

THE PROSECUTORIAL ORIGINS OF DEFENCE COUNSEL IN THE EIGHTEENTH CENTURY: THE APPEARANCE OF SOLICITORS

JOHN H. LANGBEIN*

I. THE RULE AGAINST DEFENCE COUNSEL

ENGLISH criminal procedure was for centuries organised on the principle that a person accused of a serious crime should not be represented by counsel at trial. When the surviving sources first allow us to see something of how criminal trials in cases of treason and felony were conducted, we see the judges insistently enforcing the prohibition on defence counsel.¹ Into the eighteenth century, the leading treatise on criminal procedure, Serjeant William Hawkins' *Pleas of the Crown*, endorsed the rule against defence counsel. Since any defendant "of Common Understanding may as properly [defend himself] as if he were the best Lawyer", Hawkins explained in 1721, "it requires no manner of Skill to make a plain and honest Defence. . . ."²

The notion that criminal defence was a suitable do-it-yourself activity arose at a time when the whole of the criminal trial was expected to transpire as a lawyer-free contest of amateurs. The prosecution was also unrepresented. The victim of the crime usually served as the prosecutor,³ aided by other witnesses and sometimes by the lay constable. A lay magistrate, the justice of the peace, organised

* Chancellor Kent Professor of Law and Legal History, Yale University; Arthur Goodhart Professor in Legal Science, Cambridge University, 1997-98. I adhere in this article to conventions that I have followed in prior work using manuscript and antiquarian sources. Words abbreviated in the originals have been written out, missing punctuation supplied, and obvious misspellings corrected without disclosure. Spellings have been modernised, but not in the titles of books or pamphlets. I acknowledge with gratitude suggestions and references from John Beattie, James Oldham, and Michael Prichard, and the research assistance of Cary Berkeley Kaye.

¹ For instances of criminal defendants complaining about being denied counsel, see, e.g., *John Udall*, 1 St. Tr. 1271, 1277 (Croydon Assizes 1590); *John Lilburne*, 4 St. Tr. 1269, 1294-96, 1317 (Com'n of oyer and terminer, London 1649); *Christopher Love*, 5 St. Tr. 43, 52-55, 61 (High Court 1651); *John Twyn*, 6 St. Tr. 513, 516-517 (Old Bailey 1663); *Edward Coleman*, 7 St. Tr. 1, 13-14 (King's Bench 1678); *Stephen Colledge*, 8 St. Tr. 549, 570, 579 (Oxford Assizes 1681); *Richard Noble et al.*, 15 St. Tr. 731, 747 (Surrey Assizes 1713).

² William Hawkins, *A Treatise of the Pleas of the Crown*, vol. 2, p. 400 (London, 2 vols., 1716, 1721).

³ Not, of course, in homicide cases, in which the task was sometimes taken up by the victim's kin, but in which the coroner system was the closest English approximation to Continental-style public prosecution by an investigating officer. (See also note 98 below.) For an indication of the extent of the coroner's activity in the later eighteenth century, see *Wiltshire Coroners' Bills: 1752-1796* (Roy F. Hunnisett, ed.) (1981) (Wiltshire Record Soc., vol. 36).

A. Exclusions

In theory, the courts recognised an exception to the rule against defence counsel for the case in which “some Point of Law arise[s], proper to be debated”,¹⁰ but in practice this exception had little scope. The judges commonly denied requests for counsel, invoking the maxim that the court served as counsel for the accused. In Sir Edward Coke’s formulation, “the Court ought to be . . . of counsel for the prisoner, to see that nothing be urged against him contrary to law and right . . .”.¹¹ The court-as-counsel rubric proved to be a shallow safeguard. As John Beattie observes, it meant “that the judges would protect defendants against illegal procedure, faulty indictments, and the like. It did not mean that judges would help the accused to formulate a defence or act as their advocates”.¹² Indeed, the idea of the court as counsel “perfectly expresses the view that the defendant *should not have counsel* in the sense that we would mean”.¹³

Another exception to the rule against defence counsel in common law criminal procedure was that it did not apply to misdemeanour. We have no particularly satisfying account of why contemporaries thought it appropriate to deny defence counsel in cases of treason and felony while allowing it for misdemeanour. One factor that may have influenced the distinction was the peculiarity that the category of misdemeanour included some matters of a largely civil or regulatory character—for example, the liability of property owners and parishioners for the upkeep of the roads.¹⁴ When questions of property rights (the sphere in which lawyers were otherwise most prominent in civil practice) came into litigation, it would have been awkward to forbid counsel because an archaic form had characterised the issue as misdemeanour.¹⁵

¹⁰ *Ibid.*

¹¹ Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London 1644) p. 29 (posthumous publication, written 1620s–1630s). For discussion of the court-as-counsel rubric see Langbein, “Privilege”, at pp. 1050–52; and John M. Beattie, “Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries” (1991) 9 *Law & Hist. Rev.* 221, 223 [hereafter cited as Beattie, “Scales”].

¹² Beattie, “Scales”, p. 223.

¹³ *Ibid.* (emphasis added).

¹⁴ Michael Dalton, *The Country Justice*, pp. 51–55 (London 1618).

¹⁵ As far back as the early decades of the seventeenth century, “it was apparently quite common for attorneys to act for individuals accused at quarter sessions of minor criminal offences.” C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The “Lower Branch” of the Legal Profession in Early Modern England* (1986) p. 190 (reviewing several studies). Brooks also reports “demarcation disputes between barristers and attorneys over” the right of audience in such matters at quarter sessions, a struggle that the barristers ultimately won. *Ibid.* pp. 90–91.

eighteenth century.²⁰ In an article published 20 years ago, I placed the development a generation earlier, in the mid-1730s.²¹ Using a set of pamphlet sources, the *Old Bailey Sessions Papers*,²² which supply synoptic accounts of the London felony trials held at the Old Bailey, I found that the earliest unambiguous case of defence counsel cross-examining prosecution witnesses dated from 1734.²³ I found two further examples in 1735, nine in 1736.²⁴ Using similar sources for Surrey assizes, Beattie has documented the appearance of defence counsel in that court in the same period, including a case that occurred in 1732.²⁵

Legislation in 1836, the Prisoner's Counsel Act, expanded the role of defence counsel beyond the examination and cross-examination of witnesses, allowing so-called "full defence", that is, permitting counsel to address the jury, hence to offer observations about the evidence.²⁶

C. Ending the Altercation

Having insisted for so long on the rule forbidding defence counsel in cases of felony, why did the judges abandon it in the mid-1730s? The scholarship has not had much to say about this question. In the article in which I reported the appearance of defence counsel in the Old Bailey in the mid-1730s, I observed that from the later 1710s and into the 1720s the pamphlet sources evince a trickle of cases, about one a year, in which the appearance of prosecution counsel is reported.²⁷ Such cases increased in frequency in the early 1730s. I noticed eight in the year 1734.²⁸ Because the Old Bailey reports show greater resort to "prosecution counsel in the years just before the advent of defence counsel", I wondered whether "the resulting disparity may have influenced the judges to relax" the rule forbidding defence counsel, on analogy "to the developments precipitating the Treason Act of 1696".²⁹ Just as the 1696 Act had allowed defendants to have counsel in order to even up for the prosecutorial advantages

²⁰ Stephen, *History*, vol. 1, p. 424.

²¹ Langbein, "Lawyers", pp. 311-312.

²² The title wanders across the decades but is usually some variant of "The Proceedings on the King's Commissions of the Peace, Oyer and Terminer, and Gaol Delivery . . . in the Old-Bailey, on [particular dates, also identified by London mayoral years]" [hereafter cited by month and year as OBSP].

²³ *E.-J.*, OBSP (Jul. 1734, #39) 161, cited in Langbein, "Lawyers", p. 312 n. 161.

²⁴ Langbein, "Lawyers", p. 312, n. 161. Years at the Old Bailey were reckoned from December of the previous calendar year, following the mayoral years of the City of London. Hence, the December 1735 sessions began the 1736 year.

²⁵ John M. Beattie, *Crime and the Courts in England: 1660-1800* (1986), pp. 356-357 [hereafter cited as Beattie, *Crime*].

²⁶ 6 & 7 Will. 4, ch. 114 (1836). On the background to the legislation, see David J.A. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial: 1800-1865* (1998), pp. 67-91.

²⁷ Langbein, "Lawyers", p. 311.

²⁸ *Ibid.* p. 312 & n. 160.

²⁹ *Ibid.* p. 313; accord, Beattie, *Crime*, p. 359.

and the Post Office. I also point to the growing use of solicitors by private prosecutors, and to the reinforcement for traditional private prosecution that resulted from the development of associations for the prosecution of felons. It will be seen that these widespread voluntary societies were intimately aligned with the solicitor's profession.

This article also points to the growing prominence of solicitors for the defence. The shady figures practising in London were known disparagingly as "Newgate solicitors". This epithet was also applied to some solicitors engaged in prosecution work. (Newgate was the prison that held persons awaiting trial at the Old Bailey.) By the 1730s there was considerable alarm about the ability of Newgate solicitors to falsify or to tamper with evidence in ways that judge and jury might be unable to detect at trial, unless an adverse counsel was permitted to cross-examine the witnesses whom the solicitors had produced and prepared.

2. *The reward system.* In the same decades that solicitors were bringing legal professional reinforcement to a range of criminal prosecutions, the government launched a sustained effort to increase the levels of criminal prosecution by offering monetary rewards for the successful prosecution of offenders who committed certain of the more serious property crimes. The reward statutes called forth a mercenary proto-police, the thieftakers, who lived close to the London underworld on which they preyed.

The reward system proved to be fraught with incentives for false witnessing. Reward-seekers who received £40 per conviction had no intrinsic interest in convicting the guilty rather than the innocent. It will be seen that this central flaw of the reward system came sharply to public attention in the 1730s, when the bench made its epochal decision to allow defence counsel.

This article is mainly devoted to the solicitors' increasing role in the prosecution of crime, a subject that has not been addressed in prior scholarship. The reward system was brought to prominence decades ago in Radzinowicz' *History*,³¹ and it has attracted further attention in recent years. Accordingly, in this article I am able to relate the reward system to my larger topic in a more summary fashion.

³¹ Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol. 2, pp. 57-137, 326-346 (4 vols. 1948-68) [hereafter cited as Radzinowicz, *History*] (treating statutory, nonstatutory, and private rewards).

A. Unsettled Professional Patterns

The profession of solicitor was still taking shape in the early eighteenth century,³⁴ the period during which solicitors figured in the innovations affecting criminal procedure that are the centrepiece of this article. Solicitors were only then securing their ascendancy over the older profession of attorney, which they came to subsume.³⁵ The attorney had been associated with the work of a single court, in connection with his role in entering pleadings.³⁶ The solicitor first appeared in the fifteenth and sixteenth centuries, both to manage multi-jurisdictional litigation,³⁷ and in connection with the fact-finding needs of the "new courts and councils", especially Chancery, Star Chamber, and Requests.³⁸

Indeed, into the nineteenth century "the solicitor was associated principally with the court of Chancery".³⁹ Chancery (like the defunct Tudor courts of Star Chamber and Requests) adjudicated without jury trial, basing its judgment on the evidence that the parties gathered by means of interrogatories and other discovery. These courts had a vastly larger appetite for investigation into matters of fact than did the common law courts, which exhibited an opposite tendency. From the later Middle Ages into early modern times, the common law courts attempted to correct for the dangers of civil jury practice by narrowing their range of factual inquiry, employing such clumsy devices as single-issue pleading and the insistent preference for seal and record evidence.⁴⁰ The testimonial disqualification of the parties at common law also greatly diminished the ability of the common law courts to find facts.⁴¹

The initial development of the profession of solicitor, and the solicitor's subsequent displacement of the attorney, occurred as part of the larger saga of Chancery's "conquest"⁴² of common law. The

³⁴ Parliament supplied the regulatory base for the profession in the act of 2 Geo. II, ch. 23 (1729) ("for the better regulation of attorneys and solicitors"). The Act allowed only persons enrolled with one of the courts to sue out any writ or process, or to carry on any proceeding. See Holdsworth, *HEL*, vol. 12, pp. 52-57. This registration requirement produced records that make it possible to estimate the extent of the profession. It has been reckoned that London in 1730 had over 1,500 attorneys, or one to every 383 inhabitants. Philip Aylett, "A Profession in the Marketplace: The Distribution of Attorneys in England and Wales 1730-1800" (1987) 5 *Law & History Rev.* 1, 3.

³⁵ Holdsworth, *HEL*, vol. 6, pp. 456-457.

³⁶ *Ibid.* p. 453.

³⁷ Birks (n. 33 above), p. 88.

³⁸ Holdsworth, *HEL*, vol. 6, pp. 453-454.

³⁹ *Ibid.* p. 453.

⁴⁰ I have recently discussed these matters in John H. Langbein, "Historical Foundations of the Law of Evidence: A View from the Ryder Sources" (1996) 96 *Columbia L. Rev.* 1168, 1181-86, 1194-95 [hereafter cited as Langbein, "Evidence"].

⁴¹ Chancery purported to follow the common law rule of testimonial disqualification of the parties, see Holdsworth, *HEL*, vol. 9, pp. 194-195, but Chancery largely overcame the effects of the rule by facilitating party interrogatories and other discovery against parties.

⁴² The expression is from Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective" (1987) 135 *U. Pennsylvania L. Rev.* 909. The

C. Private Prosecution

The scattered nature of the surviving records reflects the dispersion of responsibility for criminal prosecution. English criminal procedure, Stephen said somewhat tendentiously, "makes no provision either for the detection or for the apprehension of criminals. It permits any one to take upon himself that office, whether or not he is aggrieved by the crime. . . ."⁴⁵

The English system did provide inducements, beyond mere civic virtue or the desire for vengeance, for citizens to shoulder the work of prosecution. The victim of a property crime often needed the help of a magistrate and constables to locate and recover his property, and the magistrate would typically oblige such a person to prosecute as a condition of assisting him with search warrants and the like.⁴⁶ Nevertheless, the cost of bringing a criminal prosecution was a disincentive that worried policy makers throughout the century. Henry Fielding in his celebrated tract, *An Enquiry into the Causes of the Late Increase of Robbers* (1751), remarked that "the extreme Poverty of the Prosecutor" discouraged prosecutions.⁴⁷ Even when the citizen prosecutor acted without the help of lawyers, wrote Fielding, the two shillings needed to pay the court clerk for the indictment was a hardship, as was the expense of several days attendance at court, sometimes distant from home.⁴⁸

In the Continental procedural systems, in which the work of investigation and prosecution became a public and judicial function in the later Middle Ages, the creation and retention of records of criminal investigation became part of the bureaucratic routine of the courts. The Continental systems also developed a routine appellate stage for criminal cases, which reinforced the need to preserve investigative records. For these reasons, it is sometimes possible to

⁴⁵ James Fitzjames Stephen, *A General View of the Criminal Law of England* (London 1863), p. 154. By Stephen's day this account had become anachronistic, on account of the growth of professional policing and the resulting movement towards police prosecution. See generally David Philips, "A New Engine of Power and Authority": The Institutionalisation of Law-Enforcement in England 1780-1830", in V.A.C. Gatrell et al. (eds.) *Crime and the Law: The Social History of Crime in Western Europe Since 1500* (1980), p. 155; see also Radzinowicz, *History*, vols. 2 & 3.

⁴⁶ The magistrates were required to bind over to testify at trial "all such . . . as do declare anything material to prove the . . . Felony. . . ." 2 & 3 Ph. & Mar., ch. 10 (1555). I have recounted the discomforts of a victim bound over in 1754 to prosecute at the Old Bailey, in John H. Langbein, "Albion's Fatal Flaws" (Feb. 1983) *Past & Present* 96, 103-104. Sometimes the magistrate took an active hand in helping investigate felony. See, e.g., John Styles, "An Eighteenth-Century Magistrate as Detective: Samuel Lister of Little Horton" (1982) 46 *Bradford Antiquary* (NS) 98.

⁴⁷ Henry Fielding, *An Enquiry into the Causes of the Late Increase of Robbers* (London 1751), in Malvin R. Zirker (ed.), *An Enquiry into the Causes of the Late Increase of Robbers and Related Writings* (1988), 61, 157 [hereafter cited as Fielding, *Enquiry*].

⁴⁸ *Ibid.* pp. 157-158. Thus, it sometimes happened "that the poor Wretch who hath been bound to prosecute, was under more Concern than the Prisoner himself." *Ibid.* p. 157. Fielding wanted more of the costs of prosecution to be borne by the public. From 1752, a series of acts began the process of providing more regular subsidy. See Beattie, *Crime*, pp. 41-49.

Several circumstances distinguished the task of the institutional prosecutor from the robbery victim, who was Sir Thomas Smith's prototypical citizen prosecutor. Because counterfeiting and offences against the coin did not victimise particular persons, the authorities could not count on citizen victims to shoulder the enforcement work. Furthermore, crimes such as embezzlement from the mails or forgery and alteration of banknotes entailed legal complexity, because the culprit often came into initial possession lawfully.⁵³ Legal skill was needed to arrange for proper drafting of the indictment, and to identify and prepare witnesses to prove the elements of these offences.

Institutional prosecutors dealt with crimes that often required determined investigation to identify and apprehend the culprits, and to gather, preserve, and present the evidence of their deeds. Prosecuting in these circumstances required skill, effort, and resources, which is just what the institutions supplied. They arranged for a legally knowledgeable solicitor to administer what amounted to an enforcement budget.

A. What Solicitors Did: The Mint

The most useful archival record of early eighteenth-century prosecutorial activity that I have found comes from the Royal Mint. A class of document called Mint Office Record Books preserves periodic financial accounts from the Mint Solicitor from 1713. Because these accounts itemise steps taken in criminal cases that caused the Solicitor to incur charges for which he claimed reimbursement,⁵⁴ they supply a window on his prosecutorial work.

The Mint Solicitor had an illustrious predecessor in his prosecutorial work, Sir Isaac Newton. Serving as Warden of the Mint

October 1714, two undersecretaries of state were named in the Middlesex commission of the peace, doubtless in order to give them magistrate's examining powers. John M. Beattie, *Urban Crime and the Limits of Terror: Policy, Prosecution, and Punishment in London, 1660-1750* (Ch. 9) (forthcoming) [hereafter cited as Beattie, *Urban Crime*].

⁵³ On the development of the substantive law on these matters see Jerome Hall, *Theft, Law and Society* (2d ed. 1952) pp. 34-52.

⁵⁴ Mint Office Record Book, Volume 8 (1699-1713), Public Record Office [hereafter PRO], Mint 1/8, at 115-120 ("An Account of Expenses and Disbursements in the Prosecution and Conviction of Counterfeiters and Debasers of the Current Coin of this Kingdom and some others for uttering false Money knowing the same to be Such and other Law Charges attending the same in and about London, Westminster, Southwark, Essex and Kingston Assizes for two years, from Michaelmas 1713 to Michaelmas 1715").

The Mint records also evidence criminal investigations conducted on behalf of the Mint but not expressly attributed to the Mint Solicitor. "The Memorial of Henry Smithson," dated 25 March 1713/4, recites "[t]hat the said Henry Smithson hath been for near 14 years employed by the late and present Warden of the Mint in the apprehending and prosecuting" of counterfeiters. Mint Office Record Book, Volume 7 (1699-1728), PRO, Mint 1/7, at 64. Smithson was asking to have his bill paid. His "Account of [his] charges and Expenses" contains entries such as "Charges and expenses for my self, assistants and Horses in the pursuing and taking of Elizabeth Metcalfe, Francis Buckle . . . with others on Suspicion, of whom Elizabeth Metcalfe was convicted and executed and others fined and imprisoned. . . ." *Ibid.* at 65.

paid the justices' clerk "for drawing the information and binding the Evidence over" and for drafting the two indictments. Barrow paid for the "expenses of Witnesses during the time of Trial at the Assize," and he "[g]ave the witnesses" a further £1/10/0. In this case Barrow engaged counsel, whom he paid both to advise on the indictments ("to peruse them"⁶¹) and to prosecute the defendants at the trial.

These four categories of expenditure—for investigation, for fees to clerks and other functionaries, for witnesses, and for counsel—recur in the Mint records across the eighteenth century.

1. *Preparing witnesses.* By mid-century the Mint accounts sometimes supply more detail about the Mint Solicitor's involvement with prosecution witnesses. In a counterfeiting case pending in Stafford in 1756, the Solicitor charged for "[a]ttending [five named persons] and other Witnesses to take the Substance of their Evidences," and then "[a]ttending [another named] witness to take the heads of His Evidence and service of a Subpoena on him".⁶² These contacts with witnesses were directed beyond detection, toward what we now recognise as the characteristic lawyer's role of selecting and preparing witnesses for trial.

2. *Co-operation with the magistrates.* In some cases the Mint Solicitor worked through the London magistracy, rather than conduct an investigation independently. In the case against John and Elizabeth Barker for coining in 1714, previously discussed,⁶³ the Solicitor recorded having attended the London magistrates. By mid-century, when the court J.P. system had brought the Bow Street magistrate to special prominence,⁶⁴ the Solicitor made ready use of him. For example, in the investigation of Henry Lightouler and others in 1756, we find the Solicitor turning to John Fielding, the court J.P., for the arrest warrant. The Solicitor "examin[ed] him and [wrote up] his Information whereby he charged" various others. The Solicitor then

⁶¹ *Ibid.* This expression appears often in the Mint accounts and elsewhere. In the Corporation of London Record Office (hereafter, CLRO) there survives a draft indictment in the case of Elizabeth Nichols, which was sent for review to counsel, John Tracy. Nichols was charged with malicious prosecution. Tracy suggested some changes, then wrote at the end of the draft, "I have perused and do approve of the draught of this indictment." His signature is dated 30 November 1743. CLRO, London Sessions Papers 1744, at 9. (I owe the reference to this file to John Beattie.) Tracy suggested a few drafting changes. At one point he inserted the words "with force and arms." In the margin he explained, presumably to the instructing City Solicitor: "I know there are precedents without those Words as well as others with them but as the Inserting cannot possibly do any Hurt and the leaving them out may furnish some little objection I thought it safer to Insert them." *Ibid.* at 6.

⁶² Mint Office Record Book, Volume 11 (1752–64), PRO, Mint 1/11, at 84 (account for 1755–56).

⁶³ P. 327 above.

⁶⁴ "Beginning at the latest with Sir Thomas de Veil, a former soldier who entered the Middlesex commission of the peace in 1729, the government took to singling out one of the Middlesex J.P.s for special service in criminal investigation and prosecution. He received financial support, both in the way of compensation and in order to defray expenses. The person invested with this quasi-official status became known as the 'court J.P.,' 'court' in this usage referring to the central government." Langbein, "Criminal Trial", p. 60.

In England the division between the two branches of the legal profession prevented the solicitor who had built the case from presenting it at trial. Only counsel had the right of audience at trial. (This division of function between solicitors and barristers, which is currently being rethought in England as the prosecutorial system adjusts to the creation of the Crown Prosecution Service, did not survive in the United States and in some of the other English-derived legal systems.) As late as 1724 there is evidence that the exclusion of solicitors from audience at trial was not as firm in English practice as it subsequently became. In the case of Edward Arnold,⁷¹ a deranged defendant tried for malicious wounding, the trial judge effectively allowed the defendant's solicitor to conduct his defence at trial. At the arraignment (the pretrial pleading phase in which defence counsel could be heard), Arnold's counsel referred to the client's impaired circumstances and asked that Arnold "may have a solicitor by him to call his witnesses only".⁷² Serjeant Cheshire, for the crown, opposed the request, invoking the familiar rubric of court as counsel. "Your lordship is of counsel for all the prisoners, who by law can have none, as this man can't have any."⁷³ The court allowed Arnold's solicitor to cross-examine a prosecution witness (the magistrate who conducted the pretrial committal hearing) and to present the defence case.⁷⁴ (Arnold was convicted, sentenced to death, but reprieved to life imprisonment.)

Although *Arnold's Case* was undoubtedly exceptional,⁷⁵ it shows experimentation as late as the mid-1720s with an alternative means of overcoming the rule forbidding defence counsel, that is, by allowing the solicitor rather than counsel to conduct the defence at trial. On the prosecution side, however, I have seen no indication of solicitors being given the right of audience at trial.⁷⁶ Accordingly, the

⁷¹ *Edward Arnold*, 16 St. Tr. 695 (Surrey Assizes 1724). The judge's instruction to the jury in this case became an early milestone in the development of the insanity defence. See Nigel Walker, *Crime and Insanity in England: The Historical Perspective* (1968), vol. 1, pp. 53-57.

⁷² 16 St. Tr. 697.

⁷³ *Ibid.* Three other crown counsel endorsed Cheshire's view, *Ibid.* pp. 697-698.

⁷⁴ *E.g.*, *ibid.* pp. 714-715, 717. The "Solicitor for the Prisoner" called the accused's brother to testify about his mental state. The trial judge examined the witness, and prosecution counsel cross-examined. *Ibid.* pp. 717-718. Most of the questioning seems to have been done by the judge on the solicitor's motion, *e.g.*, "My lord, I desire this witness may be asked" this or that, *ibid.* p. 737 (two instances), but on occasion the solicitor took over and conducted the examination himself, *e.g.*, *ibid.* pp. 740-742.

⁷⁵ The judge, Tracy J, told the solicitor, "You have had an indulgence, the greatest that was ever given before. . . ." *Ibid.* p. 743. Elsewhere the judge explained that it was "because there hath been an affidavit sworn, that he is not perfect in his senses" that the crown "gave liberty to another person to call the witnesses, and put what questions they pleased. . . ." *Ibid.* p. 758.

⁷⁶ Investigating solicitors did on occasion testify about their pretrial work. In the celebrated case against Samuel Goodere for murdering his brother, further discussed below, pp. 361-362, the prosecution solicitor, Jarrit Smith, was the first witness to be examined. Samuel Goodere *et al.*, 17 St. Tr. 1003, 1017-26 (Bristol Assizes 1741). The Old Bailey pamphlet reports sometimes disclose the testimony of the Solicitor of the Mint in counterfeiting cases, *e.g.*, *Patrick Kelly, et al.*, OBSP (Jan. 1743, ##116-119), 70, 73; *Johannah Wood*, OBSP (Jul. 1746, #274), 218, 219.

occasion the solicitor used the brief to advise the barrister on trial tactics. Regarding one prosecution witness whose anticipated testimony was discussed in a case for criminal malicious prosecution brought in 1741, the City of London Solicitor, Peterson, warned counsel of the danger that the defence

will produce the Record of [the prosecution witness'] Conviction for Conspiracy for which he was sentenced to stand in the Pillory. Please therefore against this to guard as much as possible. If in General they should attempt to impeach his character, we say that in such dirty work as a Conspiracy 'tis supposed None but persons of indifferent Characters are Consulted, and therefore such only can be produced as witnesses. But if his Testimony should be set aside, we hope the rest of our evidence will be sufficient to prove our charge.⁸²

Peering through these rare windows into early lawyer-driven criminal cases, we see that lawyers inclined even then to the partisanship in fact gathering that is such a troublesome feature of the modern adversary system. The City Solicitor hoped to suppress the truth about his witness, but if that failed, he suggested a line of argument for downplaying the defect.

C. Prosecution by the Executive

Institutional reinforcement for criminal prosecution in the early eighteenth century also came on occasion from the monarch and the government.

In 1722 John Woodburne and Arundel Coke were convicted at Bury St. Edmunds of slitting the nose of Edward Crispe, a contemporary *cause célèbre* reported in the *State Trials*.⁸³ The *State Papers* reveal that the king was offended at this "barbarous" offence (which had dignitary overtones). Concerned that the culprits might otherwise "escape unpunished", he directed the Attorney General to see to it "that able Counsel and a proper Solicitor be employed to attend that prosecution" at the king's expense.⁸⁴ The Attorney General commissioned Nicholas Paxton⁸⁵ to be the prosecuting

⁸² *R. v. Elizabeth Nicholls*, CLRO, London Sessions Papers, September 1744, charged with maliciously accusing someone of a felony (the quoted brief dates from 1741 but is filed with documents from 1744 involving the same matter).

⁸³ 16 St. Tr. 53 (Suffolk Assizes 1722). The offence was made a capital offence (felony without benefit of clergy) under 22 & 23 Car. 2, ch. 1, §7 (1670).

⁸⁴ *State Papers Domestic Entry Book*, PRO, SP 44/81, at 24 (entry for 5 Feb. 1722).

⁸⁵ Paxton was acting on behalf of the crown in another matter in 1722, advancing money to bring a prisoner down to London from the North. *Ibid.* at 139. A prosecution brief from Paxton dated June 1729 in an unrelated seditious libel case survives in the Treasury Solicitor's archive, PRO, TS 11/424/1290. In the 1730s Paxton appears to have been active on behalf of the crown in King's Bench prosecutions. *E.g.*, PRO, SP 44/82, at 68, 69, 71, 72, 74, 76. John Beattie, who mentions Paxton's assignment in Arundel's Case (see Beattie, *Crime*, p. 354) identifies Paxton as the assistant treasury solicitor. For Paxton's role in prosecuting under the Black Act, see E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975) pp. 212-213, cited by Beattie, p. 354 n. 92.

the growing interest taken by the central authorities in the enforcement of the criminal law in the decades after the Revolution of 1688–1689. For present purposes the instructive point is that when the central authorities wanted to strengthen a criminal prosecution, they did it by sending in the lawyers. They employed solicitors to investigate and to plan the prosecution, and barristers to take the case to trial. As in the practice of the specialised institutions such as the Mint and the Bank, so in the episodic interventions of the central authorities, criminal prosecution was increasingly understood to be lawyers' work. In the light of this growing lawyerisation of prosecution, Hawkins' claim that criminal defence "requires no manner of Skill"⁹⁶ looked ever more hollow.

IV. SOLICITORS IN THE CONDUCT OF PRIVATE PROSECUTIONS

The lawyers' role in criminal prosecution in the early decades of the eighteenth century is harder to trace in cases brought on behalf of ordinary citizens. Citizen prosecutors lacked the resources and incentives to employ lawyers as routinely as the institutional prosecutors, nor did citizens share the interest or the capacity that the nascent bureaucracies were developing for preserving their papers.

By mid-century there is evidence of seemingly routine prosecutorial work in the financial ledgers of a prominent Bradford solicitor, John Eagle, who was active in the decades after 1759. We learn that he conducted six substantial criminal cases during his career.⁹⁷ "In April 1765 he handled a prosecution case against three defendants for stealing shalloons [wool lining material], malt, and silver spoons. He examined witnesses and drew the brief. The defendants were convicted at Pontefract Sessions and sentenced to be transported."⁹⁸ There is every reason to suspect that solicitors were doing such work earlier in the century, but the historical sources have not yet surfaced.

⁹⁶ Hawkins, vol. 2, p. 400.

⁹⁷ Michael Miles, "Eminent Attorneys": Some Aspects of West Riding Attorneyship c. 1750–1800" (unpublished Ph.D. Thesis, Dept. of Modern History, Univ. of Birmingham, 1982), at p. 257. The account in text follows Miles; I have not inspected his sources.

⁹⁸ *Ibid.* p. 257, n. 2. The extract quoted in text is the only one of the six cases that Miles describes. The understanding that solicitors were by this time characteristically used to gather prosecution evidence is voiced in a pamphlet published in 1768 by an acquitted criminal defendant, James Oliphant. Oliphant was a surgeon who had been prosecuted for the murder of a servant girl whom he contended drowned accidentally. Oliphant alleges in the pamphlet that a vindictive coroner insisted on charging him and his wife with murdering the girl. Describing the coroner's exceptional industry in preparing the case against the Oliphants, the pamphlet complains "that he had become as a solicitor in this prosecution; that he had gone a hunting into the country after other witnesses than those who were examined on the inquest, to give evidence against the prisoners on their trial. . . ." Anon., *The Case of Mr. James Oliphant, Surgeon, Respecting a Prosecution Which He . . . Underwent in the Year 1764* (Newcastle 1768), p. 49 (Beinecke Library, Yale Univ., shelfmark British Tracts 1768 OI 4).

robbed . . . , he is not many Hours without some of these officious Persons to advise him. . . ."¹⁰⁶ The solicitor's early steps prepare for framing of the indictment. "[T]he Solicitor pulls out a Pocket-Book, takes the Name of the Prosecutor, the Parish of which he is an Inhabitant, and the Value of the Goods stolen . . . ,” and he takes special care to get the goods and the accused accurately described.¹⁰⁷ Once again, the pamphlet deprecates the solicitor's contribution, asserting that anybody can do this work: “this, and much more, may be done without the Help of one of these Harpies. . . .”¹⁰⁸

The tract indicates something of the solicitor's role in preparing witnesses for trial. The “next Step is to make a great Stir in summoning all those together, who are to be Witnesses at the Trial of the Prisoner, and to direct who shall speak first, and how they shall deliver themselves to the Judge and Jury. . . .”¹⁰⁹ We find in this account a confirmation of the point previously inferred from prosecution briefs and other archive sources, that solicitors were already in this period taking an active hand in selecting, preparing, summoning, and sequencing the witnesses for trial.

Although *Directions* disparages the solicitor's pretrial activity as makework, that view seems nostalgic and unpersuasive. The author contends that the solicitor's preparation of witnesses is counterproductive: “nothing pleases the Judges more, than to hear Truth told with the utmost Simplicity and Plainness,” rather than to have to preside over “the Proceedings and Villainy of sharpening Solicitors. . . .”¹¹⁰ Only “silly People are so ignorant as to believe they cannot be brought into Court, without being introduced by a Solicitor, nor be heard if they do not speak his Language more strictly than their own Sentiments. . . .”¹¹¹ Indeed, “what is easier than to speak Truth, and what you know and saw, but not what others said, for that is no Evidence. . . .”¹¹² These passages seem to echo for the prosecution Hawkins' argument about why the accused needs no counsel—that any defendant “of Common Understanding . . . may as properly [defend himself] as if he were the best Lawyer”,

¹⁰⁶ *Ibid.* pp. 2–3.

¹⁰⁷ *Ibid.* p. 3.

¹⁰⁸ *Ibid.* p. 3. In a similar vein, the author advises the victim “to give Instructions to the Person who draws up the Indictment”, *ibid.* p. 7, who is said to be a clerk at the Guildhall or at Hick's Hall or in Westminster Hall, *ibid.* pp. 9, 27. The clerk “will readily assist you” if you give him the right information. *Ibid.* p. 9. The prosecutor is better off without using a solicitor to inform the clerk, because (1) the clerks are more deferential to the solicitors, who tend to get the facts wrong; (2) solicitors are “perpetually tipping at the Expense of silly People” who hire them; and (3) “the Solicitor may be in Fee with your Prisoner to entangle you at the same time that he takes your Money, promising to exert the utmost of his Talents to [convict] the Prisoner. . . .” *Ibid.* pp. 9–10.

¹⁰⁹ *Ibid.* p. 3.

¹¹⁰ *Ibid.* p. 5.

¹¹¹ *Ibid.*

¹¹² *Ibid.* p. 6.

“Counsel learned in the Law” will do the client “all the Justice the Merits of the Cause will admit of, yet the Charge will in the end be found less than employing a Newgate Solicitor, who in effect does nothing at all, but what might have been as well done, and very often much better, without him”.¹²¹ The implication in this passage that solicitor and counsel were competitors in rendering “Advice” about how to try the case sheds valuable light on the role of lawyers in criminal procedure in this period. Although the author is partial to counsel and hostile to solicitors, he makes no mention of counsel having the exclusive right of audience at trial, an advantage over the solicitor that we would expect this author to have trumpeted had it mattered. I take the author’s silence on this point as evidence that he still understood the lawyer’s role in the prosecution of ordinary felony to be the job of pretrial management. The prosecution witnesses were still expected to speak at trial under the guidance of the judge and without the intermediation of counsel.

B. Magistrates’ Clerks as Prosecuting Solicitors

The suggestion in *Directions*¹²² that solicitors came into initial contact with potential clients on the prosecution side by following up newspaper reports, whether or not accurate in some events for London, is not likely to have typified the patterns of engagement. A more regular channel for connecting the prosecutor with the solicitor was the justice of the peace (magistrate), to whom a victim would first come to report the crime and instigate proceedings. The magistrate often put the clerk in charge of the paperwork arising from the initial steps in bringing a criminal prosecution, that is, transcribing the pretrial examinations of the prosecutor and his witnesses, issuing warrants, and taking recognisances.¹²³ It was common for the magistrate to employ as his clerk a person who practised privately as a solicitor or attorney.¹²⁴ This early and official contact with inexperienced victims positioned the clerk on the inside track to be employed as the prosecutor’s solicitor.

¹²¹ *Ibid.*

¹²² *Ibid.* pp. 2–3, discussed pp. 335–336 above.

¹²³ Regarding the magistrate’s role in the pretrial process, see n.46 above. Model forms for (1) transcribing the examination of an accused, (2) taking a recognisance to bind a victim to prefer a bill of indictment and testify at trial, (3) binding a prosecution witness to testify, and (4) directing an arrest warrant to a constable are set forth in Richard Burn, *The Justice of the Peace and Parish Officer* (12th ed. 1772), vol. 1 pp. 527–528 (1st ed. 1755).

¹²⁴ “All but one of the justices’ clerks active [in Kent] in the last quarter of the [eighteenth] century are included in lists of attorneys resident in the counties—lists published for the first time in 1775”: Norma Landau, *The Justices of the Peace: 1679–1760*, at p. 229 n. 50 (citations omitted). Barnes notices the magistrates’ clerks in private practice a century and a half earlier: Thomas G. Barnes, *The Clerk of the Peace in Caroline Somerset* (1961) p. 37.

prosecutions for theft, coining, poaching and malicious damage, as well as conducting proceedings on their behalf".¹³³

The pattern of having the magistrate's clerk serve as the prosecuting solicitor also occurred in institutional practice, where it lasted well into the nineteenth century. The Mint Solicitor told a Parliamentary committee in the 1840s that "we usually prefer employing [as the solicitor to prosecute a case] the gentleman who sends up the information; he is commonly the magistrate's clerk. . . ." ¹³⁴

C. Solicitors for the Defence

John Howarth was not alone in serving sometimes as a solicitor for the defence. During the decades that solicitors were assuming an increasingly important role in the prosecution of crime, the profession also developed a defensive role in criminal cases. Once again, the sources are too thin to permit us to learn about the frequencies, but we can see the phenomenon in outline.

The rule forbidding counsel to the criminal defendant was a rule of audience in the trial court. For the out-of-court pretrial work of the solicitor no such prohibition took hold, although in the treason trials of the later Stuarts (where the law reports first notice¹³⁵ the defence solicitor), we see considerable mistrust of solicitors who aided accused traitors. Fitzharris, one of the Popish Plot defendants in 1681,¹³⁶ complained of being denied access to his solicitor.¹³⁷ When Stephen Colledge, another Popish Plot defendant,¹³⁸ was observed at trial consulting his solicitor, Aaron Smith, the trial judge reprimanded

¹³³ *Ibid.* p. 270. "For instance, he advised John Holroyd of Marsden about the mode of prosecuting a person on suspicion of maiming three of his tups [*sic.*; male sheep]. In January 1770 Luke Dewhurst of Turvin was arrested for diminishing the coin, whereupon his wife consulted Howarth for advice. Similarly, he advised Mr. Taylor of Golcar Hill on his son being accused of killing fish. He also advised his tenant whose brother had been accused of coining and he appeared as his defence attorney at York Assizes in March 1770." *Ibid.* p. 270 n. 2.

¹³⁴ *Report of the Commissioners Appointed to Inquire into the Constitution, Management, and Expense of the Royal Mint* (London, HMSO 1849) (discussed at note 69 above), p. 192.

¹³⁵ In addition to the State Trials reports discussed next in text, there is a pamphlet report of a 1680 trial held at the Old Bailey, in which counsel, in his opening remarks, refers to his brief, that is, to the solicitor's brief instructing him in the case: "if my brief be true, I make no question but to satisfy your Lordship and the jury . . . that he had no hand in this Bloody Action." (Because the offence was charged as misdemeanour, the defendant was allowed counsel, the exception to the rule against defense counsel discussed p. 316 above.) *The Tryal of John Giles at the Sessions House in the Old Bayly* (London 1681) 30 (tried July 1680 for attempted murder of John Arnold, J.P. for Monmouth and M.P.) (Lincoln's Inn, shelfmark Trials 216, no. 3).

¹³⁶ *Edward Fitzharris*, 8 St. Tr. 243 (King's Bench 1681).

¹³⁷ Fitzharris asked at his trial that "I may have a solicitor; for he was never allowed to come and speak to me, though I had a rule for him." 8 St. Tr. 329. The Lord Chief Justice replied that he let Fitzharris have a solicitor to assist him in briefing counsel to raise a point of law, but "now we are come to a matter of fact only, and we cannot by the rules of law allow you counsel. Therefore, what need you have of a solicitor, I cannot tell. . . ." *Ibid.*

¹³⁸ *Stephen Colledge*, 8 St. Tr. 549 (Oxford Assizes 1681).

occasionally show defence solicitors taking some action, such as explaining to the court the absence of witnesses or counsel.¹⁴⁹

The institutional prosecutors could also find themselves fielding a solicitor for the defence when an agent or an officeholder was prosecuted for conduct in the line of duty.¹⁵⁰ Indeed, the authorities occasionally trumpeted their willingness to defend citizen officeholders against civil and criminal suit as an inducement to zeal, for example, when the monarch ordered a crackdown on street crime in Covent Garden in 1742.¹⁵¹

V. ASSOCIATIONS FOR THE PROSECUTION OF FELONS

Another channel of engagement that placed criminal prosecutions under the management of solicitors was the association for the prosecution of felons. These remarkable organisations were formed in

¹⁴⁹ For example, in the case of William Kitchinman, OBSP (Sept. 1737, #8), 165, accused of stealing calico cloth, his solicitor, Mr. Lutwych, tried unsuccessfully to have the trial postponed, telling the court, "The Prisoner's Sister gave me Money for Counsel and Subpoenas against tomorrow," and that "I gave Subpoenas to Mr. Dottery and his Wife, but I did not imagine his Trial would have been till tomorrow." *Ibid.* at 166. In the case of John Latour, OBSP (Sept. 1736, #75), 186, the defendant told the court that "his Attorney had engaged Counsel in his Cause; but the Prosecutor sent notice to him last Night, that the Matter was compromised, and that this was the Reason he had no body to appear for him." *Ibid.* at 188. Mr. Compton, identified as Latour's attorney, confirmed this account and "was much surprised when I found Mr. Latour was called to his Trial; if I had known it, I should have feed [that is, paid a fee to, meaning hired] Serjeant Haywood. I had Instructions to call [a witness to speak to a key issue of fact] if I had been prepared." *Ibid.*

¹⁵⁰ An 1803 committee of inquiry into the work of the City of London Solicitor traced the office back to 1545 and reported that "he has been employed to defend the magistrates and officers of this city in proceedings instituted against them for acts done in the execution of their respective offices and the discharge of their several duties. . . ." Report in Relation to the Nature, Duties, and Emoluments of the Office of City Solicitor. CLR0, PAR (Papers, Acts & Reports) Book 13 (Common Council, 27 July 1803), at 3.

The Post Office archive, at P74/271, contains a brief titled "The King against Read: For Felony. Brief for the Prisoner", prepared in 1793 by Parkin & Lambert, which was the firm of Anthony Parkin, who was then the Post Office Solicitor. The Post Office was defending an employee, a guard on the Exeter mail coach, who had fired a weapon in purported defence of the coach. The OBSP pamphlet report contains the trial and records Read's acquittal but does not disclose the appearance of the defence counsel whom the Post Office Solicitor briefed. Patrick Read, OBSP (Jan. 1793, #128), 199.

¹⁵¹ In December 1742, the King had Newcastle write to the chairman of Westminster Sessions, to convey royal interest in cleaning up the Covent Garden area. PRO, SP 44/82, Criminal Book, 17 December 1742, at p. 188. He wrote that

Covent Garden is infested with great Numbers of reputed Thieves, Pick-Pockets and other desperate Persons, who have formed themselves into Bodies, so that it is hazardous and dangerous for Persons of Quality to pass and repass to the Playhouses and other Parts thereabouts, without being assaulted and robbed. His Majesty, who is desirous to encourage the Suppressing of such wicked Disorders, has commanded me to acquaint you, that Orders shall be given to the Solicitor of the Treasury to defend, at his Majesty's Expense, all Constables, and other Peace Officers of the said City and Liberty in any vexatious actions, or Suits at Law, that may be brought against them, for what they shall do in the faithful Discharge of the Duty of their Offices, in putting in Execution the Warrants issued to them by the Justices of the Peace, for the purposes aforementioned.

Ibid. at 188-189. It was hoped "that the apprehension of Trouble and Expense on this Account may not discourage them from carrying on a Service so important to the Peace and Security of his Majesty's Subjects." *Ibid.* at 189.

The associations have recently attracted the attention of legal historians.¹⁵⁹ Although the link between the associations and the solicitor's profession has not been a central concern of this literature, enough has been learned to permit us to see that the associations were a main conduit for the lawyerisation of criminal prosecution in the eighteenth century. Unfortunately, little is known about the work of the associations in the early decades of the century, the period of particular interest in the present article. The archival record is extremely thin until the second half of the century, and thus, our picture is mostly drawn from sources that are later than we would wish.

As the name implies, the prosecuting associations were voluntary organisations of a sort now sometimes characterised as mutual benefit insurance societies. Members who pay a subscription fee become entitled to scheduled benefits. My automobile club, for example, will tow my car or charge the battery if the breakdown occurs within the year of my subscription. The association not only provides these specialist auto repair services, it also serves an insurance function. Because not all members will actually require the covered services, the association operates as a risk pool, spreading the cost of the services it performs across the larger number of persons covered. This cost-spreading feature allows the association to deliver the services well below unit cost to the members who receive them.

The association for the prosecution of felons was a benefit society for the purpose of bearing some of the costs associated with the risk of being victimised by a serious crime. Members adopted articles of association and paid a subscription. When a member suffered a crime of a type covered in the articles, the association would pay the expenses of criminal investigation and prosecution. It would advertise stolen goods and offer rewards for the return of goods and the apprehension of culprits. Sometimes the articles of the association contained a schedule of rewards to be offered and paid to persons "giving such information against such offenders as shall lead to his or their conviction. . . ."¹⁶⁰ (These extra-statutory rewards are to be distinguished from the statutory £40 rewards paid by the crown for certain offences pursuant to legislation, discussed below in Part VII of this article.) Some of the associations also functioned as indemnity funds, insuring members against part of the loss that resulted when

¹⁵⁹ David Philips' study of the period 1760–1860 is a particularly valuable survey. Philips, "Associations", (n. 152 above). See also King, "Essex", (n. 154 above); and Shubert, "Initiative", (n. 158 above).

¹⁶⁰ Rules and Orders of the Binbrook Association for the Prosecution of All Persons Who Shall be Guilty of Felonies, Thefts, Crimes, or Misdemeanours (Louth 1820) (printed handbill) (exemplar in Lincolnshire County Record Office, shelfmark 4 BM 5/5/2/2).

and they handled all its business, taking members' reports of offences committed and handling the subsequent prosecutions, advertising the society and its members, and collecting subscriptions. Reading through their itemised accounts (each interview at 3s. 4d. or 6s. 8d. a time, which quickly mounted up) one sees how good associations were for their business.¹⁶⁶

Entries like the following, from the annual bills filed by the solicitor to a Bedfordshire association active from 1799, abound: "Paid printer and distributing bills [regarding] . . . Mr. Burton's Mare." "Clerk's Journey to Newport to learn the names and residences of two Men who were suspected to have stolen the mare." "Journey to Turvey to examine Evidence as to Bacon stolen from Mr. Brattams by Thomas Norman." "To Counsel and Clerk with Brief in the Prosecution of Thomas Hawkins for Stealing Wheat Stacks from Mr. B. Brooks of Emberton." "Attending Mr. Griggs and others and taking instructions to prosecute Marshall for stealing Meal." "Paid Expenses of the several Witnesses to and from and at Aylesbury on the prosecution of Marshall."¹⁶⁷

In these records we see the lawyers taking over an important segment of the work of criminal investigation and prosecution in the provinces. From the standpoint of the solicitor, a prosecuting association was a dream client. The solicitor fed off the retainer for the society's routine administration, and he captured its investigating and prosecutorial work. The association also brought the solicitor into steady contact with the substantial citizens who constituted the association's membership, among whom he could prospect for other business. Indeed, there is every reason to believe that the initiative in creating these associations passed from the citizenry to the solicitors' profession. John Styles has reported in this connection that "a Yorkshire attorney's precedent book from the 1750s includes . . . an agreement [establishing an association to prosecute felons], suggesting that they were already part of an attorney's work at that date".¹⁶⁸ Philips noticed indications that solicitors "were the most active promoters of associations, urging local property-owners to set them up; and many [solicitors] acted as solicitor to more than one association".¹⁶⁹

To conclude: The evidence is unmistakable that in the second half of the eighteenth century and beyond, the associations for the

¹⁶⁶ Philips, "Associations", pp. 136-137.

¹⁶⁷ Olney, Turvey & Harrold Association, Bedfordshire Record Office, GA 1108 (solicitor's bills, loose pages, filed by date from 1799), entries for 1799, 1800, 1808.

¹⁶⁸ John Styles, "Print and Policing: Crime Advertising in Eighteenth-Century Provincial England", in Hay & Snyder, pp. 55, 64 [hereafter cited as Styles, "Advertising"].

¹⁶⁹ Philips, "Associations", p. 137. King reports that the Essex "attorney, William Mason, . . . acted as clerk to at least five prosecution associations in the north-east of Essex." King, "Essex", p. 192.

destroyed."¹⁷¹ The writer wrestles with the boundaries of correct professional practice, approving of pretrial investigation but voicing concern lest the solicitor corrupt the witnesses. "A Solicitor . . . may not instruct, threaten or bribe [witnesses] to swear this or that."¹⁷²

Directions, the 1728 pamphlet critical of London prosecuting solicitors, warns of the danger that in cases in which there is a statutory reward for conviction, solicitors would strain to exaggerate the case in order to bring the offence within the rewardable category. Thus, "by the Insinuations of the Solicitor, and the Covetousness of the Prosecutor, Truth would be perverted. . . ."¹⁷³ Sir Isaac Newton, writing to the Treasury in 1696, complained that his prosecutorial work as Warden of the Mint exposed him to the "calumnies of . . . Coiners and Newgate Solicitors," who made "false reports and oaths and combinations against me".¹⁷⁴

A. Misbehaving Solicitors

In September 1732, in the prosecution of Peter Buck for highway robbery,¹⁷⁵ we find the script that the author of *Directions* warned about, namely, a solicitor orchestrating a false prosecution for gain. Joseph Fisher, the ostensible victim, testified that Buck forcibly stopped him in Chancery Lane and robbed him of his snuff box. The defendant's sister testified that the prosecution resulted from a failed shakedown organised by one "Lawyer Grimes", who "solicits in this court". In advance of the trial Grimes had met with her and introduced her to Fisher as "a Man that will swear a Robbery against [her brother]". (Highway robbery was an offence for which a £40 reward was payable to the persons who convicted the offender.¹⁷⁶) Grimes told the sister that, if she "would save [her] Brother's Life", she needed to pay off both Grimes and Fisher. Grimes wanted three pounds in payment of a supposed debt that the brother owed Grimes, and a further two guineas for Fisher. Fisher told her that "if you'll satisfy Lawyer Grimes, and give me 2 Guineas, I'll make it up", that is, drop the prosecution.¹⁷⁷ Another witness testified that Fisher admitted ruefully to her a few days before that he had sworn falsely against Buck, and that "Lawyer Grimes put me upon it".¹⁷⁸

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* The passage in text continues: "He may discourse with them, and enquire whether they have any thing to say to this or that point, in order to save the Court a trouble; but he ought not to work them by hope of reward, or fear of harm to say more, or less than they are inclined to. . . ." After framing the issue in this way, the writer devotes the remainder to sermonising about the evils of false witness.

¹⁷³ *Directions* (n. 99 above), p. 4. He gives the example of overcharging as highway robbery what "was only a Quarrel between the Prosecutor and the Prisoner." *Ibid.*

¹⁷⁴ Letter to the Commissioners of the Treasury, note 57 above, p. 210.

¹⁷⁵ OBSP (Sept. 1732, #53), 210.

¹⁷⁶ 4 & 5 Will. & Mar. ch. 8, §2 (1692).

¹⁷⁷ OBSP (Sept. 1732, #53), 210.

¹⁷⁸ *Ibid.* 211.

to say that the decedent signed the will on 30 November. An unidentified "Officer" interrupted the trial and advised the court, "My Lord, here's this Man, Joseph Wass, [who] prompts the Witnesses."¹⁸⁵ An unidentified "Gentleman", apparently a bystander who overheard Wass, volunteered the same information. The judge ordered them sworn and asked them what they heard Wass say. Each testified that Wass told them what date to say. Wass defended himself: "Suppose I did, I hope there was no Harm in that." The judge exploded: "No harm, Sir? When a Man's Life is at Stake, are you to put Words in the Witnesses' Mouths, and direct them what to swear? Officer, take him into Custody."¹⁸⁶ Here, on the eve of the judges' decision to admit defence counsel to cross-examine witnesses, is an Old Bailey judge recognising the danger that solicitors may "put words in the Witnesses' Mouths, and direct them what to swear. . . ."

We have seen that *Directions*, the 1728 pamphlet critical of prosecuting solicitors at the Old Bailey, makes several allegations of duplicity. One is that the prosecuting solicitor "will often, for a Fee from the Prisoner, advise the Prosecutor to compound the Felony before Sessions, or not to appear at the [trial], for which [the prosecutor is himself theoretically] liable to a Prosecution. . . ."¹⁸⁷ Some years later, in 1741, the Old Bailey reporter disclosed such a case, a prosecution for highway robbery in which the victim, Parish, testified that after the robbery, "I not knowing how to proceed, a Fellow, one Baker, offered me his Assistance as an Attorney, and got a Bill of Indictment drawn according to his own Way of Thinking; I paid him 2 shillings for it, and he has dropped me, and keeps the Indictment."¹⁸⁸ Later in the trial, Baker appeared as a defence witness, claiming that Parish had been unable to identify the culprits at the time of the crime. "The Court severely reprimanded Baker for his Conduct in this Affair."¹⁸⁹

¹⁸⁵ *Ibid.* 179.

¹⁸⁶ *Ibid.* The judge ordered Wass sent to Newgate, where we lose trace of him.

¹⁸⁷ *Directions*, p. 14.

¹⁸⁸ *George Stacey & Matthias Demison*, OBSP (Jan. 1741, ##24-25), 11, 12 (highway robbery).

¹⁸⁹ *Ibid.* 13. The two defendants were convicted and sentenced to death. This case also evidences, *ibid.* 12-13, the earliest appearance in the Old Bailey Sessions Papers of Stephen Macdaniel (sometimes McDaniel), who would figure as the chief villain in 1754 in the great reward scandal discussed in Langbein, "Criminal Trial", pp. 110-14. Macdaniel appeared as a crown witness, testifying against his former accomplices. As as in his later exploits, this was a case of highway robbery, for which legislation offered a £40 reward to those who prosecuted and convicted offenders. The reward system is discussed at pp. 356-360 below. Paley reports that in this case Parish, Macdaniel, and six others split £80 in reward money for convicting the two offenders. Ruth Paley, "Thief-takers in London in the Age of the McDaniel Gang, c. 1745-1754" [hereafter cited as Paley, "Thieftakers"], in Hay & Snyder, pp. 301, 319.

reviewed all the proffered bills of indictment and could reject transparently preposterous ones. The rest of the cases went to trial.¹⁹⁴ This “dependence on prosecutions initiated by private individuals”, Ruth Paley has remarked, invited “vexatious actions”.¹⁹⁵ Indeed, the bare threat to institute a groundless prosecution was terrifying enough that it could be used to extort money. Thomas Neaves, a “Noted Street-Robber” active in the 1720s, boasted of his success at this technique.¹⁹⁶ Behind the London grand jury’s presentment is the discomfort that contemporaries felt that solicitors specialising in criminal prosecutions had at their fingertips the ability to subject citizens to the danger, expense, and humiliation of defending against criminal charges.¹⁹⁷ The Old Bailey made an ineffectual regulatory response to the presentment, decreeing that the ranks of solicitors practising at the court would be restricted to persons “that have been

¹⁹⁴ When confronted with an accusation of felony, the magistrate acting at pretrial “had only two options. . . . He could jail the accused or bail him. He could not discharge him.” Langbein, *Prosecuting Crime*, p. 7; see *ibid.* p. 124 n. 72, citing Dalton, (n. 14 above) p. 262, the authoritative justicing manual that articulates the point in the first edition in 1618 and carries it forward for decades in subsequent editions. Beattie traces the point into other early-eighteenth-century practice manuals. Beattie, *Crime*, at p. 272 & n. 13. By Blackstone’s day the magistrates were able to dismiss if they found an accusation “wholly groundless.” Beattie, *Crime*, pp. 280–281, citing William Blackstone, *Commentaries on the Laws of England* (1769) vol. 4, p. 293.

¹⁹⁵ Paley, “Thieftakers”, p. 312. Paley has traced the activities of several gangs of London thieftakers active in the 1740s and 1750s, showing that they took advantage of the ease of charging to institute malicious prosecutions. *Ibid.* pp. 312–313 and n. 39.

¹⁹⁶ He would “step to a Justice of the Peace, and having given some formal Account of a Robbery, sometime or other committed, he generally procured a Warrant, which he carried along with him, till he had an Opportunity of securing . . . [his victims, unless they paid him off. Otherwise,] they were certainly charged in Custody, and sent to Prison on suspicion till he could (as he often pretended) find an Adversary to prosecute them.” Anon., *The Life of Tho[mas] Neaves, the Noted Street-Robber* (London, n.d., c. 1729) p. 26, discussed in Langbein, “Criminal Trial”, pp. 109–110.

Trumped up cases of sodomy were feared for their reputational damage. E.g., Anon., *A Full and Genuine Narrative of the Conspiracy Carried on by Cather, Cane, Alexander, Nixon, Paterson, Falconer, Smith, Which Last Was Executed at Tybourn with McLeane, against the Hon. Edward Walpole, Esq., Charging Him with the Detestable Crime of Sodomy, in Order to Extort a Large Sum of Money from Him, Together with an Account of Their Remarkable Trial and Conviction before the Rt. Hon. the Lord Chief Justice Lee, in the Court of King’s Bench, Westminster, July 5th, 1751*. (London, 2nd ed. [1751]) (Beinecke Library, Yale Univ., shelfmark British Tracts 1751 F 95). Two such cases that came before Lord Mansfield in the 1770s—*R. v. Foote* (1776) (unreported), and *R. v. Donnally*, 1 Leach 193, 188 Eng. Rep. 199 (1779)—are discussed in James Oldham, “Truth-Telling in the Eighteenth-Century English Courtroom” (1994) 12 *Law & History Rev.* 95, 107–108. Mansfield brooded in *Donnally* that such cases were “a specious mode of robbery of late grown very common. . . .” Oldham, p. 108, citing Oldham, *Mansfield Manuscripts*, vol. 2, p. 929.

Evidence of a solicitor’s involvement in a trumped up sodomy case appears in the Old Bailey prosecution of George Sealey & Thomas Freeman, OBSP (Sept. 1736, ##78–79), 188. Freeman testified that the prosecutor “got acquainted with one Cuttings, a Solicitor in the Old Bailey, and they 2 gave . . . Directions to draw the Bill for Sodomy against me.” *Ibid.* 190.

¹⁹⁷ The September 1733 *Gentleman’s Magazine* reported that, in addition to the presentment discussed in text, “the Grand Jury presented 4 noted Solicitors for infamous Practices, in fomenting and carrying on Prosecutions against innocent Persons for the sake of Rewards, &c, whereupon the Court returned Thanks to the Grand Jury and assured them that the Offenders should be rigorously prosecuted.” 3 *Gentleman’s Magazine* 493 (Sept. 1733). In a forthcoming book, John Beattie traces this report in the London records and identifies the four solicitors. Beattie, *Urban Crime*, chapter 9.

testimony, explaining that "We fear some bad Practices. . . ." ²⁰⁵ MacCray contended that the prosecution was a frame-up growing out of election hostilities, and that he had alibi witnesses placing him at a pub in Holborn on election business at the time of the robbery. His first witness, Gilbert Campbell, identified himself as an attorney, and testified that he took MacCray with him to the pub on a client's business. Two further witnesses corroborated Campbell's story, one Ruffhead, a butcher, and Julian Brown. Brown's appearance stirred Sir Thomas DeVeil, the court J.P., who was sitting with the trial bench, to recollect that Brown had been prosecuted for a robbery four years earlier, and had been lucky to be acquitted because the evidence against him was very full. Nevertheless, confronted with three un rebutted alibi witnesses, the jury acquitted MacCray.

The contemporaneous *Old Bailey Sessions Paper* account of MacCray's case underscores the reporter's distrust of the alibi witnesses. A footnote identifies Campbell as having been a defence witness in another felony case a few months before. ²⁰⁶ Another footnote cites readers to the 1731 report of the prosecution of Brown. ²⁰⁷ A posthumous biography of DeVeil, published in 1748, claims that a notorious solicitor, William Wreathock, masterminded the false alibis that saved MacCray. ²⁰⁸ Wreathock was renowned as the attorney with the effrontery to bring the so-called Highwayman's Case in the Exchequer in 1725. That suit asserted a dispute about the profits of a joint venture. When the court discovered that both parties were highway robbers contesting their shares in stolen loot, the case was dismissed and Wreathock fined £50 for contempt of court. ²⁰⁹ In 1735 Wreathock was convicted at the Old Bailey of highway robbery ²¹⁰ and sentenced to death but transported and ultimately pardoned. He returned to London, resumed practising as a solicitor, and was finally struck off the solicitors' rolls in 1758. ²¹¹

The pamphlet biography of DeVeil also contends that the

²⁰⁵ *Ibid.* 90.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* 91, citing *Julian Brown*, OBSP (Sept. 1731, #7), 11. Months after he testified as a witness for MacCray, Brown was prosecuted and acquitted of the rape of an eleven-year-old girl. *Julian Brown*, OBSP (Oct. 1735, #35), 161.

²⁰⁸ Wreathock "had managed the whole scene of perjury, by which MacCray came off in Middlesex, and a very bold attempt of the same nature, by which it was endeavoured to get him acquitted likewise in Surrey, though that miscarried". Anon., *Memoirs of the Life and Times of Sir Thomas DeVeil, Knight* (London 1748) p. 38 [hereafter cited as DeVeil, *Memoirs*]. I owe the reference to this passage to Heather Shore, who is currently researching certain of the London criminal gangs active in the mid-1730s, including the MacCray-Wreathock group. Regarding DeVeil and this pamphlet biography, see Langbein, "Criminal Trial", pp. 59-60.

²⁰⁹ The case, which arose on a bill in the equity side of the court of Exchequer, is unreported. The archive sources are discussed and extracted in Note, "The Highwayman's Case (*Everet v. Williams*)" (1893) 9 Law Q. Rev. 197-199.

²¹⁰ *William Wreathock et al.*, OBSP (Dec. 1735, ##67-71), 18.

²¹¹ Birks, (n. 33 above), pp. 135, 149; Holdsworth, *HEL*, vol. 12 p. 59.

or disprove²¹⁶ whatever the case needed for victory. The judges' decision, taken in these years, to allow defence counsel to cross-examine witnesses at trial was, in my view, motivated in considerable part by their growing realisation of the potential for distortion and fabrication that inhered in the increasingly lawyerised pretrial that lay behind the trials over which they presided.

VII. DISCREDITING THE REWARD SYSTEM IN THE 1730s

In the same years that uneasiness was growing about the capability of solicitors to compromise the integrity of the evidence in criminal trials, the reliability of another pillar of early eighteenth-century prosecutorial practice—the reward system—was also shaken by scandal.

The essentials of the reward system are well described in the scholarly literature²¹⁷ and can be treated here in summary. Beginning in 1692, Parliament enacted a series of statutes that offered £40 rewards to persons who would apprehend and convict offenders who had committed certain serious property crimes.²¹⁸ The 1692 Act applied to highway robbery. In the next decades further legislation extended such offers to burglary and housebreaking, coining, theft of certain livestock, and other offences.²¹⁹ The trial judges became intimately familiar with the administration of the reward system, because the statutes put them in charge of apportioning each reward among all the persons who claimed to have participated in procuring the conviction.²²⁰ In addition to the statutory rewards, the government episodically offered rewards by proclamation, often tailored to highway robbery or murder in the metropolis.²²¹ When a statutory reward overlapped a proclamation, prosecuting highway robbers could be worth £140 a head,²²² a stupendous sum at a time when a

²¹⁶ DeVeil, *Memoirs*, p. 35.

²¹⁷ Beattie, *Crime*, pp. 50–59; Paley, "Thieftakers" (n. 189 above); Radzinowicz, *History*, vol. 2 pp. 57–137, 326–346; Langbein, "Criminal Trial", pp. 106–114.

²¹⁸ 4 & 5 Will. & Mar., c. 8, §2 (1692). Some of the statutes offered, in addition to or in place of cash rewards, so-called 'Tyburn tickets', negotiable certificates of immunity from parish and ward offices that traded freely in the aftermarket. See Radzinowicz, *History*, vol. 2, pp. 155–161.

²¹⁹ Compiled in Patrick Colquhoun, *A Treatise on the Police of the Metropolis* (7th ed. London 1806), pp. 390–392 (1st ed. London 1795). Modern accounts appear in Beattie, *Crime*, pp. 50–59; Radzinowicz, *History*, vol. 2, pp. 57–60; Langbein, "Criminal Trial", pp. 106–114.

²²⁰ Paley, "Thieftakers", pp. 317–318; Langbein, "Criminal Trial", pp. 107–108.

²²¹ Beattie, *Crime*, pp. 52–53. Radzinowicz traced these proclamations well back into the seventeenth century and concluded that they inspired the later statutory system. Radzinowicz, *History*, vol. 2, pp. 84–88.

²²² Paley, "Thieftakers", p. 324. The sense that £140 was the going rate in London rather than the basic statutory reward of £40 appears in the statement at trial of one of the defendants, William Booth, in a highway robbery case prosecuted in 1733. Denouncing the accomplice witness appearing against him, Booth says, "I set down a Candle by him at the King's Arms, and it happened to burn his Wig, upon which he swore that Job should fetch him £140." *John Ackers et al.*, OBSP (Jan. 1733, ##34–36), 44, 45. Beattie believes that royal proclamations offering the supplementary £100 for offences committed within five miles of London were continuously in

The first of the great reward scandals broke in 1732. One John Waller was convicted at the Old Bailey of a misdemeanour in attempting to prosecute a person falsely for a highway robbery in order to collect the reward. Evidence was adduced that Waller had succeeded in bringing such prosecutions in other counties. He was convicted and sentenced to be pilloried.²³⁰ When he was exposed in the pillory at a location called the Seven Dials, the brother of one of his victims set upon him and beat him to death. The brother was subsequently tried at the Old Bailey, convicted of Waller's murder, and sentenced to death.²³¹ The Waller case caused a sensation. The title of a contemporary pamphlet account suggests the horror that the saga evoked: *The Life & Action of John Waller, Who Made his Exit at the 7 Dials on 13 May 1732; Containing All the Villainies . . . Swearing Robberies Against Innocent People, to Take Away their Lives for the Sake of the Rewards.*²³²

Waller was an individual entrepreneur at the business of false prosecution, not connected to a gang, and his tactics were primitive compared to the frame-ups staged by gangs in later decades. He would pretend to have been robbed outside a pub, where he identified some hapless person as the supposed attacker.²³³ At the trial it was Waller's word against the innocent accused. Groups such as the MacDaniel gang perfected better techniques for false witnessing in reward prosecutions. They employed several persons to give seemingly corroborating evidence—apprehenders of the accused robber, sometimes a feigned victim for the staged crime, and sometimes other supposed witnesses.²³⁴ The gangs were also cunning in their selection of victims. "Those entrapped were invariably young and inexperienced and were often newcomers to the capital . . . [d]enied counsel and faced with what was in effect a professional prosecution conducted without regard to truth. . . ."²³⁵

The Waller episode made the danger of false witnessing in reward-driven prosecutions a subject of acute concern. Roughly from this time onward, we find some evidence in the skimpy trial narratives from the Old Bailey that defendants were beginning to claim that they were the victims of reward-driven frame-ups. This new line of defence suggests that defendants had detected from whatever sources a new sensitivity on the part of the courts to the danger of reward-tinged prosecutions. Mary Haycock, prosecuted by the Mint with her

²³⁰ *John Waller*, OBSP (May 1732, #89), 146–148.

²³¹ *Edward Dalton et al.*, OBSP (Sept. 1732, ##86–88), 219, 221.

²³² (London 1732) (British Library, shelfmark 518.3.20).

²³³ *John Waller*, OBSP (May 1732, #89), 146, 148.

²³⁴ E.g., *Joshua Kidden*, OBSP (Jan, 1754, #129), 71, discussed in Langbein, "Criminal Trial", p. 110.

²³⁵ Paley, "Thieftakers", p. 328.

the *Old Bailey Sessions Papers* were especially revealing about the courtroom activities of counsel, we see the legendary defender William Garrow²⁴¹ resolutely challenging the motives of reward-seekers and probing the circumstances of reward-based prosecutions.²⁴² By the end of the century, Colquhoun wrote that defence counsel had become so successful in contesting reward-based prosecutions that "many notorious offenders often escape justice".²⁴³ Thus, across the eighteenth century, the dangers of the reward system became a vital *raison d'être* for the work of defence counsel.

VIII. CONCLUSION: UNDERSTANDING A SILENT REVOLUTION

In the mid-1730s the bench took the epochal decision to permit felony defendants to have the assistance of counsel for the limited purpose of examining and cross-examining witnesses. Unlike the Treason Act of 1696,²⁴⁴ which allowed treason defendants to be represented by counsel, the decision in the 1730s did not take the form of legislation. Accordingly, it did not leave the characteristic traces that help us to understand the origins of an enactment. We have no statutory text, no preamble, no Journals of the two Houses, no papers of the parliamentarians. The change occurred in judicial practice, but because the change did not arise from adjudication, the judges did not leave decisional law to explain their thinking. This change in judicial practice is so poorly evidenced for its early decades that we are able to document it only through the study of obscure pamphlet trial reports that were all but unknown to legal historians until the 1970s. Lacking, therefore, any authoritative account of the rationale for the judges' decision, we are left to try to infer the judges' purposes from the surrounding circumstances.

In deciding to allow defence counsel in the 1730s, the judges surely took comfort from the precedent established by the Treason Act of 1696. Hawkins, it will be recalled, intimated in 1721 that a main reason that the Act's grant of defence counsel was limited to treason defendants was because treason cases were those in which

²⁴¹ On whom, see Beattie, "Scales", at pp. 236-247.

²⁴² E.g., *James Wingrove*, OBSP (May 1784, #637), 818, 821 (acquittal); *William Horton*, OBSP (Jul. 1784, #735), 970, 971 (acquittal); *Robert Mitchell*, OBSP (Dec. 1784, #190), 196, 197 (acquittal; Garrow cross-examined the prosecutor about the number of times he had previously prosecuted robberies supposedly done to his person); *John M'Carty & Thomas Hartman*, OBSP (Dec. 1787, #28), 45-47 (convicted of simple theft and transported); *William Eversall et al.*, OBSP (May 1788, #333), 436, 437 (acquittal); *John Wood, et al.*, OBSP (May 1788, #374), 477 (convicted; jury recommended mercy); *Thomas Gibbs*, OBSP (Dec. 1788, #44), 28-29 (acquittal); *Thomas Jones*, OBSP (Dec. 1788, #76), 48, 49 (acquittal).

²⁴³ Patrick Colquhoun, note 219 above, at p. 222 (London, 1796 ed.), cited by Beattie, *Crime*, p. 374.

²⁴⁴ 7 & 8 Will. 3, ch. 3 (1696), discussed at p. 317 above.

questions for him. . . ."²⁵¹ Prosecution counsel still thought it worth his while to object, emphasising in this striking passage his understanding of the extent of judicial discretion about whether and how to allow defence counsel to cross-examine:

This, I apprehend, is a matter purely in the discretion of the Court, and what can neither in this or any other court of criminal justice be demanded as a right. The judges, I apprehend, act as they see fit on these occasions, and few of them (as far as I have observed) walk by one and the same rule in this particular: some have gone so far, as to give leave for counsel to examine and cross-examine witnesses; others have bid the counsel propose their questions to the Court; and others again have directed that the prisoner should put his own questions: the method of practice in this point, is very variable and uncertain; but this we certainly know, that by the settled rule of law the prisoner is allowed no other counsel but the Court in matters of fact, and ought either to ask his own questions of the witnesses, or else propose them himself to the Court.²⁵²

This account, insisting that the new rule allowing defence counsel to examine and cross-examine witnesses was "purely in the discretion of the Court", and that "few of [the judges] . . . walk by one and the same rule", supports the view that the change did not arise from any authoritative decision or directive, but rather emerged from the judges' exercise of their residual discretion over trial management.

The discretionary character of the changed practice allowing defence counsel was long remembered. In an Old Bailey case heard in 1786 the defence counsel William Garrow objected when the presiding judge, Heath J., allowed a prosecution witness who was mute to be examined through an interpreter. According to a manuscript report of the exchange, Garrow persisted after the court overruled his objection. Heath then upbraided him, reminding him: "What you do here is by *permission of the Court in a Criminal Case*."²⁵³ The courts also exercised a discretion to relieve against the restriction of the new rule that limited counsel to examining and cross-examining, hence to permit what came to be called "full defence of counsel". In an Old Bailey case in 1771, William Davis, charged with robbing the mails, was unwell when tried. "The judge said, that as the prisoner was ill he would permit his counsel to state his defence to the jury."²⁵⁴

As the submission from prosecution counsel in 1741 in *Goodere*

²⁵¹ 17 St. Tr. 1022.

²⁵² *Ibid.*

²⁵³ Manuscript bound with the Harvard Law Library's exemplar of the Old Bailey Sessions Papers for January 1756, following the case of *William Bartlett*, OBSP (Jan. 1756, #151), 247. The quoted language appears at 1v, emphasis original.

²⁵⁴ *William Davis*, OBSP (Dec. 1771, #40), 16, 25.

of false witnessing in crown witness cases by fashioning the corroboration rule for accomplice testimony,²⁵⁸ one of the earliest of the exclusionary rules of evidence. Thereafter, the probing of crown witness cases became a central sphere of the activity of defence counsel at the Old Bailey. Although crown witness prosecutions began to loom large in the mid-1730s,²⁵⁹ the corroboration rule does not appear to be in place until the 1740s, hence after the introduction of defence counsel and quite possibly as a result of counsel's demonstration of the weaknesses of crown witness cases.²⁶⁰

The likely precipitating factor in the relaxation of the ban on defence counsel was the judges' recognition of the increasing unreliability of the evidence in the solicitor-driven and reward-driven prosecutions of the 1730s. The fundamental flaw in English criminal procedure, the failure to develop public policing and prosecutorial institutions appropriate to the dawn of the urban age, was beyond the mission of trial judges to rethink and to correct. Confronted with the deeply deficient evidentiary product of a partisan and privatised pretrial, the judges decided to allow defendants to invoke the aid of private lawyers for protection at trial. This decision to admit defence counsel to probe menacing evidence became in the light of hindsight a milestone on the road towards the adversary system of lawyer-dominated trial.

The resort to defence counsel from the 1730s onward also perpetuated and helped entrench the principle that the trial court would shoulder no responsibility to investigate on its own. In the 1741 trial of William Warner and another for a nighttime highway robbery,²⁶¹ we find a poignant reminder of the path not taken. Prosecution witnesses testified that they were certain of their identification of the two defendants, because the scene of the robbery was bright and starlit. The defendants protested that the night was dark and rainy. Warner pitifully suggested to the trial judge, "I hope you will look into it, and see whether it did [rain] or no".²⁶² An

²⁵⁸ The earliest unambiguous cases in the Old Bailey reports arise in the December 1744 sessions: *James Leekey, William Robinson, & Elizabeth Cane*, OBSP (Dec. 1744, ##7-9), 5 (burglary; receiving stolen property); *John & Edward Hill*, OBSP (Dec. 1744, ##26-27), 9 (highway robbery); *James Ruggles et al.*, OBSP (Dec. 1744, ##93-95), 48, 49 (highway robbery).

²⁵⁹ For example, in the February 1733 sessions there were four: *Joseph Fretwell*, OBSP (Feb. 1733, #32) 61 (highway robbery); *William West & Andrew Curd*, OBSP (Feb. 1733, ##38-39), 67-69 (burglary); *Leonard Budley & William Harris*, OBSP (Feb. 1733, ##51-52), 69-71 (highway robbery); *William Norman*, OBSP (Feb. 1733, #58), 71 (burglary).

²⁶⁰ The defendants in one of the three early corroboration-rule cases, *John & Edward Hill*, OBSP (Dec. 1744, ##26-27), 9 (highway robbery), cited note 258 above, are shown as being represented by counsel in that sessions when tried on another indictment. *John & Edward Hill*, OBSP (Dec. 1744, ##24-25), 8-9 (highway robbery).

Henry Fielding chafed at the corroboration rule, a recent innovation in his day that restrained his investigative and prosecutorial work as court J.P. for Middlesex. Fielding, *Enquiry*, pp. 158-163.

²⁶¹ *William Warner & John Newman*, OBSP (Dec. 1741, ##5-6), 3 (highway robbery).

²⁶² *Ibid.* p. 4.