THE INQUISITORIAL ANCESTRY OF THE COMMON LAW CRIMINAL TRIAL AND THE CONSEQUENCES OF ITS TRANSFORMATION IN THE 18TH CENTURY

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Introduction

One of the first things that new law students learn is that the common law criminal trial can be characterised as 'adversarial', with a relatively passive judicial input and an agenda set by the prosecution and defence sides. They learn that in such trials, the lawyers for the two sides largely decide what issues should be the focus of the case, what evidence to call and what questions to ask of witnesses (which evidence and questions are included are themselves controlled by a rigid series of exclusionary rules). The lawyers make sometimes lengthy speeches to the tribunal of fact about the merits of their respective cases and are, in many ways, the 'focus of attention' during the trial. The new law student will also learn that this is to be contrasted with the civil law inquisitorial approach that characterises most of Europe outside the British Isles, which produces an agenda substantially set by the judges themselves who, in serious cases, have often been personally involved in the supervision of the initial investigation and frequently decide what evidence needs to be called to determine the case. These judges, the student is told, are often not accompanied by lay people and, if they are (as is sometimes the case in France, for example), never allow the laymen alone in deciding the issues before the court (the French sometimes opting for trial by three judges with nine lay jurors). They will learn that in such a system, most trial evidence is subject to a system of 'free proof', whereby the general test of admissibility, relevance (common to both systems), is not qualified by further exclusionary rules of admissibility (a characteristic of common law countries), such a system allegedly not being possible in a system where laymen are unsupervised in their consideration of the evidence. Although simplistic, this analysis is substantially correct with regard to differences between the two systems of criminal litigation. For example, 'traditionally' (ie for the past century and a half), case law has required the judge to show great restraint in his participation in the questioning process, something which contributed to a situation in which as early as 1820, a French visitor to an English criminal trial was able to remark: 'the judge remains almost a

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stranger to what is going on'.[1] In France, by contrast, it is not uncommon for the presiding judge to 'rigorously cross-examine the witnesses', sometimes with crucial results to the trial.[2] The modern common law jury members are also very circumscribed in the questions that they can ask during the trial; in practice, such questions are very rare.[3] Even more significantly, the power of a judge to call a witness not called by either side is one that case law encourages the judiciary to use most sparingly and which is, as a consequence, also rarely exercised,[4] something contrary to the practise in most inquisitorial systems.

However, often overlooked is the fact that although common law is an ancient legal system, largely fashioned before the 'Reception' of Roman law in the rest of Europe, the adversarial nature of its criminal trial is very much younger, being substantially a creature of the period from the middle of the 18th century onwards. Indeed, there was a degree of intellectual neglect over criminal law in England until the late 18th century that made it a 'case apart' from the rest of the nation's substantive and procedural law (this was closely linked to the enforced absence of professional lawyers from felony trials). This issue is of more than antiquarian significance. The purely adversarial form of criminal trial that emerged towards the end of the 1700s was to be inherited by all other common law jurisdictions and largely continues today in those countries, whether the United States, Australia or any other.

However, many recent changes or proposed modifications to the system of criminal justice in England and some other common law countries have included the adoption of measures which, to a very limited extent, might be viewed as 'inquisitorial', increasing judicial involvement in the fact finding process and reducing technicality. For example, there has been the abolition of the 'right to silence' in England in the 1994 *Criminal Justice and Public Order Act*, the provisions in the *Criminal Justice Act* 1987 and the 1996 *Prosecution of Offences Act*, which require a defendant to give advance disclosure, in general terms, of the nature of his defence, and the creation of the Criminal Cases Review Commission in 1995 to examine alleged miscarriages of justice. Additionally, many legislative or judicial changes in recent years in England, Australia and other common law countries have been aimed at reducing the technicality (and perhaps illogicality) of the law of evidence. It has been observed that there is a growing tendency in

1 JH Langbein, 'The Criminal Trial Before the Lawyers' (1978) 25 *UChi LR* 307.

2 For a recent example of this, see RL Jones, 'The Trial for Murder of Henri Jacomet' (1995) *Justice of the Peace and Local Government Law*, 30 December, p 873.

3 See on this *R v Lillyman* [1896] 2 QB 167 at 177.

4 See on this *R v Roberts (JM)* (1985) 80 Cr App R 89.

Australian courts towards a situation in which: '[j]urors are being "coddled" less, they are being invested with the capacity to conduct a variety of difficult tasks in the trial process and the exclusionary rules of expert evidence are being interpreted more liberally'.[5] Furthermore, although firmly rooted in an adversarial culture, the *Evidence Acts* of 1995 of the Commonwealth of Australia and New South Wales have reformed some aspects of the law of evidence (as suggested by the Australian Law Reform Commission), exclusionary rules not reproduced in the Acts ceasing to have effect and other reforms introduced to make the subject more rational.[6] There have also been proposals from the English Royal Commission on Criminal Justice that the admissibility of evidence relating to a defendant's previous convictions should not be restricted to cases covered by the present Similar Fact exception.[7] The Law Commission is currently examining the possibility of relaxing the hearsay rule in criminal proceedings[8] while in the case of *R v Gilfoyle* (1995),[9] the English Court of Appeal voiced concern at the lack of rational coherence in this area in this subject. Additionally, there have been suggestions that a trial judge should be freer to ask questions or call witnesses at his/her own behest than is currently the case.

Concern at the consequences of adversariality (ie partiality and control in the calling and questioning of witnesses and other evidence) and excessive procedural/evidential technicality (with attendant lawyer dominance) has produced a growing feeling that it might not necessarily provide effective justice in the modern period. Nevertheless, any proposals to change the existing situation in a partially inquisitorial direction (a total abandonment of the present system is rarely proposed) often meet the suggestion that they are contrary to all the traditions of common law criminal procedure. Thus, the abolition of the right to silence in England has been described as a major and ominous step in undermining the English adversarial justice system in favour of an inquisitorial one.[10] As a consequence, any historical ancestry

5 I Freckelton, 'Expert Evidence and the Role of the Jury,' (1994) 12 *Aust BR* 2.

6 See I Dennis, 'Codification and Reform of Evidence Law in Australia' (1996) *Crim LR* 477. An illustration might be the abolition, under s 38 of the *Evidence Act* 1995 (Cth), of the distinction between 'adverse' and 'hostile' witnesses in favour of a single category of unfavourable witnesses.

7 Royal Commission on Criminal Justice (1993) Cm 2263, HMSO, recommendations 189, 191–4.

8 See the Law Commission (1995) 'Evidence in Criminal Proceedings: Hearsay and Related Topics', HMSO.

9 *The Times*, 31 October 1996.

10 On this and on hostility to such changes generally, see G O'Reilly, 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1995) 85 *J Crim L & Criminology* 447.

that can be found for such an approach is potentially important in this ongoing debate. Equally significant is an examination of the reasons for any change from a partially inquisitorial process to a fully adversarial one in the 18th century and the continuing relevance, if any, of these reasons to the present time.

It has been appreciated for many years that the closer the examination of the 14th and 15th-century legal structure in England, 'the more evident becomes the indigenous quality of the inquisitorial procedure'.[11] However, work in the past two decades has shown that this survived much later in criminal (as opposed to civil) procedure than had once been thought. In reality, from start to finish, early 18th-century criminal procedure was characterised by elements that could properly be described as 'inquisitorial' as well as by other aspects that can be seen as obviously 'adversarial'. This was manifest by the investigative role of magistrates before trial and by judicial and, to a lesser extent, jury activism during the trial process itself. It produced, to modern eyes, an interesting amalgam. Change swept through the system only from the middle of the 1700s onwards, this being to a much greater extent than could, perhaps, have been imagined at the outset of the transition process.

The Magistrates' Role in the Investigation of Crime c1700

The JPs of the early 1700s played an important role in the investigation of serious crime (ie those which would go for trial on indictment), which function derived from an Act of 1555.[12] It was in marked contrast to their very limited judicial role in dealing with petty crime summarily as well, of course, to their administrative function in local government. Indeed, it was the unwillingness of 'trading justices' (ungentlemanly urban magistrates who took their judicial position for the potential court fees involved rather than social prestige) to do this tedious and, because of the lack of fees, poorly remunerated employment that led to changes amongst London's magistrates in the 18th century. Initially, this took the form of government financial support for the magistrate Sir Thomas de Veil from 1729 and, after his death, the Fielding brothers. Ultimately, the process led to the emergence of the current London system of paid stipendiary magistrates in 1792).[13] Exercising their investigative function, witnesses would be questioned by the Justices, the defendant examined, weak cases thrown out and prosecution witnesses entered into recognisances (essentially bound over) to ensure that they

11 TG Barnes, 'Star Chamber Mythology' (1961) 5 *Am J Legal Hist* 9.

12 1 & 2 Philip and Mary c 13.

13 JH Langbein, 'Shaping the 18th Century Criminal Trial: A View from the Ryder Sources' (1983) 50(1) *UChi LR* 60.

attended trial. Additionally, obvious but technical flaws in the case could be remedied. This was an almost automatic process, as can be seen from contemporary accounts. Thus, even when five men were arrested for the 'audacious burglary' of the Lord Chancellor's Mace in 1676, they were first promptly 'carried before the Right Worshipful, Sir William Turner, who after Examination (according to Justice) committed them to the common Gaol of Newgate'.[14] In some cases, the arrested suspects would be examined in private, as was the case in 1677 with the husband killer Mary Hoby, 'for fear of any unreasonable discovery of what she might declare'.[15] However, in this case, the examining magistrate was clearly concerned about the situation, as he stressed that there was no untoward pressure on her. Indeed, before he 'put so much as one question to her', he gave her so full an account of the evidence against her that 'she gave herself for lost' without holding any 'hope of either an acquittal or a pardon' and freely made a clean breast of the matter, telling him 'frankly from point to point' about the case as he recorded it.[16] This pre-trial examination appears to have been notably devoid of some of the features that marred the inquisitorial version of the investigative process in France in this period, where the *instruction*, or preliminary investigation, was often accompanied by torture intended to obtain the names of accomplices and a brutal cross-examination of the suspect while he/she was uncomfortably seated on a low stool (the *sellette*). The accused in France was denied the right to legal advice (not simply trial representation), inspection of evidence and the questioning of witnesses. The whole French process was largely secret, written and non-confrontational.[17]

The English procedure of the early 1700s was never close to being a *purely* inquisitorial system, not least of all because, in a country like England that was characterised by weak policing agencies (unlike, for example, Louis XIV's France), the role of the private individual in pursuing crime was paramount. The system was almost entirely dependant, normally, on ordinary people taking the burden of pursuing, arresting, initially detaining, and prosecuting criminals, an expensive and time-consuming process. In these circumstances, with members of the public 'pitted' against each other, the essential form of the criminal trial and investigation was necessarily adver-

14 'A Perfect Narrative of the Apprehension, Tryal and Confession of the five several persons that were Confederates in stealing the Mace and the Two Privy Purses from the Lord High Chancellor of England' (1677) printed for E Olivier, p 1.

15 'A Hellish Murder Committed by a French Midwife on the Body of her Husband. (1688) Randal Taylor, p 38.

16 Ibid.

17 See H Trouille, 'A Look at French Criminal Procedure' (1994) *Crim LR* 736.

sarial. However, the judicial contribution to the trial and investigation process was not.

Pre-trial procedure contributed to the efficient functioning of the felony trial when it was subsequently heard in court. In particular, the evidence of the defendant's examination by a JP, including any confessions made during the magistrate's questioning, would be adduced there, being proved if necessary by the JP or, probably more commonly, by the attendance of his clerk who would normally have also acted as scribe during the examination. The London police magistrates only lost their policing role (the supervision of some of the constabulary and investigations) in the 1830s, being confined then to a purely judicial function. In part, this was to avoid being 'tarred' by the initial unpopularity of the new post-1829 Metropolitan Police.

The Common Law Trial in the Early 18th Century

In most early 18th-century criminal (though not civil) trials, counsel was acting for neither the prosecution or the defence[18]. As there were only 338 barristers practicing in the Westminster courts (Kings Bench, Common Pleas etc) and the civil law side of provincial Assizes (*nisi prius*), most of whom were concentrated in London, it would, in any event, have been administratively difficult, as well as financially impossible, for most criminal trial defendants to be represented.[19] As a result, the judge necessarily had to take a very active (ie almost inquisitorial) role (by modern standards) in the supervision of the trial if the system was to run smoothly and swiftly; this included extensive personal involvement in the questioning of witnesses and the consideration of other evidence. As a consequence, he remained a dominant figure throughout the trial. This was so axiomatic that even in the 1760s, after change was underway, Blackstone was to note that it was felt to be one of a trial judge's obligations to 'be counsel for the prisoner; that is, [he] shall see that the proceedings against him are legal and strictly regular'.[20]

The trial judge would ask large numbers of questions of the witnesses in a way that would be unthinkable today. Additionally, judges in 18th-century trials showed little reservation during the proceedings in revealing their points of view on the evidence to the jury (again, contrary to the modern practise).[21] Furthermore, the judges were sometimes willing to adjourn cases while important extra evidence, not present in court but easily obtained, was

18 In the latter case, they were legally forbidden in felony cases.

19 D Lemmings (1990) *Gentlemen and Barristers: The Inns of Court and the English Bar 1680–1730,* Clarendon Press, p 123.

20 W Blackstone (1763) *Commentaries on the Laws of England,* vol 4, p 349.

21 TA Green (1985) *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800,* University of Chicago Press, p 271.

called. The jurors themselves also took a much more active role than would be the case today. The *Old Bailey Sessions Papers* for the late 17th and early 18th centuries (the most complete records for a felony court and greatly superior to those for the provincial Assizes) regularly record them asking questions of the witnesses, the accused and the judge, as well as asking, on occasion, that other witnesses not present in court be called. This apparent lack of intimidation by the process is, perhaps, not surprising; the same men often served repeatedly on jury trials. Although London was already a huge city in 1700 (appreciably over 500,000 people), the recurrence of some 'petty' jurors names on an annual basis means that jurors were drawn from what was proportionately a very small part of the population. This probably gave them a familiarity with the law, courtroom conventions and intimacy with the judges, something which probably also limited their independence, in practice, from judicial directions, especially in 'routine' types of felony cases.

For *most* of the time, it seems, the judge and jury worked together in relative harmony, though there were periodic (and celebrated) exceptions to this. It appears that it was openly done (and not uncommon), for the judges at the Old Bailey to argue with the jury about their verdicts, to require further deliberation by them and to give them fresh instructions if unsatisfied with their decisions.[22] All that the celebrated and, from the point of contemporary significance to the conduct of a 'normal' felony trial, exaggerated, *Bushell's* case[23] appears to have established at this time was that a jury could not be fined (or, as in the case of Bushell, imprisoned for refusing to pay such a fine) for persisting in returning verdicts against such judicial direction. However, this was something that was rare in any event.

It is significant that *Bushell's* case arose out of a very untypical trial (one with substantial political overtones), namely that of the Quaker leaders William Penn and William Mead for unlawful assembly and conspiracy. Some other types of cases also often appear to have produced a marked reluctance, on principle, to convict on the part of English juries, an obvious example being the trials of pirates, though there were also some others, especially where the prosecution had blatant political overtones, for example, under the 1722 'Black' Act, or involved the criminalisation of a long accepted perquisite.[24] However, it is important not to confuse these

22 On these issues, see Langbein (1978) p 291. Professor Langbein's work has been of immense importance in establishing the reality of criminal procedure in England in the 1700s.

23 (1670) Vaugh 135, 124 ER 1006.

24 *'Black' Act* 1722 (9 George I c 22). On pirates, see D Defoe (1724) *A History of the Pyrates*, Rivington, pp xix, 285. Given the frequently fluctuating legal status of such men as 'privateers' and buccaneers. this is, perhaps,

relatively uncommon cases with the situation in the enormously greater number of trials for offences such as pickpocketing, larceny and housebreaking. While it may have occurred in such cases that the judiciary periodically viewed 'obstinate jurors as a threat to the social order and the rule of law', it is wrong to assume that 'conflict between bench and jury was not uncommon'.[25] From an examination of the Sessions Papers for the Old Bailey, which probably would have had a higher proportion of such semi-political cases than a normal Assizes court, it appears to have been unusual. Indeed, some late 17th-century commentators, such as the lawyer Sir John Hawles, the author of *The Englishman's Right: A Dialogue Between a Barrister at Law and a Juryman* (1680), even felt that some jurors manifested a 'slavish fear' of the judges instructions which encouraged them to 'echoeback what the bench would have done'.[26] When conflict did occur, it is perhaps also a mistake to view it as necessarily the result of unreasonable attitudes on the part of the Bench. Sometimes, apparently bullying behaviour by judges appears to have been an understandable (if short tempered) response to the problems that juries had in making sense of difficult and confused areas of the complicated criminal law of the period when left to their own devices.

Nearly all trials in this period began with the prosecutor (also usually the victim) telling his/her version of events directly to the jury. At the conclusion of the prosecution case, the judge then asked the defendants in straightforward terms what they had to say about the evidence brought against them, allowing them to begin their own account of events.[27] Although defendants could not give sworn evidence in their own defence (a situation that persisted till 1898), their unsworn speech to the jury effectively served the same purpose and was, at this time, probably viewed as being much the same in status to those of the sworn witnesses.[28] In these circumstances, the burden of proof in a trial in the early 18th century was not clearly fixed on the Prosecution (something that only changed towards the end of the century). Once a prima facie case had been made out (something

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understandable. On the 'Black Act', see the 1725 trial of John Huntridge in EP Thompson (1977) *Whigs and Hunters: The Origins of the Black Act*, Peregrine Books, pp 188–9.

25 JM Mitnick,' From neighbour-witness to Judge of Proofs: The Transformation of the English Civil Juror' (1988) 32 *Am J Legal Hist* 207.

26 Cited by P Linebough, '(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein' (1985) 9(2) *NYULR* 233 at .

27 JM Beattie (1986) *Crime and the Courts in England, 1660–1800*, Clarendon Press, p 343.

28 After the 1898 *Evidence Act* allowed the defendant to give testimony (and be cross-examined) on oath, the unsworn 'dock statement' continued in England, although rarely used, until its abolition in 1980.

that was almost inevitable if witnesses 'came up to proof', given that by the trial stage the case would have survived scrutiny by both a JP, exercising his examining function, and the pre-trial Grand Jury), it was usually necessary for the defendant to provide telling evidence that he/she was not involved in the commission of the alleged crime. It is, thus, doubtful if the 'presumption of innocence' in a modern sense can properly be said to have existed. In the early 17th century, one legal writer had even felt that the defendant could be convicted even without Crown witnesses, the evidence of the indictment alone being sufficient.[29] A failure to give an account in these circumstances, via the defendant's statement to the jury, albeit unsworn, would often have been tantamount to an admission. Thus, the effective reality of the 'Right to Silence', as opposed to a debate concerning the harsh interrogation methods sometimes adopted in the prerogative Court of Star Chamber before its abolition in 1641, arrived only towards the end of the 18th century along with, and linked to, the advent of counsel to the criminal trial. A detailed examination of the hundreds of cases covered by the *Old Bailey Sessions Papers* from the 1670s to the mid-1730s has not identified a single case in which an accused person refused to testify on the grounds of privilege.[30]

Trials at the time were brief, very rarely more than a few hours, often very much less. It was not even finally settled till the end of the 18th century that a jury in a felony trial, as opposed to the normally much longer treason cases, could adjourn to consider its verdict overnight.[31] For a typical example of speed of hearings can be cited the case of the Middlesex jury at the Old Bailey (there was a second one empanelled from the City of London) that heard 21 cases over two days in December 1678 and deliberated just three times on verdicts on all the defendants (most of these offences, at least technically, like all felonies, carrying a potential death penalty).

Not surprisingly in a system where there were no lawyers and where there was such a rapid turnover of cases, the rules of criminal evidence were necessarily rudimentary or even non-existent in the early 18th century; given the constraints of time they had to be. The earlier, turn of the 19th-century portrayals of the emergence of modern evidential rules in works by Thayer and Wigmore, for example, suggesting a historical ancestry for the process that reached back to the 15th century can be misleading if taken to suggest an early and vigorous adoption of these rules in criminal trials. Exclusionary rules of evidence started in civil cases, where legal representation was common, and moved into criminal ones at the end of the 17th century.

29 JH Baker (1997) 'Criminal Courts and Procedure at Common Law: 1550–1800' in JS Cockburn (ed) *Crime in England 1550–1800*, Methuen, p 40.

30 Langbein (1978) p 283.

31 Baker (1997) p 38.

Although Mathew Hale (1609–76) had noted in the 1600s that exception could sometimes be taken to physical evidence or testimony, such rules were still very flexible at this period. The first major text on the law of evidence, by William Nelson, only appeared in 1717.[32] Hearsay evidence was regularly admitted in the first two decades of the century, though with a few reservations as to its weight (as is the situation today in most of Western Europe and in civil trials in England since the 1995 *Civil Evidence Act*). Thus, John Cooper's conviction and execution for murder in 1702 was considered a 'hard case' as 'the greatest part of the [prosecution] evidence was founded in hearsay'.[33] Witness testimony was also largely ungoverned by rules of admissibility. Previous convictions were not only not excluded but were regularly a part of the prosecution case, as they still are in most inquisitorial systems. A classic example can be seen in the case of one Mary Skinner who was charged with theft in 1714 and, having been caught with some of the stolen goods, 'pretended the Prosecutor lent them to her; but she appeared to be an old Offender, and was found guilty of Felony'.[34] This would certainly not, it appears, come within the modern similar fact exception to the present exclusionary rule, an exclusionary rule that was clearly well established by 1814.[35]

Reasons for change in the system from the mid-18th century

An obvious question is why this all changed in a comparatively short period and produced what was a clearly adversarial system by the end of the 1700s. The answer appears to lie in two interacting phenomena: the advent of lawyers to the trial process and a loss of confidence in the existing system on the part of the judiciary. This latter phenomenon is difficult to estimate, but may have occurred because of a number of *cause celebres* involving 'thief-takers', such as the infamous perjurer Stephen McDaniel, accomplices giving evidence against former criminal colleagues and cases where suspects had mistakenly made confessions in the firm expectation of being admitted as Crown witnesses against their accomplices, only to have it used against themselves at trial, immunity having been refused.

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32 W Nelson (1717) *The Law of Evidence*, Gosling.

33 'A Select and Impartial Account of the Lives and Dying-words of the most Remarkable Convicts from the Year 1700, down to the Present Time' (1745) 2nd edn, vol 1, J Applebee, pp 39–45.

34 Langbein (1978) p 303.

35 See on this *R v Cole* 1814, reported in SM Phillip (1814) *A Treatise on the Law of Evidence*, 2nd edn, p 69.

The advent of lawyers to the trial process

To an extent, there were already signs as to the future potential significance of counsel to the trial process at the start of the 1700s. Although confined to treason trials, the 1696 *Act for Regulating of Trials in Cases of Treason* was later to be of enormous significance in the 18th century.[36] It provided a set of procedural safeguards which set important precedents for the introduction of such safeguards to due process into felony trials at a later period.[37] The Act codified protective provisions in treason trials that had been selectively used or proposed over the previous half century. It put on a statutory footing the right of the accused to be indicted only on the evidence of two witnesses, gave him/her a right to see the indictment and a copy of the panel of jurors, to subpoena witnesses for the defence who could testify under oath and, very significantly, the right to be represented by counsel on both legal *and* factual matters.

The passing of the Act, and the legal representation provision in particular, can be explained by a widespread feeling, in the politically dominant Whig party, that treason trials had been used in the previous decade to destroy political opponents. The unfairness of a procedure where the Crown was (unlike in most crimes) routinely represented in such cases by excellent lawyers (often by the Attorney-General himself) while defendants were in the position of having to respond to several hours of oral evidence on their own was widely appreciated.[38] However, it should be noted that there had been calls for legal representation in ordinary felony cases for several decades before 1700.

Counsel acting for the prosecution appear in a few routine cases at the Old Bailey in the 1720s and in rather more substantial numbers in the following decade. Defence counsel followed closely behind. By the 1730s, counsel were being allowed to act for defendants in felony trials where previously they had been limited to arguing points of pure law on the rare occasions that they came up; strangely, they could always also appear at the less serious misdemeanour trials, though rarely did so.[39] Their role progressively increased, though all the limitations on defence counsel's conduct of the trial were only formally abandoned with the passing of the 1836

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36 7 & 8 Wm III c 3.

37 On this, see A Shapiro, 'Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696' (1993) 11(2) *Law & Hist Rev* 215.

38 JM Beattie, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9(2) *Law & Hist Rev* 224

39 Beattie (1986) p 356.

Prisoner's Counsel Act.[40] Until this date, they could not make a closing speech to the Jury; something which had to be done by defendants themselves. Prior to the 1730s, the judge had normally been the only person present in the court in felony trials with any legal training.

The use of counsel for defendants who could afford the considerable expense was quite widespread by the end of the 18th century, although their numbers only exceeded participation in 10% of such trials at the Old Bailey at the start of the 1780s.[41] The 1780s also saw the emergence of outstanding and able specialist criminal Barristers, working in the Old Bailey court and at Assizes. These lawyers, men such as William Garrow, for the first time apparently did not find regular participation in such work beneath them.[42] There also appears to have been a sharp increase in lawyers' willingness to aggressively pursue their clients interests in the 1780s, perhaps accelerating the acceptance into criminal law of the rules of evidence, as they determinedly took issue with proposed evidence that they felt to be flawed.

These men undoubtedly contributed to the developing rigidity of the law and it is perhaps not surprising that so much of current English evidence law can claim its provenance in the later 18th century. As Langbein has noted, this process rapidly developed a dynamic of its own.[43] As the rules became universal to both criminal and civil cases, they were driven to extremes. Few could have foreseen that the early cases firmly excluding rather than merely reducing the weight of direct hearsay evidence could have led within little more than half a century to the extreme interpretation of the rule manifest in *Wright v Doe d Tatham.*[44] In this civil case (also to become authority for similar criminal cases), it was held that the rule against hearsay also applied to *implied* assertions of fact not intended by their maker as well as express ones. In the Court of Exchequer Chamber, Bosanquet J felt with absolutely no sense of historical perspective beyond his own lifetime that admission of letters with a view to drawing inferences as to the belief of their writer about the mental health of the individual with whom he was corresponding 'would establish an entirely new precedent in a court of Common Law'. Significantly, while supporting the exclusion of such evidence, his brother judge Baron Parke did underline the departure of evidential rules from commonsense when he accepted in his judgment that the proposed inference to be drawn from the correspondence was logical in everyday matters: 'such an inference no doubt would be raised in the

40 6 & 7 Wm IV c 114.

41 Beattie (1991) p 227.

42 Ibid, p 239.

43 Langbein (1978).

44 (1837) 7 A & E 313.

condition of the ordinary affairs of life, if the statement were made by a man of veracity'.[45] From providing safeguards against injustice, by the 1830s, the rules were already on the way to an almost absurd degree of technicality that would have profound ramifications.

A sign of the potential influence of determined counsel on the criminal trial process can be seen in the 1723 trial for high treason of the Jacobite plotter Christopher Layer, for which he was entitled to have the assistance of counsel at his trial under the 1696 Act.[46] The *London Journal* produced a 'large and impartial Abstract of the Tryal' in a weekly supplement, providing a detailed account of his trial. The potential influence of the presence of counsel can possibly be seen in the care that was taken to exclude the written statements of Layer's earlier interrogation, as the judge noted that '[t]hese minutes of the Examination were not offered to be read as Evidence, it not having been either read to Mr Layer at the time he was examined, nor signed by him; but the witnesses gave an Account of his confession viva voce, look'd to their notes to refresh their memories'.[47] This was already a departure from normal felony practice at the Old Bailey, perhaps being a very early manifestation of a rule that was to become well established in the English Law of Evidence. That advocates even then would vigorously defend their clients, even in a politically sensitive cause, can be seen in the angry words of the Lord Chief Justice who presided over Layer's trial and who was to note to the defendant at the end:

> You have had all the indulgence and Advantage that the Law would allow you. You have had counsel assigned you of your own choosing, to advise you preparatory to your tryal, and to assist you in making your defence at your tryal. These counsel have been permitted to say whatever they thought proper for your service, and I heartily wish that I could say ... that they had not taken a greater Liberty than they ought to have done.[48]

The advent of lawyers by itself, however, does not fully explain the changes to the system. A series of scandals appear to have led judges themselves to increasingly question the nature of the 'robust' felony trials, conducted speedily and relatively informally in the early 1700s, and provided the background in which legal objections to disputed evidence could be considered.

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45 Ibid at 386.

46 As was common in treason trials or those cases with political overtones.

47 *London Journal*, 9 February 1723.

48 Ibid.

Doubts about the Justice of the Existing System

Concern about the justice provided by criminal trials was linked to policing reforms in the 1700s. Influential people in the newly mobile society of early modern England felt that the nation was increasingly plagued by crime, especially in London, something which necessitated new counter-measures. This prompted innovations in policing; in particular, it encouraged a movement away from an acceptance that in most cases, apprehended felons would normally have been detained in the immediate aftermath of their crimes (sometimes by the Hue and Cry) or while trying to dispose of stolen property, rather than being subsequently detected at some remove from the crime by investigation. However, because the formal policing agencies of the State were weak and there was little political willingness to alter that situation post-1688, other means had to be found to effect such detection. As a result, encouragement was increasingly provided to ordinary members of the public to police themselves. This mainly took the form of financial rewards as well as a few other benefits, such as 'Tyburn tickets', first introduced in 1693, for the capture and conviction (by giving evidence) of felons. These were on a fixed scale set under statute, though sometimes there were special additional rewards offered. The rapidly increasing scale of these inducements (sometimes involving hundreds of pounds) in the first decades of the century produced a series of scandals involving 'thief-takers' (essentially professional bounty hunters) which would bring the system into disrepute and result from the second half of the century in much greater judicial care in the reception of thief-takers' (and other) evidence by the courts.

In the mid-18th century, the examination of witness names that recur frequently on the back of indictments for the metropolis and adjacent counties and of the names of those to whom rewards were regularly paid results in a list of about a dozen 'professional' thief-takers (men living mainly on their rewards) and another 12 less committed but still frequent ones. A number (but not all) of these men were themselves of dubious probity; for example, most of them appear to have had a previous criminal record of their own.[49] Perhaps in part because of this, there were a number of entrapment scandals in the mid-century in which members of London's population of vagrants were enticed into committing crimes by thief-takers specifically aiming to claim the rewards for their prompt capture. These scandals appear to have provided a severe shock to the existing legal system.

The master-criminal Jonathan Wild, executed in 1725, had been an early indicator of the dangers of such entrepreneurial policing. However, the

49 R Paley (1989) 'Thieftakers in London in the Age of the McDaniel Gang, c. 1745–1754' in D Hay and R Snyder (eds) *Policing and Prosecution in Britain 1750–1850*, Clarendon Press, p 303.

most famous of these cases in the mid-century involved a group of thief-takers led by Stephen McDaniel, who had already prosecuted several men to their deaths and in 1754 had lured two youths into committing a robbery against one of his colleagues in Deptford.[50] When the details of the case were exposed, McDaniel and his companions were pilloried amid popular outrage.

As a consequence of this and other similar cases, the authorities appear to have become progressively more defensive and careful about receiving such evidence. The magistrate John Fielding, the half-brother and successor of fellow magistrate Henry, even felt it necessary to produce a tract distinguishing thief-takers like the perjurer McDaniel from 'real and useful thieftakers' who 'deserve to be considered with regard and esteem'.[51] Writing in the same year as the scandal, Henry Fielding also felt obliged to stress how, when employing a group of thief-takers in the previous year to combat a dangerous gang of street robbers in London, he had carefully chosen men who were all 'of known and approved fidelity and integrity'.[52] Nevertheless, no amount of care in their selection could eliminate the root problem in the system, as was demonstrated in 1816 when six constables, including a respected member of the Bow Street Patrol, were prosecuted for being involved in crimes to obtain the attendant rewards.[53]

However, mid-century evidential problems were not confined to thief-takers. Additionally, and for the same reasons, the early 18th-century system of criminal justice had become highly dependant on accomplice evidence. Just as rewards encouraged supposedly honest members of society to fight crime, so criminals were encouraged to turn against their colleagues by the offer of various forms of immunity, which in its turn produced serious instances of injustice and scandal.

In 18th-century England, the use of accomplice evidence was widespread, being felt to be a cruel necessity. As Chitty was to note a hundred years later, '[t]he law confesses its weakness by calling in the assistance of those by whom it has been broken'.[54] In some respects, the accomplice system worked very well, creating permanent distrust amongst criminals as a result of which apprehended gang members often rushed to be the first to turn

50 Deptford parish enticingly offered an extra twenty pounds reward for the apprehension of such offenders: L Radzinowicz (1956) *A History of English Criminal Law and its Administration*, vol 2, Stevens, p 326.

51 J Fielding (1755) *A Plan for the Prevention of Robberies Within 20 Miles of London*, p 7.

52 H Fielding (1952) *The Voyage to Lisbon*, orig 1754, Everyman, p 192.

53 C Emsley (1996) *The English Police: A Political and Social History*, 2nd edn, Longmans, p 20.

54 J Chitty (1826) *A Practical Treatise on the Criminal Law*, 2nd edn, vol 1, Butterworth & Son, p 769, quoted in Radzinowicz (1956) p 54.

King's evidence before one of their colleagues did so (and precluded their own opportunity). Sometimes there would be 'chains' of mutual incriminations covering numerous individuals once an initial capture had been effected. It was, however, a system that was necessarily susceptible to abuse, as desperate criminals (and sometimes probably the innocent) sought to save themselves while they had the chance, at the expense of others. Their motives were usually purely self-serving. Later in the century, Sir John Fielding was to observe that most such accomplices who gave evidence subsequently returned to a life of crime,[55] illustrative of this being a newspaper account of one 'Thomas Barton, who was one of the Evidences in convicting the Blacks of Waltham, [who] was lately taken up for a robbery committed between Gosport and Fordham and was sent to Winchester Jail'.[56] Fielding was also firmly of the opinion that 'commonly the greatest rogue in the gang turns evidence'.[57] Sometimes, as a result, juries appear to have been concerned at the use of accomplices who had turned King's Evidence, occasionally voicing this anxiety in court by asking which of those involved, the accused or the Crown's witness, had had the greater role in a crime.[58]

This accomplice evidence was potentially in two forms. In theory, accomplices who had their liberty could come forward freely and impeach their colleagues, claiming a pardon as of right under a variety of statutes. For obvious reasons, this was extremely rare. Much more commonly, the situation would be one where an accomplice had already been captured and then attempted to make a 'deal' with the authorities. This second form of 'agreement' was termed the 'Equitable Claim to the Mercy of the Crown'; unlike the former situation, a pardon was not *as of right* in this situation but was based on the practice of the court and amounted to a promise or an 'implied confidence' of mercy.[59] The pardon, as Lord Mansfield noted, would be given to those who 'behave[d] fairly and disclose[d] the whole truth and bring others to justice'. It amounted to a promise of a recommendation of mercy; if the accomplice fulfilled his part of the agreement, 'they are not entitled as of right to a pardon, yet the usage, the lenity, and the practice of the Court, is to stop the prosecution against them'.[60] Its discretionary nature inevitably encouraged would-be accomplices into

55 Radzinowicz (1956) p 54.

56 *The Original Half-Penny London Journal*, 23 February 1725.

57 J Fielding (1755) p 11.

58 JM Beattie (1997) 'Crime and the Courts in Surrey 1736–1753' in Cockburn (ed) p 167.

59 Baker (1997) p 40.

60 Mansfield CJ in *R v Rudd* (1775) 1 Leach 120, quoted in Sir William Holdsworth (1938) *A History of English Law*, Methuen, vol 12, p 514.

providing as many names as possible, so as to become more attractive to the authorities as Crown witnesses.

Additionally, the informality of such deals and 'understandings' with the authorities, perhaps sometimes encouraged by a desperate prisoner's wishful thinking, often a result of misleading suggestions by the authorities themselves, was such that they could not be relied on. Thus, a newspaper noted in 1731 that:

> William Maynee [an accountant], suffer'd [was executed] for feloniously erasing two indorsements from Bank Notes.... Being suspected, he was stopt at the bank, January 2nd, and put in the Compter from whence he sent to the Deputy Governor of the Bank, intimating that if he might be admitted to the mercy of Transportation to Jamaica, he would make a full Confession and Discovery, and by the Answer brought back, conceiving some Hopes, he made and Sign'd his Confession, impeached his Accomplice, and pleaded Guilty at his Trial.[61]

Despite this, he was executed.

This was not untypical, there were a number of cases where a suspect admitted guilt in the mistaken belief that it would lead to a pardon. Some of these were felt to be (and probably were) totally innocent or only very marginally involved in crime. Concern at cases such as Maynee's led ultimately to the landmark case of *R v Warwickshall* making confessions obtained by 'the flattery of hope' inadmissible.[62] The case was to be important authority in England until the codification of the law on confessions in section 76 of the *Police and Criminal Evidence Act* 1984.

As a result of the fears engendered by accomplice cases, the courts had decided by the middle of the 18th century that such evidence should normally be corroborated, this was later watered down at the end of the 1700s to a mandatory warning to the jury about the risks involved in employing such evidence. This was the case in England until the 1994 *Criminal Justice and Public Order Act* abolished the requirement. However, like many other criminal evidence rules, this rapidly lost contact with the mischief at which it was aimed, and became absurdly complicated in its requirements, with cases such as *R v Baskerville*[63] requiring such supporting evidence to satisfy numerous technical requirements before it could be considered corroborative.

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61 'An Account of the Malefactors executed at Tyburn', *The Monthly Intelligencer*, March 1731, p 125.

62 (1783) 1 Leach 263.

63 [1916] 2 KB 658.

Consequences

The new style of adversarial trial was, inevitably, slow, expensive and technical. Its advent had many consequences. It meant that trial on indictment was no longer viable for many criminal cases. It would have been administratively (and financially) impossible to have continued hearing the less serious matters in such a manner. This problem was met in England by a huge expansion in the judicial/adjudicative function of the JPs (and stipendiary magistrates in the cities) at the expense of their investigative one. By 1855, although the metropolitan stipendiary magistrates dealt with 97,090 cases, only 19,278 were sent for trial on indictment, while 77,712 were dealt with summarily.[64] Blackstone's fears in the previous century as to the future of trial on indictment (with a jury) had proved to be justified; the system could cope with the partly inquisitorial version of criminal trial in the early to mid-18th century, perhaps accepting that 'delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters';[65] this became impossible with the adversarial trial that emerged at the end of the 18th century.

The changes also meant that juries were substantially denied the experience and overt guidance of the trial judge, the results of a judicially supervised (and relatively impartial) investigation carried out much closer to the commission of the alleged crime (by the examining JP) as well as access to evidence which, though cogent, was either legally inadmissible or, alternatively, was not selected by the parties to the trial. This process was not confined to England.

In the United States, the growth of adversariality (and 'technicality') developed, in some ways, even more completely than in other common law countries. For example, current English case law makes it clear that the trial judge should leave all the issues in a case to the jury and not direct them in excessively strong terms about the evidence.[66] Though this is a massive departure from the early 18th-century situation where trial judges had no fear of making their views on a case clear, they *can* still address the jury on the evidence rather than simply direct on the law. In the United States, however, criminal trial judges are much more circumscribed in the extent to

64 J Davis, 'A Poor Man's System of Justice: The London Police Courts in the Second Half of the Nineteenth Century' (1984) 27(2) *Historical J* 312.

65 Blackstone (1763) vol 9, p 343.

66 *R v West* (1910) 4 Cr App R 479. It has also produced the recent strange situation in which in a 'total break with tradition' an English High Court Judge, Rougier J, could write to a convicted defendant's solicitor, over whose trial he had presided, after conviction, to record his surprise at the jury's verdict. The conviction was quashed on appeal 'Root for Rougier' (1996) 160(27) *Justice of the Peace* 447.

which they can comment on evidence, something that prompted an American lawyer observing a routine Old Bailey trial and judicial summing up in the 1990s to observe that '[f]ew American judges would have treaded as far and perhaps as accurately as the *M*[case] judge did in commenting upon the trial evidence'.[67] In turn, this loss of effective jury control and guidance contributes to a degree of delay, expense and verdict uncertainty (occasional 'rogue' verdicts against the evidence) in the American (and English) system that means that the overwhelming majority of defendants must be encouraged into waiving their right to a trial by their peers, by pleading guilty, if the system is not to break down. This was something that was very rare in England in the 18th century (perhaps only 1% of cases in the early 1700s) and that appears to have been actively discouraged by the Judiciary. Thus, when Mary Hoby pleaded guilty in February 1687 on her arraignment at the Old Bailey, 'the Court with all possible Tenderness, let her know the Danger and the Consequence of her confession and offer'd her yet the Liberty to Depart from her Plea, and take her Tryal if she thought fit'.[68] This discouragement of guilty pleas was not confined to England; in the United States, the same phenomenon can be observed until quite late in the 19th century. In the case of *Commonwealth v Battis*, a 20-year-old black man accused of the rape and murder of a 13-year-old white girl (a politically highly 'sensitive' situation) came under considerable pressure from the court to retract his guilty plea, the trial court judge informing him that he was 'under no legal or moral obligation to plead guilty'.[69] As the century advanced, the numbers of guilty pleas progressively increased from 15% of convictions in Manhattan and Brooklyn in 1839 to 80% in 1880. This transformation was, in substantial part, effected by an extreme form of 'plea-bargaining', a system that at worst showed signs of corruption and, at best, extreme disproportionality in sentences between the same offences, depending on whether they had met with a guilty plea or not.[70] This has continued to the present. In *Bordenkircher v Hayes*, the Supreme Court upheld a life sentence imposed on a defendant who had refused a 'deal' for the same offence that would have resulted in a five-year sentence had he pleaded guilty.[71] Arguably, the present English system of sentencing discounts for early guilty pleas is only a more subtle and refined version of this phenomenon. As Alschuler noted in the

67 R Tarun, 'An American Trial Lawyer's View of an Old Bailey Trial' (1993) 143 *New LJ* 1039.

68 'A Hellish Murder' (1688) p 35.

69 *Commonwealth v Battis* 1 Mass 95 (1804). AW Alschuler, 'Plea Bargaining and Its History' (1979) 79(1) *Colum LR* 7.

70 Ibid, p 18.

71 *Bordenkircher v Hayes* 434 U 357 (1978).

late 1970s, although the old system of trial (ie that of the early 18th century) clearly lacked procedural safeguards, the modern Anglo-American one 'has now become absurd, both in the complexity of its trial processes, and in the summary manner in which it avoids trial in the great majority of cases'.[72]

Conclusion

At the start of the 18th century, judges appear to have been confident that the existing form of jury trial, following an investigative process conducted by a Justice, worked fairly well. A loss of this confidence, in part engendered by a series of scandals (themselves reflecting changes in policing), together with the arrival from the 1750s of trial counsel in numbers, led to profound changes. It produced the adversarial system in its modern form, complete with much of the *corpus* of criminal evidence law, a subject that from modest beginnings became so complex that, with the attendant changes in criminal procedure, trial on indictment, as the normal way of disposing of nearly all criminal cases swiftly ceased to be viable.[73] However, whether an excessive degree of adversariality and technicality meant that this process went further than was necessary or desirable is open to debate; that it is inappropriate in the modern era is certainly arguable.

The loss of the inquisitorial element to the English criminal trial was linked to contemporary deficiencies in the existing criminal justice system, something that provided fertile ground for the newly arrived lawyers to work on. These have been remedied to a very considerable extent. The advent of modern professional police forces, equipped to investigate crime, from 1829 onwards, the growth of detective and forensic branches within these police forces, the attendant phasing out of substantial state rewards (reduced in England steadily to near non-existence in the 150 years from the mid-18th century onwards) and the consequent demise of professional thief-takers, along with the great reduction in significance in accomplice evidence in the modern trial, began a transformation in the system. This is something which has been greatly bolstered in most common law countries in recent years by extra safe-guards and the provision for access to free legal advice for those in police custody, as seen in England in the Codes of Practice issued pursuant to s 66 of the *Police and Criminal Evidence Act* 1984 and an increased general scepticism about the value of confessions.

However, despite these changes, the legal consequences of these early deficiencies, not least the purely adversarial trial, are still with us. At a time when miscarriages of justice have caused concern in both common law

72 Ibid, p 41.

73 On this, see Langbein (1978) p 133; D Hay 'The Criminal Prosecution in England' (1984) 47 *MLR* 1.

countries, such as Australia and England, as well as in those with an inquisitorial system, such as France, the notion of a fusion or 'grafting on' of elements from the rival system is increasingly attractive, each being seen to have safeguards and strengths lacking in the other.[74] In common law countries, a judicially supervised investigative stage, or at least examination, for serious crimes, a greater degree of judicial and jury involvement in the calling and questioning of evidence at trial, something that would also facilitate a focussing on weight rather than admissibility of evidence, might be a valuable improvement to the existing system. In this context, English criminal procedure and trial in the early 18th century, which in many ways was such a combination (if an obviously flawed one) with a major and usually relatively impartial judicial input by JPs before, and by the presiding Judge at, the trial, accompanied by fairly relaxed (but not totally non-existent) evidential rules, is worthy of re-examination.

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74 It is, perhaps, salutary to appreciate that in France some reformers are advocating a move to a more adversarial/accusatorial system, at a time when a move in the opposite direction is sometimes suggested in England. See, for example, Trouille (1994) p 735.

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