case of John Wilkes, 19 St. Tr. 1075, 1098-1116 (K.B. 1770) (citing defects in the wording of the document of outlawry); Edward Heward, Lord Mansfield 116 (1979).} Mansfield also ruled, however, that because of the existence of a number of outstanding misdemeanor charges, Wilkes should pay a fine of £100 and serve 22 months in jail.

The initial jailing and eventual punishment of Wilkes led to two events of considerable importance to the Wilkite movement. The first arose out of the shooting of several Londoners by troops under the direction of a local magistrate.\footnote{My description of the events arising out of the St. George’s Field “massacre” is based upon John Brewer’s essay in An Ungovernable People. See Brewer, supra note 436, at 143-44.} This shooting occurred on the day the new Parliament was to convene when a huge crowd assembled outside the jail where member-elect Wilkes was being held. After the crowd became unruly, Gillam, a London justice of the peace, authorized the troops to use their weapons. About an hour later, the soldiers fired on the crowd, killing several men, at least one of whom was an innocent bystander. This incident became known as the “massacre” of St. George’s Field.

The Wilkites were quick to react. They sought and obtained the convocation of several coroner’s juries to consider the deaths. They also contacted the widow of the innocent bystander and persuaded her to commence a private prosecution against Gillam. The result of these moves was that the magistrate and one of the soldiers who had fired were made to stand trial for murder. The fact that Gillam is said to have fainted twice during the proceedings attests to the earnestness of the prosecutions. Juries acquitted both defendants, but the Wilkites had made a profound impression with this litigation. They had brought home to those in power that they could be held accountable for their actions. Historian John Brewer has suggested that the initial reluctance of public officials to suppress the Gordon Riots of 1780 was traceable to this affair.\footnote{Id. at 145.}

The second important consequence of Wilkes’s jailing was that it gave Parliament an excuse to expel Wilkes and award his seat to
his rival. This expulsion was greeted by protests from all over the country. Perhaps as many as 60,000 voters (one quarter of the electoral population) signed petitions of protest. These petitions focused not only on Wilkes, but on other matters including interference with the writ of habeas corpus, with the right to jury trial, with freedom of the press, and with the right to vote. The petitioners decried the threat of governmental tyranny and called for renewed respect for the rights of the people. While the petitions had little overt effect, they generated immense pressure on the government to conform its conduct to established legal principles.

In 1770, Wilkes was elected alderman of the City of London. One of his duties was to serve as city magistrate. In this capacity he pursued a number of procedural and substantive reforms. He abolished the requirement that defendants in criminal cases pay fees, thus reducing the burden on those prosecuted. He barred the imposition of spectator fees in criminal proceedings, thereby opening the process to fuller public scrutiny. He also worked to curb the activities of the press gangs that roamed London’s streets forcibly seizing recruits for the Navy. In the campaign against the press gangs, Wilkes utilized pre-existing law such as the Case of Alexander Broadfoot to sanction resistance to impressment. All these measures had the effect of expanding the rights of the lower classes, and each relied on fair and open adjudication in courts of law to protect liberty interests.

While sitting as a magistrate, Wilkes was involved in another celebrated matter, the so-called “Printers’ Case.” For many years Parliament had controlled the reporting of its proceedings by granting an exclusive license to a single publisher. In the early 1770s, a number of printers began producing unlicensed reports of parliamentary debates. They defended their actions as necessary to the maintenance of a free press and as providing an essential service to citizens, who were entitled to know what the legislative branch of government was doing. In 1771, Parliament sought to put an end to the unauthorized reports. It began by summoning a number of printers to appear before it. At Wilkes’s urging, the printers refused

451 Unless otherwise noted, my consideration of the Wilkite petition campaign is based on George Rude’s work. See G. Rude, supra note 435, at 105-48.
452 Id. at 154.
453 See Brewer, supra note 436, at 150-51.
454 Id. at 151.
455 Id. at 151-52.
456 18 St. Tr. 1323 (1743).
457 Unless otherwise noted, my description of the “Printers’ Case” is drawn from John Brewer’s work. See Brewer, supra note 436, at 140-41.
to honor Parliament's summonses. This led Parliament to order the arrest of the printers.

As a test case, one of the printers, Wheble, allowed himself to be seized by his own servant, Carpenter. Wheble was brought before Wilkes, who was sitting as magistrate for the City of London. Wilkes freed Wheble, relying on the technical legal argument that an arrest was improper unless the charge was either a felony or breach of the peace. Wheble, in true Wilkite fashion, immediately filed a countersuit for assault against Carpenter. At the same time, a second publisher named Miller had a parliamentary messenger, Whittman, arrested on a charge of assault and false arrest. The Commons was incensed by these moves and had the Mayor of London incarcerated. Although none of the cases brought during this battle set a definitive precedent, Parliament was fought to a standstill, and the printers were neither punished nor prevented from circulating their reports.

Wilkes remained at the center of controversy. His followers initiated a number of further cases to expose or curtail governmental oppression. After Wilkes was excluded from Parliament for a third time in 1772, his supporters commenced a suit for damages against the tax collector. The theory of this case was that the plaintiff's taxes had been wrongfully collected when his duly elected representative (Wilkes) was denied a seat in Parliament. Mansfield managed to get the case quashed by browbeating the jury, but again the Wilkites had manipulated the legal process to bring great pressure to bear. In 1774 Wilkes was elected Mayor of London, and thereafter passed into the mainstream of English politics.

The success of the various Wilkite campaigns may be attributed to a variety of factors, but, without doubt, one of the most important was their skill in using the courts to call the government to account. Wilkes and his followers repeatedly were able to frame and vindicate novel legal theories in defense of the rights of citizens. They also were able to enforce existing precedents to restrain the government from abusing its powers. On such questions as the

458 See, e.g., id. at 148-50 (Wilkite prosecution of appeal of felony against brothers named Kennedy who had used political connections to gain pardon for the murder of a night watchman named Bigby), and id at 158 (Wilkite prosecution of another appeal of felony in case of a Scottish soldier accused of stabbing a tavern keeper).
459 See id. at 139-40; see also J. CARSWELL, supra note 435, at 141 (A number of American colonies carefully scrutinized Wilkes's activities. South Carolina voted to provide Wilkes monetary support for his campaign.).
460 See Brewer, supra note 436, at 139.
461 See G. RUDE, supra note 436, at 170.
462 See id. at 179-93 (tracing Wilkes's success to support of growing merchant class, unsettling impact of rising food prices, and reaffirmation of the Whig rhetoric coined during the Glorious Revolution).
freedom of the press, the validity of general warrants, and the use of force to suppress political demonstrations, the Wilkites led the courts to establish principles that curtailed government authority. They helped turn the law's promise into political reality. From the perspective of adversarial developments they did a great deal more. They transformed the courts into a battleground where those contending against the government could not only mount a vigorous effort, but could expect to succeed. The lessons Wilkes, Glynn, and lawyers from the SSBR learned were directly imported into the criminal process. Wilkes saw to that as magistrate. Glynn and the others did the same as they pressed habeas corpus applications, presented their arguments before coroner's juries, and pursued private prosecutions of public officials.

2. Other Reform Activity

Others also turned to the courts in an effort to curtail government misbehavior or to challenge existing law. One dramatic example was Rex v. Shipely. In that libel case, the great Erskine persuaded a jury to return the highly unusual verdict of "guilty of publication only," thereby nullifying the instruction of Judge Buller that they were to find the defendant guilty if publication were established (the judge having already declared the material libelous). Buller compelled the jury to reconsider and recast their verdict. Erskine then moved for a new trial or, in the alternative, in arrest of judgment. These motions were heard by Lord Mansfield, who strongly urged Erskine to press his motion in arrest of judgment and thereby avoid a direct challenge to Buller's conduct. Instead, Erskine insisted that Mansfield rule on the trial judge's behavior because, he claimed, it constituted a gross interference with the defendant's right to a jury trial by undermining the jurors' power to

463 Later eighteenth-century commentators were keenly aware of the possibility that litigants might challenge official action in court proceedings. See, e.g., T. deVeil, Observations on the Practice of a Justice of the Peace: Intended for Such Gentlemen as Design to Act for Middlesex or Westminster (1747), cited in Langbein II, supra note 3, at 60 n.225 (pamphlet warning justices of the peace about serious risk of liability for false arrest); Francis Buller, An Introduction to the Law Relating to Trials at Nisi Prius 11-15, 22-24 (4th ed. 1785) (extensive consideration of questions of malicious prosecution and false imprisonment).

These concerns should be contrasted with the views of the court in Hamond v. Howel, 86 Eng. Rep. 1035 (C.P. 1677), where the false imprisonment claim of a co-defendant of the renowned Edward Bushel was rejected. The court there declared: "[T]he bringing of this action was a greater offense than the fining of the plaintiff, and committing of him for non-payment . . . it was a bold attempt both against the Government and justice in general." Id. at 1036-37.

464 21 St. Tr. 847 (1783-84). My discussion of this case is based upon P. Devlin, supra note 14, at 118-25.
nullify an unjust law. Erskine is said to have privately noted that he pressed his motion "from no hope of success, but from a fixed resolution to expose to public contempt the doctrines fastened on the public as law by Lord Chief Justice Mansfield, and to excite, if possible the attention of Parliament to so great an object of national freedom." The willingness of an advocate to frame and press such an attack on judicial doctrine revealed the strength of the contentious spirit and the intensity of a great lawyer's conviction in the perfectibility of the law. It also displayed his strong belief in the need for an unfettered jury. The nullification question was never authoritatively settled, but Erskine's hope that Parliament would eventually curtail judicial interference with juries in libel cases was fulfilled in 1792 when it adopted Fox's Libel Act.

In the 1770s, law reformers seeking to upset both the debt collection system and the legal underpinnings of slavery turned to the courts. In 1770, James Stephen adopted Wilkes's strategy and allowed himself to be imprisoned for debt. He then brought a writ of habeas corpus claiming that such imprisonment was unlawful. Mansfield eventually ruled against him. His choice of tactics, however, indicates the strength of the reformers' faith in the courts.

Granville Sharp and his abolitionist allies used similar methods to challenge the institution of slavery. In 1771 they pursued a test case involving a slave named James Somerset and his American master. After Somerset had sought his freedom and been arrested, Sharp initiated a habeas corpus proceeding on his behalf contending that Somerset had become a free man once he set foot in England. Again Mansfield was called upon to rule. He delayed for over a year, but in 1772, on the narrowest of grounds, found that Somerset was indeed emancipated. This decision did not end slavery throughout the British Empire, but it did advance the abolitionist cause. Again and again, the courts were called upon to adjudicate social conflicts and modify the law. They were repeatedly

465 For the part Shipley played in the development of legal doctrine concerning jury nullification, see T. Green, supra note 3, at 328-31.
466 Cited in P. Devlin, supra note 14, at 122.
467 32 Geo. 3, c. 60 (1792); see T. Green, supra note 3, at 330.
468 See Joanna Innes, The King's Bench Prison in the Late Eighteenth Century: Law, Authority and Order in a London Debtors' Prison, in An Ungovernable People, supra note 50, at 250, 292.
469 Id.
471 See E. Heward, supra note 448, at 145.
472 Somerset, 98 Eng. Rep. at 510 (holding that the cause on the return of the habeas corpus was not sufficient without positive English law); see C. Fifoot, supra note 10, at 41; E. Heward, supra note 448, at 146-47.
473 Id.
faced in both civil and criminal proceedings with the most adversarial of contests. The climate of the time clearly fostered contentious notions and approaches.

The 1760s and 1770s were an extraordinary period in the history of the English courts. It was the time when the potential of adversary procedure was realized. Blackstone captured something of the sentiment of the era in his wildly popular Commentaries, published between 1765 and 1769. There he presented the court system as adversarial in many of its attributes, and tied its contentious aspects to vital liberty interests. Reliance on the adversarially-oriented jury, rather than on a judge, was essential for Blackstone because even the finest magistry would frequently have “an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that the few should be always attentive to the interest and good of the many.”^474 Where, as in the Ecclesiastical Courts, non-contentious methods were in use, the “spirit . . . of liberty” was eroded.^475 Open, *viva voce* examination by the litigants (as well as the judge and jury) was said to be the best way to “sift out the truth.”^476 In these arguments Blackstone showed just how far the adversarial modifications advanced by the law reformers had reached. They had penetrated the definitive legal work of the era and become associated with its highest values.

C. The Reconceptualization of the Trial as Adversarial Contest

Blackstone’s adversarialism, however, was incomplete. He did not embrace the full range of mechanisms that constitute a contentious approach. He viewed the litigants’ role in witness examination as quite restricted,^477 and appeared content to accept Gilbert’s formulation of the rules of evidence^478 though, as will be discussed in this section, these were predicated upon a model with substantial inquisitorial attributes. In the period between the time Blackstone published the Commentaries and 1815, prominent evidence scholars including Thomas Peake, William David Evans, and S.M. Phillipps^479 reformulated the rules of evidence and reconceptualized the trial in far more adversarial terms. This shift was both a reflection

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^474 3 W. BLACKSTONE, supra note 7, at 379 (emphasis in the original).
^475 Id. at 62.
^476 Id. at 373.
^477 Id. at 372 (the swearing of the oath required witnesses to provide the court with the whole truth—the judge determined whether limits ought to be imposed).
^478 Id. at 367-68.
^479 Wigmore and Twining placed all three of these men among the outstanding evidence scholars of the era. See John Henry Wigmore, A General Survey of the History of the Rules of Evidence, in 2 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 696 (1908) (3 vols.); W. TWINING, supra note 4, at 2; see also J. BEATTIE, supra note 3, at 363 n.120 (mentioning both Peake and Phillipps).
of changes that had already occurred and a force in fueling further change as judges and barristers used the new treatises as the basis for argument and decision.  

1. Gilbert and Early Eighteenth Century Evidence Law

At the beginning of the eighteenth century, legal scholars portrayed the trial as a process which narrowly confined the introduction of evidence and allowed litigants few opportunities for direction and control. The chief expositor of this view and a seminal figure in the development of the rules of evidence was Sir Geoffrey Gilbert, Lord Chief Baron of the Exchequer. Although his treatise, The Law of Evidence, was not published in authoritative form until 1754 (28 years after his death), it is generally agreed that Gilbert's work reflects an understanding of evidence formed no later than the opening decade of the eighteenth century.

Gilbert believed that "[t]he first . . . and most signal Rule, in Relation to Evidence, is this, That a Man must have the utmost Evidence, the Nature of the Fact is capable of." This best evidence rule governed the whole of Gilbert's work. It led him to organize the different sorts of evidence in a hierarchical fashion. The preeminent category of proof was documentary and was to be preferred to oral testimony. Gilbert spent 81 of the first 86 pages of his treatise on written evidence and, in total, devoted three times as much space to it as to questions concerning unwritten evidence. This sequencing of topics and distribution of attention suggest that Gilbert conceived of the judicial process as a search for a determinative

480 Thomas Peake provided a nice example of the perceived authority of evidence treatises when he remarked that Gilbert's treatise was to be viewed as "coeval with the law itself." THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE at v (1801) [Fascimile of the 1801 ed. published by Garland Publishing, Inc. 1979].

481 Nineteenth century evidence scholars appear to have viewed Gilbert's work as the starting point for analysis. See, e.g., T. PEAKE, supra note 480. Jeremy Bentham said that Gilbert's work was "the grand fountain of legal instruction on the subject of evidence" that had to be demolished if a better system were to be built. 1 J. BENTHAM, supra note 17, at 6. Modern scholars generally have viewed Gilbert's work as the first of its kind and the "most important," at least until Bentham. See W. TWINING, supra note 4, at 1; Barbara J. Shapiro, Law and Science in Seventeenth-Century England, 21 STAN. L. REV. 727, 754 (1969). It may not, however, have been the first work published on the subject. See WILLIAM NELSON, THE LAW OF EVIDENCE (1717).

482 See W. TWINING, supra note 4, at 1; Shapiro, supra note 481, at 755.

483 G. GILBERT, supra note 6, at 3.

484 See William Twining, The Rationalist Tradition of Evidence Scholarship, in WELL AND TRULY TRIED 211, 213 (Enid Campbell & Louis Waller eds. 1982) ("Gilbert attempted to subsume the whole of the law under a single principle, 'the best evidence rule.' ").

485 G. GILBERT, supra note 6, at 5.

486 Gilbert devoted only 27 pages of his treatise to evidence not in written form. Id. at 86-113.
piece of documentary proof rather than the examination of conflicting evidence in open court.

After concluding with documentary evidence, Gilbert turned to the unwritten. He commenced by detailing at least ten types of witnesses who should be barred from testifying. By placing witness exclusions at the start of the chapter, Gilbert seemed to signal his reticence concerning oral examination and his conviction that a substantial number of issues could be resolved by exclusion rather than by questioning. The intricate nature of the exclusionary rules, and the relative length at which they were analyzed, signaled a major commitment to the process of screening witnesses rather than examining them in open court. The exclusions created another series of categories of acceptable and infirm evidence and thereby attempted to bring further order and restraint to the proof-adding process. In this way they conformed to the best evidence approach.

When oral proofs were allowed at trial the key to their credibility was the swearing of the oath rather than in-court interrogation. As Gilbert put it: “The first and lowest Proof is the Oath of one Witness.” Without at least this quantum of assurance, oral proof almost always was worthless. Driven by the logic of his classification scheme Gilbert ranked the oaths of two witnesses as superior to that of one: “The second Degree of Credibility is from the Oaths of two several Witnesses, and one Step higher than the Credibility that arises from the Oath of one Witness only.” The mechanical emphasis on oaths led toward a quantitative view of evidentiary weight.

Remarkable in Gilbert’s treatment of oral evidence was the absence of any serious emphasis on cross-examination. Its form, application, and limits were never directly discussed. The closest Gilbert came to considering the topic was in his pro forma reference to “the Liberty to Cross-examine” as a reason for rejecting the use of a prior verdict in litigation involving someone other than the

487 Witnesses to be excluded were those: “interested in the Matter in Question,” id. at 86; those of particularly questionable integrity including convicts and infidels, id. at 94-103; and those suffering from a “Want of Skill and Discernment” like “Ideots, Madmen and Children under the Age of common Knowledge.” Id. at 103.

488 Gilbert utilized 18 of his 27 pages on unwritten evidence to discuss witness exclusions. Id. at 86-104.

489 “[W]here the binding Force of the Oath ceases, the Reasons and Grounds of Belief are absolutely dissolved.” Id. at 103.

490 Id. at 106.

491 Gilbert recognized an exception to this proposition in treason and felony trials where witnesses on behalf of the defendant were barred from taking the oath. See id. at 112. Since the law on the question of the administration of oaths was changed in 1702, this passage in Gilbert’s work suggests the very early genesis of the treatise. For a discussion of the asymmetrical rule concerning oaths, see supra note 6.

492 Id. at 108.
original parties and as the basis for rejecting the use of affidavits or depositions made by non-parties. Although Gilbert mentioned the need for interrogation, the examination of witnesses by opposing parties was never more than marginal to his conception of litigation.

Gilbert seemed to view each piece of proof as having a relatively fixed value that might be discovered by identifying its position in the grand categorizational hierarchy. Once each piece had been evaluated a total value for the case might be calculated by adding all the proofs together. This total could then be scrutinized to determine, in Gilbert's words, whether a "full Proof" had been presented. Described in this way, Gilbert's approach is strikingly like the mathematical methods developed in the Roman-canon system. Under the mandate of this system the inquisitorial courts of Continental Europe required either the testimony of two witnesses to the gravamen of an offense or a confession by the accused in order to convict in a criminal case. Any other combination of proofs, for example, the testimony of a single witness with or without supporting circumstantial evidence, might be considered useful as a basis for further investigation (perhaps even justifying interrogation of the defendant under torture), but could not justify conviction.

The mathematical approach employed on the Continent relied on the categorical analysis of proofs. It denigrated the value of in-court interrogation by parties and favored ex parte enquiry by an examining magistrate. Adjudication was based upon fixed numerical standards; anything short of full proof was rejected. Gilbert's vision of the judicial process shared many of these characteristics. As he declared in defining the best evidence principle: "[T]he Design of the Law is to come to rigid Demonstration in Matters of Right." This view left little room for the free evaluation of testimonial evidence in open court.

The emphasis on a rigid, quasi-mathematical evaluation of proofs and the absence of serious concern about cross-examination served to narrow the way Gilbert conceptualized the functions of

493 Id. at 23.
494 Id. at 44.
495 Id. at 47-48.
496 Id. at 36.
497 For excellent brief discussions of that system, see J. Langbein, Prosecuting Crime, supra note 21, at 129-39; J. Langbein, Torture and Proof, supra note 22, at 5-8, 56-57. The following description of the Roman-canon system is drawn from Langbein's work unless otherwise noted.
498 It should be noted that Gilbert was well-informed about the Continental approach, having authored a treatise on Chancery practice. See Sir Geoffrey Gilbert, The History and Practice of the High Court of Chancery (1758).
499 G. Gilbert, supra note 6, at 3-4.
advocates. Lawyers were not presented as having a major role to
play in courtroom proceedings. Their chief responsibility seemed
to be the preparation of pleadings that would structure lawsuits.
Apparently with this in mind, Gilbert devoted more than half his
treatise to advice about pleading, and virtually none to considera-
tion of in-court interrogation.\footnote{Pleading was the specific focus of all the material between page 113 and the end
of the treatise at page 199. It also was frequently addressed in the first part of the volume. \textit{See G. Gilbert, supra note 6, passim.}}

Gilbert's vision was decidedly non-adversarial. He championed
written rather than oral proof and a quantitative approach to the
evaluation of testimony. He had little use for cross-examination and
appeared to think that lawyers had no great part to play in court-
room proceedings. Plainly, Gilbert's conceptualization stood in the
way of adversarial growth and change.

2. \textit{The Growth of an Adversarial Conception of Evidence}

The late eighteenth and early nineteenth centuries witnessed
the vigorous development of the rules of evidence. Wigmore de-
scribed this era as the "spring-tide of the [evidence] system."\footnote{See Wigmore, supra note 479, at 695. ("A.D. 1790-1830. The full spring-tide of
the system had now arrived.").} Between 1800 and 1815 a series of remarkable volumes concerning the
topic were produced. These demonstrated that substantial change
had occurred since the early 1700s in conceptions of both the trial
and the rules that managed it. By general consensus\footnote{I have worked from the first edition of Peake's Compendium. \textit{See T. Peake, supra note 480.}} the leading
works of the era were Thomas Peake's, \textit{A Compendium of the Law of
Evidence} (1801);\footnote{On the basis of availability, I have worked from the 1826 American edition of
Evans's translation. \textit{See Evans, supra note 406.}} William David Evans's essay, "On the Law of Evi-
dence," attached as Appendix XVI to his translation from the
French of Pothier's, \textit{A Treatise on the Law of Obligations} (1806);\footnote{Again, based on availability, I have worked from the third edition of Phillipps's
work, published in 1817. \textit{See S. Phillipps, supra note 315.}} and S.M. Phillipps's, \textit{A Treatise on the Law of Evidence} (1814).\footnote{See 1 J. Wigmore, supra note 4, at 26.}

These books approached their topic from a variety of perspec-
tives. Peake, like Gilbert before him, attempted to catalogue the evi-
dence rules of his day. His was an extension of the techniques used
by the Lord Chief Baron to categorize and classify all proof. Peake's
work was essentially a practitioner's handbook that, Wigmore sug-
gested, was out of date within a few years of its publication.\footnote{\textit{See 1 J. Wigmore, supra note 4, at 26.}} Ev-
ans took a far more analytical approach to the subject. Wigmore
claimed that Evans's essay "was the first reasoned analysis of the rules." Its impact may be seen in a number of works that followed, including Phillipps's treatise which sought to combine the practitioner's perspective with the critical approach suggested by Evans. In what follows, the views of each of these scholars will be compared with those of Gilbert in an effort to highlight the growing influence of the adversarial concept.

Gilbert used the best evidence concept as the organizing and limiting principle of the rules of evidence. While none of his three successors rejected the best evidence rule, all sought to cabin it by according oral evidence greater importance. Peake stressed the regular need for recourse "to the testimony of others." Evans went further and argued that the best evidence "system of precaution may be carried too far." Phillipps followed Evans's lead and relegated the best evidence rule to the sixth section of Chapter VII of his Treatise, some 176 pages into the text. It was treated with no greater dignity than rules concerning relevance, presumptions, or hearsay, and more pages were devoted to its exceptions than its attributes. While Phillipps's analysis contained no radical alteration of the law, the relegation of the rule to this subordinate position clearly signaled a diminution in its importance. It was no longer, in any sense, the organizing principle of evidence analysis.

On the strength of the best evidence concept Gilbert built a whole hierarchy of proofs and mathematics of decision. One of the key assumptions of this structure was the superiority of written proofs to oral testimony. Peake, Evans, and Phillipps did not directly challenge Gilbert's assertion about writings. In fact, Evans specifically reiterated it. Their analyses, however, suggested a far more balanced view of the relation between oral and written proof. Peake and Evans devoted approximately as much space to questions concerning unwritten as written evidence. Phillipps went further. Not only did he lend about equal space to the two sorts of evidence, he began the Treatise by considering testimonial matters

507 Id. at 27.
508 T. PEAKE, supra note 480, at 1.
509 Evans, supra note 406, at 124. For Evans's attack on the extension of the best evidence rule to cases involving oral testimony, most particularly Williams v. The East India Co., 102 Eng. Rep. 571 (K.B. 1802), see id. at 130-31.
510 See S. PHILLIPPS, supra note 315, at 176-85.
511 Evans, supra note 406, at 128 ("Written evidence is superior to verbal, as it is by no means equally liable to misconception, or misrepresentation.").
512 Peake devoted 61 pages to "written evidence." See T. PEAKE, supra note 480, at 19-80. He then spent 56 pages on "parol evidence." Id. at 81-137. Evans devoted 66 pages to written evidence. See Evans, supra note 406, at 128-94. He then spent 82 pages on oral testimony. Id. at 195-277.
513 Phillipps devoted 235 pages to the question of oral testimony. See S. PHILLIPPS,
and relegated the question of written materials to the second half of
the volume.

It is clear that the most significant area of growth and change in
the works of all three authors was that concerning oral testimony.
All, more or less, followed Gilbert's lead on written proof. When it
came to parol evidence, however, they pursued a different approach.
As Peake said in his "Preface":

The chapter on Parol Testimony,... is in a great measure new;
for the rules of evidence in this respect have been so much al-
tered, and so much light have been thrown on them by modern
decisions, that, comparatively, little is to be collected from ancient
books that is satisfactory on the subject. It was said by Lord Mans-
field..., "We do not sit here to take our rules of evidence from
Sidesin or Kebe."514

This new approach recognized the greater importance of testimony
in court. Gone was much of the hierarchical analysis and mathemat-
ical thinking that constrained Gilbert's work.

Gilbert extended his categorical approach to unwritten evi-
dence. He focused the majority of his attention on a set of exclu-
sionary rules that curtailed the offering of oral proofs and avoided
in-court contests concerning credibility. His successors sought to
narrow witness exclusion. Underlying their efforts was agreement
with Lord Mansfield's assertion that the law of evidence had to dis-
tinguish between questions of credibility and competence and that
exclusions based on a lack of competence ought to be curtailed.515
All three writers adopted Mansfield's rhetoric and advocated
changes opening the doors of the courtroom to an increased volume
of evidence. Again the shift was to a decidedly more adversarial ap-
proach based on litigant presentation and interrogation.

The oath figured centrally in Gilbert's vision of the worth of
oral testimony. It was, however, relegated to a strikingly marginal
position by his successors. While Peake continued to refer to the
importance of the oath, his real emphasis was on its connection with
cross-examination. Oaths remained a necessary part of the court-
room apparatus, but they were far from the evidentiary sin qua non

supra note 315, at 2-236. He then spent 276 pages on "written evidence." Id. at 237-
513.
514 T. Peake, supra note 480, at v.
stated: "The old cases, upon the competency of witnesses, have gone upon very subtle
ground. But of late years the Courts have endeavoured, as far as possible, consistent
with those authorities, to let the objection go to the credit, rather than the competency,
of a witness." Id. at 1106). Evans, in particular, was likely influenced by Mansfield's
approach, having previously prepared an admiring two volume survey of Mansfield's
work in civil cases. See William D. Evans, A General View of the Decisions of Lord
Mansfield in Civil Causes (1803) (2 vols.).
that Gilbert had hypothesized. They were beginning to assume the appearance of a formality. The oath was abandoned as the mechanical yardstick for measuring credibility. As noted by both Evans516 and Phillipps,517 the holding in Ormichund v. Barker,518 a case allowing a Gentoo to swear according to the dictates of his religion rather than conform to Judeo-Christian requirements, had rendered the oath a matter of individualized application rather than a uniform shibboleth. The very necessity for an oath was questioned in situations like those involving Quakers.519

In place of the oath, the writers of the early nineteenth century embraced cross-examination as the crucial element in courtroom adjudication. Peake, the earliest of the trio, conflated cross-examination and the oath. The two together defined courtroom procedure. As Peake said in discussing the hearsay rule:

The Law never gives credit to the bare assertion of any one, however high his rank, or pure his morals; but always requires the sanction of an oath: It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties, and, therefore, in cases depending on parol evidence, the testimony of persons who are themselves conusant of the facts they relate, must in general be produced . . . .520

Questioning here was presented as an integral part of the process. The sense of routine incorporation of cross-examination pervaded Peake’s work521 and presented a significant contrast to Gilbert’s position. While it cannot be said that Peake viewed interrogation as the core of the courtroom process, it certainly had come to occupy a place of genuine importance. With this growth in importance came an increased inclination to see trials as adversarial events involving the give-and-take of rigorous questioning.

Evans was keener still on the need for cross-examination. He was sharply critical of the use of a number of types of prerecorded testimony. Private examinations by magistrates, justices of the peace, and commissioners of excise were, in Evans’s view, fatally flawed.

Wherever the narration of a witness may be the subject of objection, on account of his want of veracity, the failure which justice must experience from the want of an opportunity of trying the fact by a minute examination of circumstances, open to contradiction,

516 See Evans, supra note 406, at 204.
517 See S. Phillipps, supra note 315, at 19.
518 95 Eng. Rep. 506 (Chancery 1745); see T. Peake, supra note 480, at 89-92.
519 See S. Phillipps, supra note 315, at 22.
520 T. Peake, supra note 480, at 7-8.
521 See, e.g., id. at 135-36 (discussing cross-examination and its relation to rules concerning leading questions).
by fixing the witness to particulars of time and place, and all other
topics not comprised in a general sweeping account, will be mani-
fest to the most cursory observers.\textsuperscript{522}

Similarly, Evans challenged the use of a magistrate's pretrial exami-
nation of witnesses in felony prosecutions because the accused "has
not those assistances for analysing the proofs which are adduced
against him, which exist upon a solemn trial, where he can call in aid
the exertions of judicious advocates."\textsuperscript{523} There was nothing in Gil-
bert's work that even remotely approached this sensitivity to the
need for cross-examination. Before the early nineteenth century,
the most that was ever called for was physical confrontation between
witness and accused.\textsuperscript{524} As long as the defendant was present,
words spoken at pretrial hearings generally were admissible.\textsuperscript{525} Ev-
ans's work embodied a new conception of the legal process, one in
which the cross-examination of witnesses by \textit{skilled counsel} was of
such importance that the process was rendered suspect without it.

Evans depicted advocates as vigorous and skilled examiners.
Their effectiveness created problems because witnesses could be
"prevented by an intimidating and acrimonious course of in-
quiry"\textsuperscript{526} from giving an accurate and complete account of what
they knew. Evans provided a detailed review of advocates' tricks
("disengenuous artifices")\textsuperscript{527} ranging from suggestive interrogation
to "captious cross-examination."\textsuperscript{528} In the end, one gets the im-
pression that for Evans, cross-examination had become the central
focus of adjudication and that its regulation was vital to the adminis-
tration of justice. No fixed rules, however, could limit examination.

The abuses to which this procedure is liable are the subject of very
frequent complaint, but it would be absolutely impossible, by any
general rules, to apply a preventive to these abuses, without de-
stroying the liberty upon which the benefits above averted to es-
tenially depend: and all that can be effected by the interposition
of the Court, is a discouragement of any virulence towards the
witnesses which is not justified by the nature of the cause, and a
sedulous attention to remove from the minds of the jury the im-
pressions which are rather to be imputed to the vehemence of the
advocate, than to the prevarication of the witness.\textsuperscript{529}

Counsel had to be allowed great latitude to ensure effective exami-

\textsuperscript{522} Evans, \textit{supra} note 406, at 202.
\textsuperscript{523} \textit{Id.} at 203.
\textsuperscript{524} For a summary of the older rules concerning confrontation, see 1 L. \textit{MacNally},
\textit{supra} note 6, at 14-15.
\textsuperscript{525} \textit{Id.}; see also T. \textit{Peake}, \textit{supra} note 480, at 40-41.
\textsuperscript{526} Evans, \textit{supra} note 406, at 216.
\textsuperscript{527} \textit{Id.} at 212.
\textsuperscript{528} \textit{Id.} at 223.
\textsuperscript{529} \textit{Id.} at 233.
nation. Evans urged judicial restraint because "the judge, acting only upon the impressions of what has already been disclosed, cannot by any possibility anticipate" what is of critical importance in the testimony. In these views the contentious spirit is ascendant. Advocates had become masters of the courtroom, and their adversarial enquiry the heart of the process.

Phillipps was neither as direct nor insistent about cross-examination as Evans. The issues surrounding interrogation, however, were of fundamental importance to Phillipps's work. This was most apparent in his discussion of hearsay:

It is a general principle in the law of evidence, that if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, because evidence ought to be given under the sanction of an oath, and that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness as to his means of knowledge and concerning all the particulars of the fact. Phillipps carried his concern beyond this rather stock proposition. He explored the hearsay problem in great detail and focused on cross-examination as the ground of decision in a number of important cases, including especially In re Berkeley, where a Chancery deposition was rejected because of the absence of an opportunity for cross-examination. Phillipps advocated a similar rule with respect to other sorts of depositions. He also insisted that most hearsay exceptions be coupled with a showing of the unavailability of the original witness. While this insistence was not novel, Phillipps suggested that only demonstrable necessity could justify abandoning cross-examination.

The cross-examination theme was carried over into Phillipps's discussion of the interrogation of witnesses. Phillipps made it clear that vigorous cross-examination was an integral part of courtroom procedure. The rules of interrogation, including those about leading questions, compulsion to respond to potentially incriminating questions, and the handling of hostile witnesses, were all premised upon the assumption that cross-examination would be rigorous and was vital to decision-making. Cross-examination had

530 Id. at 234.
531 S. PHILLIPPS, supra note 315, at 185-86 (footnote omitted).
533 See S. PHILLIPPS, supra note 315, at 192-93.
534 Id. at 186-220.
535 Id. at 221-22.
536 Id. at 222-26.
537 Id. at 222.
become firmly established as one of the pillars of the adjudicatory edifice.

The early nineteenth century writers had come to view litigation as a fundamentally adversarial contest. The participants in the adjudicatory process generally were assigned what would, today, be considered adversarial roles. The jury was treated as a neutral and passive factfinding body that was to be informed by means of party interrogation of witnesses. This interrogation was the core of courtroom procedure and the basis for judgment. Categorical restraints and numerical notions had, for the most part, been abandoned as guides to decision. Preference for writings had been eroded, as had insistence on oaths and exclusion of witnesses.

Counsel were now depicted as critical participants in the gathering of proof. In criminal, as well as civil cases, lawyers were viewed as a vital part of the process. They, rather than judges, guided interrogation. When courts interfered with examination they were criticized. The rising intensity of zealous advocacy was observed and commented upon. Excesses of zeal including improper witness preparation, the use of experts who were little more than advocates themselves, and pressures to adopt the

538 But see Evans, supra note 406, at 228-29 ("Other circumstances being equal, the preponderance of numbers is certainly entitled to the advantage, and sometimes this preponderance will be sufficiently great to counterbalance an apparent superiority in other circumstances on the opposite side. . . .").

539 See, e.g., id. at 234. Evans stated:

The benefits of cross-examination are sometimes defeated by the interposition of the Court, to require an explanation of the motive and object of the questions proposed, or to pronounce a judgment upon their immateriality: whereas experience frequently shews that it is only by an indirect, and apparently irrelevant inquiry, that a witness can be brought to divulge the truth which he had prepared himself to conceal; the explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained, if the gradual progress, from immateriality to materiality, was withheld from his observation. The importance of an inquiry may sometimes be strongly felt by an advocate, and upon very reasonable grounds, from his own instructions with respect to the bearing and circumstances of the cause, which the judge, acting only upon the impressions of what has already been disclosed, cannot by any possibility anticipate. The full exposition of the motives can only be attained by a premature exposition of the case that is to be brought forward, and even when that can be done without prejudice to the party, the endeavour to satisfy the Court would have the common effect of an interruption of the regular course of inquiry, and instead of assisting the accurate discussion of the question, would, in all probability, terminate in confused and desultory altercation.

540 Id. at 233-34.

541 Id. at 209.

542 Id. at 213 ("The evidence of persons who depose to their scientific knowledge of any matters in dispute is, in many cases, subject to be influenced by their wishes, in
"passions, and prejudices of . . . clients," were all noted as sources of concern.

In the work of Gilbert's successors a vision of adversarial justice held sway. The contentious approach was established as the fundamental means of conducting business. What the evidence scholars had done was validate or legitimate the adversarial mechanism. Even the most outspoken critic of then-existing courtroom procedure, Jeremy Bentham, seemed to accept much of the adversarial view with his sweeping endorsement of oral testimony, broad reliance on adversarial interrogation, and recognition of the need for zealous advocates.

D. The Importance of these Factors in the Larger Framework

Thief catchers, reform movements, and evidentiary reconceptualization were not the only impetuses for legal change. Indeed, other developments such as the rise of dynamic individualism,

favour of the party adducing them. It has been the observation of a great advocate . . . that these persons were only advocates upon oath.

543 Id. at 228.
544 See 1 J. BENTHAM, supra note 17, at 274-75.
545 See 2 id., at 406-07. Bentham declared:

When each witness is examined by the parties,—examined by both parties,—examined primarily by the party by whom his testimony was called for, . . . cross-examined by the adverse party; he is examined by two persons, who, taken together, have every interest which the matter at stake in the cause can give them, to draw from him the whole truth: each having every interest which the value of the matter in dispute to himself can give him, in drawing forth so much of the truth as makes in favour of his side. So far as the extraction of the truth is concerned, justice, under this system, has nothing to fear but such casual deficiency as may happen to take place in respect of the intellectual sufficiency of the parties and their agents in relation to this task.

546 See id. at 407. Bentham suggested:

When the business, the proper business, of both parties, is taken out of the hands of both parties, and lodged in the hands of the judge; so far as depends upon the state of the affections, of motives and interests, the business is as badly arranged as possible. General deficiency of zeal, variegated by occasional excess of zeal, and that on one side only: general carelessness, variegated by occasional partiality, both of them almost without controul: such is the natural result of so incongruous a state of things.

547 During the seventeenth and eighteenth centuries, the value of individual action was ever more widely extolled. See CRAFORD BROUGH MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBSES TO LOCKE 1 (1962); R. PORTER, supra note 49, at 266-72; L. STONE & J. STONE, supra note 33, at 89. It was a theme taken up by both Blackstone and Adam Smith. See DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 51-52 (1941). John Locke's philosophical works had enlivened this intellectual trend by contending for the central importance of the individual and his right to property. Locke's arguments were widely accepted and encouraged the view that civil government's primary function was to serve as a neutral arbiter between contending parties and to defend the right of property. See P. ATIYAH, supra note 33, at 45-48. The development of a system that allowed contending individuals to fashion and press their claims
the growth of a market economy,\textsuperscript{548} and even the forging of the scientific method\textsuperscript{549} may have had as much or more to do with legal change. Yet, each of the three causes examined above powerfully contributed to the growth of the adversary system over the course of the eighteenth century. Thief catcher activity gave a concrete im peutus to developments in the early part of the century. It made the risks inherent in the status quo all too obvious. The adoption of litigious political tactics and their success in vindicating a variety of rights broadcast the effectiveness of an adversarial approach. It also fostered the training of a regiment of advocates. The political campaigns themselves resulted in the application of the new methods in the criminal as well as civil arena. Finally, the works of the evidence scholars gave adversarial change legitimacy and permanence. The image of the system was transformed, and the system itself came more and more to conform to its refashioned image.

\section*{IV
EPÍLOGUE

The adversary method was created by judges and lawyers who sought, through hundreds of incremental reforms, to build a more equitable court system. They were concerned not only that there be appropriate adjudications, but \textquotedblleft that the Publick may be satisfied, that no unfair Practices have been made use of.\textquotedblright\textsuperscript{550} To ensure the through the offering of proof was entirely consistent with these premises. In addition, its use of opposed proofs was consonant with Locke's ideas about the development of human knowledge through the sifting of evidentiary probabilities. See \textsc{Henry J. Van Leeuwen}, \textit{The Problem of Certainty in English Thought 1630-1690} at 132-36 (1963).

\textsuperscript{548} John Brewer argued that the opening of politics and enterprise went hand in hand and that each had the effect of reinforcing the other. See Brewer supra note 436, at 200-01. The eighteenth century saw dramatic changes in England as the economy shifted toward the open market. See P. Atiyah, supra note 33, at 24. These changes led to the steady decline of government regulation and the release of immense economic energy. \textit{Id.} at 74-76. In the absence of a strong executive, enforcement of the law was, perforce, left in private hands. \textit{Id.} at 98. The adversary system with its emphasis on the action of individual litigants was well suited to the economic and social needs of such a time.

\textsuperscript{549} Concerning the possible influence of scientific developments on the growth and change of the legal process, see Shapiro, supra note 481. Thomas Green provided the most useful framework in which to view the influence of such developments when he stated:

\begin{quote}
Restoration advances in scientific theory can't be discounted, but they should be seen as having provided a more modern intellectual approach to longstanding practice. Their impact upon the emerging law of evidence is palpable, but it was nonetheless indirect, making itself felt via the catalysts of politics and, most important, the administration of a criminal law based upon mercy as well as terror.
\end{quote}

\textsc{T. Green}, \textit{supra} note 3, at 274.

\textsuperscript{550} Patrick, OBSP (Sept. 1732), at 186.
probity of the process prosecutors were restrained in a variety of ways. Out-of-court interrogations were carefully scrutinized, and the use of promises or threats policed. Cases brought by thief catchers or buttressed by the testimony of accomplices were held up to rigorous examination. Lawyers were allowed entry into the process in an apparent effort to secure a more reasonable balance between prosecution and prisoner, even though existing law specifically excluded counsel from appearing. All these developments suggest that the legal community of the day saw its task not simply as convicting the guilty, but as satisfying a profound social desire for fair play.

A number of modern judges and reformers have attacked the notion of fair play. For them the state's interest, whether in conviction or governance, takes precedence. Their approach may be glimpsed in the Supreme Court's refusal to facilitate the use of lawyers by veterans in hearings before the Veteran's Administration\(^551\) or to require that adequate counsel be provided to criminal defendants.\(^552\) Such challenges to the tradition of fair play and its instrumentalities violate the very spirit of the system created in the eighteenth century. They undermine adversary principles without adequate explanation or justification. They proceed as if the history examined in this Article never existed.

The adversary system grew as a consequence of the steady narrowing of judicial authority. Lawyers supplanted judges as managers of the courtroom contest. The rules of evidence limited judicial discretion, and contentious examination replaced the inquisition. These steps reflected the belief that a neutral and essentially passive judiciary would be the most effective defender of what Blackstone called “liberty.” The too active judge, like Buller in *Rex v. Shipley*,\(^553\) was subjected to the sharpest criticism.

The modern trend has been to scorn restraints on judicial activity and to encourage the development of “managerial judges” who seize control of litigation from the moment it is filed.\(^554\) The call from many in the legal community is for a strengthened judiciary that will operate efficiently,\(^555\) will put an end to the excesses of “contentious[ness] [that] disfigures our judicial administration at


\(^{553}\) 21 St. Tr. 847 (1783-84).


every point,"\textsuperscript{556} and will get at the truth.\textsuperscript{557} These proposals strike at the heart of the adversarial approach to adjudication. They increase the risk of judicial bias,\textsuperscript{558} reduce the citizen's opportunity to control his legal destiny, and provide no realistic alternative to judicial hegemony.

The association between contentious methods, procedural fairness, and liberty make anti-adversarial reforms a risky business. Change should not be undertaken without the greatest of care and in light of the historical foundations of the adversary system. What is lost may be both precious and irreplaceable.

\textsuperscript{557} See M. FRANKEL, supra note 14.
\textsuperscript{558} See Fuller, supra note 14.
APPENDIX

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