

The Criminal Trial before the Lawyers

John H. Langbein†

The common law criminal trial is dominated by the lawyers for prosecution and defense. In the prototypical case of serious crime (felony), counsel take the active role in shaping the litigation and proving the facts for a passive trier. Continental observers, accustomed to a nonadversarial trial in which the court itself has an active role in adducing evidence to inform its own judgment, regard our lawyerized criminal trial as a striking Anglo-American peculiarity.

We seldom appreciate that this lawyerized criminal trial looks as striking from the perspective of our own legal history as from that of comparative law. It developed relatively late in a context otherwise ancient. Whereas much of our trial procedure has medieval antecedents, prosecution and defense counsel cannot be called regular until the second half of the eighteenth century.

In our historical literature the relative newness of our adversary

† Professor of Law, The University of Chicago.

This article results from a period of research in 1977 that was made possible by a Humanities Research Fellowship from the National Endowment for the Humanities, and by the grant of research funds from the University of Chicago Law School. I wish to record my gratitude to the Endowment and to Dean Norval Morris and the Law School for their support. I also wish to express my thanks to the Warden and Fellows of All Souls College, Oxford, for permitting me to work as a Visiting Fellow of the College. This research has benefitted materially from references and suggestions made by Professor Sir Rupert Cross (Oxford) and from comments on a prepublication draft by Professors James S. Cockburn (Maryland), Thomas Green (Michigan), Stanley Katz (Chicago), and Geoffrey Stone (Chicago).

I also wish to thank the editors of the *Review* for permitting deviations from their customary citation practices in order to facilitate the use of historical sources. Regarding the rendering in this article of spelling, capitalization, punctuation, and so forth from antiquarian sources, see note 18 *infra*.

procedure has not been much emphasized, largely because it could be so little glimpsed from the conventional sources. In the present article, I shall be working mainly from novel sources in order to sketch some key features of the ordinary criminal trial in the period just before the lawyers captured it. I shall suggest that these sources require us to revise some of the received wisdom about the history of the trial, especially about the functions and the relationship of judge and jury.

I. SOURCES FOR THE ORDINARY TRIAL

Historians of post-medieval English private law have as their primary source material the hundreds of volumes of nominate law reports produced between the mid-sixteenth and mid-nineteenth centuries. These reports are largely barren of criminal cases. As a generalization that requires only modest qualification, it can be said that the law reporting tradition was not extended to ordinary criminal trials until the *nisi prius* reports of the late eighteenth century.¹ Law reports are lawyers' literature; it ought not to surprise us that during an epoch when lawyers were not engaged in criminal litigation, compilers and publishers were not engaged in producing precedent books for a nonexistent market.

A. The State Trials

For the criminal law the main counterpart to the law reports is the set of State Trials,² first published in 1719, revised and expanded three times in the eighteenth century, and published definitively in Howell's edition of 1809-1826. The State Trials contain accounts of criminal proceedings from Norman down through Stuart and (in later editions) Georgian times. The series acquired instant authority among contemporaries.³ Stephen⁴ and Wigmore,⁵

¹ See J.H. Wigmore, *A General Survey of the History of the Rules of Evidence*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 691, 696 (Ass'n of Am. Law Schools ed. 1908). Scattered reports arising from or touching upon criminal proceedings can be found throughout the nominate reports from their inception in the sixteenth century, especially in the King's Bench reports.

² The first edition is T. SALMON, A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS (London 1719) (4 vols.). The definitive edition, to which all subsequent citation in this article refers, is T.B. HOWELL, COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD (London 1809-1826) (33 vols.) [hereafter abbreviated as ST. TR.]. For discussion of other editions see J.G. Muddiman, *State Trials: The Need for a New and Revised Edition* 1 (1930).

³ The State Trials are extensively cited in 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (London 1721), written within months of the appearance of the first edition of

whose pioneering scholarship still lies at the foundation of modern thinking about the history of the criminal trial, based their work overwhelmingly upon the State Trials, as did Holdsworth who followed them in his influential history.⁶

Only rather lately have scholars come to realize that in important respects the State Trials are unreliable. Muddiman and Kitson Clark pointed out that the series was retrospectively compiled; that the compilers patched together their accounts of trials in former centuries from a variety of sources, many now suspect—manuscripts of doubtful provenance, lay chronicles, pamphlets and tracts—the work of nonprofessional scribes; and that for the Tudor-Stuart period, the compilers gave preference to sources with a Puritan and Whig bias.⁷ The standard of reliability of the trial reports reprinted in the State Trials improves towards the end of the seventeenth century. Major trials were transcribed in shorthand by professional scribes, promptly published in pamphlet editions represented to be accurate and complete, and scrutinized by contemporary audiences that included many of the official participants.⁸

However, the State Trials have another major defect as a source for the history of the criminal trial that is irremediable. By "State Trials" is meant trials of state, that is, affairs of state—cases involving high politics. Here are to be found the trials of Thomas More, Walter Raleigh, Guy Fawkes, the Popish Plotters, and the Seven Bishops. These were the cases that held interest for the Whig editors and their gentle, predominantly nonlawyer readership. The State Trials are sufficiently miscellaneous to contain a handful of nonpolitical cases from the mid-seventeenth century onward—the odd case of witchcraft, bigamy, homicide, or whatever, where the sensational nature of the crime or the notable status of the defendant had

the State Trials. (Hawkins' Volume I appeared in 1716; the two-volume work will hereafter be cited as HAWKINS).

⁴ J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) (3 vols.) [hereafter cited as STEPHEN]. Stephen thought that criminal "proceedings have been recorded in the State Trials with such completeness and authenticity as to give to that great collection the character of a judicial history of England." 1 *id.* at 319-20.

⁵ J. H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940) (10 vols.) [hereafter cited as WIGMORE; volumes revised by later editors cited with date and name of revising editor]. For an instance of Wigmore's extensive reliance on the State Trials, see the citations in his section on the history of the hearsay rule, 5 WIGMORE § 1364, at 12-28 *passim* (J.H. Chadbourn ed. 1974).

⁶ W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1922-1966) (16 vols.) [hereafter cited as HOLDSWORTH]. For reliance on the State Trials, see, e.g., 9 HOLDSWORTH 222-36 *passim*.

⁷ E.g., Muddiman, *supra* note 2; G.K. CLARK, THE CRITICAL HISTORIAN 92-114 (1967). Cf. Plucknett, *The Rise of the English State Trial*, 2 POLITICA 542 (1937).

⁸ On the development of shorthand reporting see CLARK, *supra* note 7, at 86-88.

induced somebody to chronicle the trial. But the compilers of the State Trials did not search for cases of ordinary crime—routine homicide, sheep-stealing, shop theft, and the like—nor could they have found reports of such cases from former times had they wanted them.

Hence, not only are the State Trials to some extent unreliable, they are grossly unrepresentative as well. Yet from these few hundred cases of mostly political crime we have derived our historical picture of the criminal trial. To be sure, the judges who presided at ordinary assizes were drawn from the same tiny pool of royal central court judges who sat in the State Trials.⁹ Moreover, much of the procedure was common to both political and nonpolitical cases, which is why the State Trials were usable for general legal history in the first place. But the differences were hard to assess and were, therefore, seldom remarked. We may briefly point to some major ones:

(1) Many of the State Trials involved treason, an offense with a peculiarly complicated conceptual basis. Treason was also unique in being subject to express standards of proof, on account of a succession of statutes that mostly required two witnesses.¹⁰ By contrast, there was as yet no articulated standard of proof in ordinary criminal procedure; the beyond-reasonable-doubt standard was not clearly formulated until the nineteenth century.¹¹

(2) The venue of most State Trials was peculiar, even disregarding the many cases tried by the houses of Parliament and related courts.¹² Ordinary criminal cases were tried in great quantity and with corresponding haste at regular sittings of the assize courts or their London equivalent, the Old Bailey sessions. The State Trials were typically conducted on a special commission of oyer and terminer, normally convened in London. The judges and jurors were handpicked for the individual case, and they felt the eyes of the government upon them. The State Trials were show trials, closer in function to political pageants than to routine adjudication.

(3) From Tudor times the crown was invariably represented

in the State Trials by prosecution counsel—often the attorney general and the solicitor general—and the right to defense counsel was granted in treason cases from 1696.¹³ We shall see that in both these respects the practice in the State Trials was well in advance of that in ordinary criminal procedure.

(4) The State Trials produced a handful of celebrated acquittals,¹⁴ but they record overwhelmingly convictions. We know from indictment files and other public records that there was a significant level of acquittals in ordinary criminal prosecutions. The higher conviction rate in the State Trials might be explained by a variety of factors: better pretrial selection and preparation of important cases, better courtroom prosecution, more timid judicial behavior, overawed juries.

B. The Old Bailey Sessions Papers

Renewed interest in the history of early-modern criminal procedure over the past decade has been accompanied by a search for sources that would permit scholars to escape from the State Trials and to study the development of criminal procedure in ordinary cases. We have begun to get some glimpses of sixteenth- and seventeenth-century practice in hitherto unused archive, manuscript, and pamphlet sources.¹⁵ This article takes another step in widening the range of sources. I shall be working from the first sixty years, from the mid-1670s to the mid-1730s, of a group of "reports" called the Old Bailey Sessions Papers (hereafter abbreviated as OBSP).¹⁶

The OBSP resemble an earlier genre of literature, the so-called crime chap-books dating from as early as Elizabethan times, to which I have called attention elsewhere.¹⁷ The chap-books were

⁹ 7 & 8 Wil. 3, c. 3 (1696).

¹⁰ See, e.g., Throckmorton, 1 St. Tr. 869 (1554); Lilburne, 4 St. Tr. 1269 (1649); Lilburne 5 St. Tr. 407 (1653); Cowper, 13 St. Tr. 1105 (1699).

¹¹ E.g., Cockburn, *Early-modern Assize Records as Historical Evidence*, 5 J. Soc. ARCHIVISTS 215 (1975); Baker, *Criminal Justice at Newgate: 1616-1627: Some Manuscript Reports in the Harvard Law School*, 8 IRISH JURIST 307 (1973). Regarding pamphlet sources, see the works cited at note 17 *infra*.

¹² While not unknown to legal historians, the OBSP appear to have been seriously consulted in prior work on the history of criminal procedure only once, in Nigel Walker's tabulations on the frequency and characterization of insanity pleas from 1740 onward. 1 N. WALKER, *CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE* 37, 57-58, 66-73, 284 (1968). Regarding Beattie's important article using similar publications from Surrey for the years 1736-1753, see note 29 *infra*.

¹³ J.H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 45-54* (1974) [hereafter cited as LANGBEIN, PCR], substantially reprinting Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEG. HIST. 313, 326-34 (1973) [hereafter cited as Langbein, *Origins*].

⁹ T.G. BARNES, *Introduction, SOMERSET ASSIZE ORDERS: 1629-1640*, xii-xvi (1959); J.S. COCKBURN, *A HISTORY OF ENGLISH ASSIZES: 1558-1714*, at 1-48, 262-931 (1972).

¹⁰ See 7 WIGMORE, *supra* note 5, §§ 2036-2039, at 263-73 (3d ed. 1940). See generally J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970).

¹¹ See C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* 799 (2d ed. 1972); C.K. Allen, *The Presumption of Innocence*, in *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* 253, 258-59 (1931).

¹² Regarding parliamentary jurisdiction over peers and in cases of impeachment and attainder, see T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 203-05 (5th ed. 1956).

sensation-mongering pamphlets written by nonlawyers, usually anonymously, for sale to the general public, each pamphlet recounting the detail of one or more freshly committed or freshly prosecuted crimes. The OBSP survive from 1674. They are pamphlets that recount the trials at a single monthly "sessions" of the Old Bailey, the court of regular jurisdiction for cases of serious crime in London and the contiguous county of Middlesex. The earliest surviving OBSP exemplars, from 1674-1676, are still recognizably of the older chap-book format in size, appearance, content, and tone.¹⁸ They are quite selective, reporting only a few cases of greatest general interest; and they preserve the moralizing tone that was long characteristic of the chap-books ("And because from the Female Sex sprung all our Woes and bad Inclinations at first, we may begin with The Trial of three very young Women . . .")¹⁹

From these beginnings the OBSP run in a substantially continuous series for nearly two and a half centuries.²⁰ During that time

¹⁸ The titles of the pamphlets wander a little, especially in the first two decades, before settling on the version that becomes regular: *The Proceedings at the Sessions of the Peace, and Oyer and Terminer, for the City of London, and County of Middlesex* [for the particular date]. We shall hereafter cite the series as OBSP (for Old Bailey Sessions Papers) with month and page references. In the 1730s and later the OBSP are paginated continuously for the eight sessions of each mayoral year.

The earliest exemplar that has come to my attention is titled *The Truest News from Tyburn, or, An Exact Account of the Tryal, Condensation [sic; Condemnation] and Execution, of the Syrrurgion [Surgeon], and Butcher, and the Rest . . . Sentenced to be Hang'd for Their Several and Respective Offences Herein Particularly Specified. At Justice-Hall in the Old Bailey, the 12th of Decem[ber] 1674.* (London 1674). This and more than a dozen other very rare pamphlets from the 1670s are bound together with contemporary chap-books in the Guildhall Library, London, under shelfmark A.5.4. no. 34. The producers' sense of the novelty of their enterprise is reflected in the preface to the April 1676 pamphlet (also in the Guildhall volume), at page 3, where it is observed that former pamphlets "having proved very acceptable, we have thought good to continue their publications; this Sessions being as remarkable as others, and is as followeth."

In quotations from the OBSP and other antiquarian sources in this article we follow the convention of modernizing and Americanizing the spelling. Abbreviated words have been written out. Capitalization and paragraphing is original. Obvious misprints are corrected without mention. Punctuation is overwhelmingly original, but modernized when required for clarity. Thus, apostrophes and quotation marks have occasionally been supplied and some terminal punctuation either altered or supplied (in particular, colons, semicolons, and dashes meant to end a sentence are rendered as periods). We delete the italic typeface commonly used in the originals to show indirect discourse, using instead ordinary typeface and quotation marks. In rendering the titles of printed works, however, we have not tampered with archaic orthography, but we have applied modern conventions of capitalization. Where our sources supply varying spellings of a proper name, we follow when possible the usage of the *DICTIONARY OF NATIONAL BIOGRAPHY* (1937-1938 ed.).

¹⁹ *A True Narrative of the Proceedings at the Sessions-house in the Old Bayly* (Aug. 1676), at 3 (Guildhall Library shelfmark A.5.4. no. 34).

²⁰ For the principal British Library holdings, see 141 *BRITISH MUSEUM GENERAL CATALOGUE OF PRINTED BOOKS* 339-50 (1964). The Guildhall Library has a strong though still incomplete collection for the years 1685-1688 and after 1707. To supplement the Guildhall

they undergo major changes of format and function, from chap-books to newspapers to true law reports. The newspaper phase had been reached by the mid-1680s. The OBSP of that time were published regularly and they recount a goodly number of cases; crude sensation-mongering dies out from the title pages,²¹ and moral instruction disappears from the accounts. In 1684 one reader referred to them as "the *Monthly News from the Old Bailey*."²² The court sat eight times a year, and an OBSP was produced for each session. For some decades there were occasionally competing editions, but in the eighteenth century there was a single series that had a quasi-official station.²³

In general the case reports in the seventeenth-century OBSP are so compact that they tell us rather little about the trials. (We must exclude from this statement an exceptionally lengthy and detailed number for December 1678, which really predates the regularization of the OBSP in the 1680s, and which we shall use extensively hereafter.) From the 1680s into the 1710s, reports like the following (from December 1684) are typical:

*Mary Cadey, Indicted for Stealing a Gown and Petticoat, valued at 20 shillings from James Cross in the Strand, on the 26th of May last, the proof upon Trial was that she having taken opportunity, conveyed them away, and absconded herself, though upon search the Goods or part of them were found, where she had sold them, to which she Pleaded, she had them of her Sister, but not being capable to produce her, nor anyone to testify for her life and conversation, she was found Guilty.*²⁴

So much has been compressed and omitted that we cannot say with any precision what evidence was adduced at the trial, nor how and by whom.

holdings for the early 1680s and for the period 1688-1707 I have relied upon the Bodleian Library, Oxford, and the British Library collections. From December 1729, when a change of format occurred, good OBSP holdings are more common; for example, the University of Chicago Law School and the Harvard Law School collections are substantially complete.

²¹ A late instance of a sensation-seeking title page appears in the OBSP for April 1682 which announces in large and partially bold face type that one of the trials was "In Relation to the Person Accused for Getting his Daughter With-Child."

²² JOHN NEWTON, *THE PENITENT RECOGNITION OF JOSEPH'S BRETHREN: A SERMON OCCASIONED BY ELIZABETH RIDGEWAY* iii (London 1684) (emphasis original).

²³ By the 1740s it was felt that the OBSP had a duty to report (however briefly) all cases from the relevant sessions. When the January 1742 issue neglected some cases, the February issue reported them with the following preface: "The Trials of the five following Persons having been omitted in the last Sessions-Book for want of Room, they are here inserted to obviate any Surmise that they were left out with any Design or sinister View whatsoever." OBSP (Feb. 1742), at 42.

²⁴ OBSP (Dec. 1684), at 2.

From the later 1710s an ever increasing number of OBSP cases are reported in greater detail, with testimony attributed to individual witnesses and defendants, although still mostly in compressed summaries. In the 1730s some reports begin to narrate questions and answers in a fashion that resembles modern stenographic trial transcripts. As the reports grow in detail, the individual sessions pamphlets grow in size. The customary four-page folio editions of the early years give way in the 1720s to eight-page, then in the 1730s to twenty-page editions. In the later 1730s the report of a single session commonly requires two pamphlets of twenty pages.

Throughout the period that we are studying, the OBSP contain unmistakable internal evidence that they were still being compiled for lay readers. They omit much procedural and doctrinal detail that would have interested lawyers; they emphasize the factual detail of witnesses' and defendants' tales, especially in sensational cases. When a two-part publication of trials from an eventful session was justified in December 1731, it was for speed's sake, since "the Town [is] so impatient for the Perusal of" the first batch.²⁵

²⁵ OBSP (Dec. 1731), at 54.

There was a parallel series of pamphlet reports even more manifestly oriented to lay readers than the OBSP, the so-called Ordinary's Accounts written by the clergymen who ministered to the inmates of Newgate prison (where Old Bailey prisoners awaited trial and, if condemned, execution). E.g., James Guthrie, *The Ordinary of Newgate, His Account of the Behaviour, Confessions, and Dying Words, of the Malefactors, Who Were Executed at Tyburn on Monday the 6th of This Instant March, 1731 [1732]: Being the Third Execution in the Mayoralty of the Rt. Hon. Francis Child, Esq.: No. III for the Said Year* (London 1732). Written in a moralizing tone purporting to instruct the reader by example in order that he might avoid the fate of the criminals condemned to death at the Old Bailey, these accounts dwell on the backgrounds and criminal careers of the convicts, their behavior in prison as they awaited death, and their executions. In the principal English libraries these Ordinary's Accounts are sometimes bound next to the OBSP pamphlets for the sessions at which the particular felons were condemned. The Ordinary's Accounts are occasionally useful as a source reporting post-sentence developments, particularly reprieves and pardons. They summarize but do not materially add to the detail of the trial reports in the OBSP. These sources are discussed in an essay just published: P. Linebaugh, *The Ordinary of Newgate and His Account*, in *CRIME IN ENGLAND: 1550-1800*, at 246 (J.S. Cockburn ed. 1977).

Since the early eighteenth century it has been common for compilers of popular collections to draw upon (and embellish) the reports in the OBSP and the Ordinary's Accounts. These collections often appear titled either *The Newgate Calendar* or *Select Trials . . . in the Old Bailey*. The forerunner: *A Compleat Collection of Remarkable Tryals of the Most Notorious Malefactors, at the Sessions-House in the Old Bailey, for Nearly Fifty Years Past* (London 1718) (2 vols.) (British Library shelfmark 518.b. 1/2). A well known set: *SELECT TRIALS AT THE SESSIONS-HOUSE IN THE OLD BAILEY, FOR MURDER, ROBBERIES, RAPES, COINING, FRAUDS, BIGAMY, AND OTHER OFFENCES: TO WHICH ARE ADDED THE LIVES, BEHAVIOUR, CONFESIONS, AND DYING SPEECHES OF THE MOST EMINENT CONVICTS* (London 1742) (4 vols.). Regarding these works see G. HOWSON, *THIEF-TAKER GENERAL: THE RISE AND FALL OF JONATHAN WILD* 321, 324-25 (1971).

It should be remarked that the OBSP throw light on all manner of legal and administrative topics, and they constitute a vast and fascinating repository of information about nonle-

Witness testimony is sometimes preserved in lower-class or regional dialect for readers' entertainment.²⁶ In the endpapers of the pamphlets we find advertisements for medicines and a wide variety of lay literature. There is a long-running advertisement for "A speedy Cure for the Itch," sold "At the Crown and Ball in George's Court in St. Jonn's Lane, near Hick's Hall . . . A WATER which perfectly cures the Itch, or Itching Humour, in any Part of the Body" Among the publications advertised in the September 1731 edition by booksellers: "The Speling [sic] Dictionary," newly published in a third edition; "The Art of knowing Women, or the Female Sex dissected, in a faithful Representation of their Virtues and Vices," "The Brothers of Treachery punish'd, a novel," and "The Invalidity of Lay-Baptism."²⁷

To write legal history from the OBSP is, therefore, a perilous undertaking, which we would gladly avoid if superior sources availed us. However, on the present state of our knowledge about the surviving sources, it has to be said that the OBSP are probably the best accounts we shall ever have of what transpired in ordinary English criminal courts before the later eighteenth century.²⁸ We have no reason to suspect invention in the OBSP; Old Bailey trials were well-attended public spectacles, and word would soon have got round if the OBSP reporters had started fabricating. The pressures of the marketplace made for reasonable accuracy in what was reported. The troublesome aspect of these sources, as already indicated, is what they do not report. Most of what was said at an Old Bailey session must have been omitted. In the 1730s a single session lasted two to five days and processed fifty to one hundred felony cases. Pamphlet reports of the size in question could not begin to capture the full proceedings. Much of the omission occurred in the many cases that are merely noted in the OBSP in a line or two, but omission also took the form of compression within the more detailed reports that interest us. Verbatim transcripts sometimes

gal subjects of every conceivable sort. They touch on countless facets of the social and economic life of the metropolis and give us sustained contact with the lives and language of the ordinary people of the time.

²⁶ E.g., Hannah Cummins, OBSP (Feb.-Mar. 1734), at 85.

²⁷ OBSP (Sept. 1731), at 17-20.

²⁸ Contemporary newspapers such as *The Post Boy*, *The London Journal*, and *The Weekly Journal/British Gazetteer* usually report entire Old Bailey sessions in a couple of paragraphs, which are usually little more than body counts—how many convicted of what and sentenced to what. Provincial assizes were even more curtly reported. One report in its entirety (from *The London Journal*, No. 346, Mar. 12, 1726): "Last Friday the Assizes ended at Winchester, when Seven Men received Sentence of Death."

Regarding the surviving public records from the Old Bailey and from assizes, see note 29 *infra*.

lapse in improbable ways. Hence, even extensively reported cases were not necessarily completely reported. (I shall return to this subject with illustrations when discussing various facets of the trial procedure.) Accordingly, we must stand warned about the difficulty of quantitative analysis of such sources, and we must be especially cautious about drawing negative inferences. It need not follow that something did not happen because it is not reported.²⁹

II. JURY PRACTICE AT THE OLD BAILEY: 1675-1735

From the mid-1730s, as I shall hereafter discuss, the OBSP reveal a significant component of participation by prosecution and defense counsel at some Old Bailey trials. The present section of this article is based on OBSP cases of the preceding decades, in order to identify the main features of jury trial in its still lawyer-free phase. It will help frame this inquiry to remind ourselves of some of the characteristics of the criminal jury system to which we are today accustomed.

(1) *Jury composition.* The modern jury is impaneled for a single case. Especially in American practice, the prosecution and defense take an active hand in winnowing prospective jurors through the use of challenges on voir dire. The jury hears only the

²⁹ Having emphasized the uniqueness and the utility of the OBSP, I should add some qualifications that are mostly of concern to future researchers.

A series of pamphlets identical in format to the contemporary OBSP was published for Surrey assizes during the period we are studying, although very few exemplars appear to have survived, and it may well be that the series was not so regularly published. Pamphlets for March 1679, July 1680, and March 1683 are bound under shelfmark Trials 214 in Lincoln's Inn Library. Beattie discusses data drawn in part from the Surrey pamphlets for the years 1736-1758, "including a complete run [of pamphlets] for the years 1738-42," in an important essay just published. J.M. Beattie, *Crime and the Courts in Surrey: 1736-1753*, in *CRIME IN ENGLAND: 1550-1800*, at 155, 332 n.5 (J.S. Cockburn ed. 1977) [hereafter cited as Beattie]. There may also have been a series of pamphlets for Essex; one that survives, titled *The Full and True Relation of All the Proceedings at the Assizes Holden at Chelmsford* (London 1680) (Mar.-Apr. 1680 assizes), is bound with the Lincoln's Inn volume cited *supra*.

It is also important to bear in mind that a variety of public records that can amplify the OBSP sources in certain respects have been to some extent preserved. For descriptions see the introductions, extracts, and calendared material in *LONDON SESSIONS RECORDS: 1605-1685* (H. Bowler ed. 1934) (Catholic Rec. Soc.); *MIDDLESEX COUNTY RECORDS* (J.C. Jeaffreson ed. 1886-92) (Middlesex County Rec. Soc.) (4 vols.). Cf. Howson, *supra* note 25, at 325-26. The main classes are the sessions rolls (containing, inter alia, recognizances of persons bound over to prosecute, indictments, jail calendars, and jury lists) and the sessions papers (containing a miscellany of recognizances, depositions, petitions, etc.). For corresponding records from Elizabethan-Jacobean assize courts on the Home Circuit see note 41 *infra*. Because these records were prepared in advance of trial, with only tiny additions made at trial, they cast only indirect light on the issues of courtroom procedure with which the present article is principally concerned. However, as the Beattie article demonstrates, these archives can be of considerable value for the study of related matters such as jury composition, offense characterization, conviction rates, social traits of offenders, sentencing practices and so forth.

one case for which it has been selected and is discharged upon rendering its verdict.³⁰ Jurors are inexperienced at the work of being jurors. On any one panel a few may have seen former jury service once or twice, but in general jurors are novices.

(2) *Informing the jury.* At trial we keep these inexperienced jurors isolated and passive. We seat them in a special box, which prevents them from having any informal interaction with the bench and other trial participants. We sequester them during adjournments. Even in very long trials, jurors ordinarily say nothing and do nothing to inform the verdict that they will thereafter determine. Counsel for prosecution and defense adduce evidence for the jury; the accused sometimes testifies, but otherwise he sits by as silently as the jurors.

(3) *Controlling the jury.* The jurors deliberate alone and in camera. They render their judgment in a one- or two-word verdict, for which they give no statement of reasons. If the jury has erred in evaluating the evidence or applying the law, the verdict will not reveal the mistake and it will not ordinarily be amenable to correction. The danger that inexperienced laymen rendering conclusory and unassailable judgments might err in these matters of life and death has led to the development of prophylactic safeguards at the trial stage. The information about the case that is allowed to reach the jurors is filtered through rules of evidence that are meant to exclude types of information whose import the jurors might misapprehend. The hearsay rule and the rule excluding evidence of past criminal convictions typify this exclusionary system. The other main device for preventing the jury from erring is the judge's summation and instruction at the conclusion of the case, in which the evidence is to some extent discussed and the jurors are told about the standard of proof and the applicable substantive law.

When we turn back to jury practice at the Old Bailey in the years under study, this familiar image of the criminal trial dissolves, and a picture emerges of a quite different institution.

A. Jury Composition

For many centuries in England until quite lately, cases of serious crime were routinely tried before itinerant justices at semiannual assizes (literally, "sittings"). On the "crown" side (for criminal business) the justices of assize sat under commissions of jail delivery and oyer and terminer for each of the counties and for the principal

³⁰ Multiple defendants and multiple counts are occasionally aggregated in a single case, but only if there is sufficient interconnection under the joinder rules.

boroughs on their circuit.³¹ The Old Bailey was the London counterpart to the crown side of these provincial assizes. It differed from them in a few details. It had no civil ("nisi prius") side. It sat eight times a year, in order to deal with the quantity of criminal business generated in the metropolis. And it exercised simultaneous commissions for two venues, the city of London and the contiguous county of Middlesex.³²

Throughout the period we are discussing in this article, it was customary for the Old Bailey to impanel just two twelve-man trial juries for each sessions—a London jury composed of men from the city, and a Middlesex jury drawn from the county environs.³³ We have said that in the 1730s a single sessions lasted several days and processed fifty to one hundred cases of felony (plus a handful of serious misdemeanors). The one London jury and the one Middlesex jury tried all these cases. Once regularized in the 1680s, the OBSP list the names of the jurors in two columns on the first page of text, just after the judges' names. They do not tell us which jury tried which case, although that can normally be inferred from what is said of the venue (it can also usually be established from the surviving public records³⁴).

One exceptionally detailed pamphlet from the December 1678 sessions³⁵ shows us how the two juries proceeded. The sessions lasted two days. On Wednesday morning two cases were tried to the London jury, and seven cases (involving eight accused) to the Middlesex jury. In the afternoon the London jury tried three cases, including the lengthy Arrowsmith case emphasized below. The next morning the Middlesex jury tried eight cases (eleven accused) and the London jury six. For Thursday afternoon the London jury was discharged and the Middlesex jury tried its last six cases. These staggered sittings permitted the court to arrange business so that one

³¹ See generally Barnes, *supra* note 9; Cockburn, *supra* note 9.

³² See generally H. Bowler, *Introduction*, LONDON SESSIONS RECORDS: 1605-1685 (1934) (Catholic Rec. Soc.). Howson, *supra* note 25, at 27, 315-16, and plates 2-3, at 50, develops the point that from 1673 to 1737 the Old Bailey sat in a curious open-air structure in order to reduce the danger of infection from contagious disease.

³³ There were, of course, corresponding grand juries; according to the venue of the crime, one or the other had found all the indictments that were tried at the Old Bailey. The grand jury was typically in session processing new bills of indictment while the trial jury was trying the bills already found. See, e.g., THE OFFICE OF THE CLERK OF ASSIZE 16 (London 1676 ed.); *An Exact Account of the Trials of the Several Persons Arraigned at the Sessions-house in the Old Bailey for London & Middlesex: Beginning on Wednesday, Decemb[er] 11, 1678, and Ending the 12th of the Same Month* (London 1678), at 5 [hereafter cited as *Exact Account*].

³⁴ See note 29 *supra*.

³⁵ *Exact Account*, *supra* note 33. There are copies in the Bodleian, the British Library, and Lincoln's Inn.

jury could be hearing fresh cases while the other was out deliberating. Between them the two juries returned verdicts in thirty-two cases involving thirty-six accused in two days.

Further, these cases were tried and decided in batches. The Middlesex jury that handled a total of twenty-one cases deliberated only three times. It heard all seven trials on Wednesday morning before deliberating on any of the cases; it then withdrew to formulate verdicts in all seven. It proceeded in like manner with its two Thursday deliberations—the eight morning verdicts together and the six afternoon verdicts in another batch.

At provincial assizes this practice of a single jury hearing many cases and leaving to deliberate on all of them at once was also routine. The newly calendared³⁶ indictment files for the "Home" (suburban) counties near London evidence the phenomenon for the Elizabethan-Jacobean years; the *Clerk of Assize* manual describes it as the norm at county assizes under Charles II.³⁷ Provincial assizes did not, however, limit themselves to the use of just two trial juries, as did the Old Bailey.

This remarkable practice of multiple trials and multiple verdicts goes unmentioned in the standard histories of English criminal procedure such as Stephen and Holdsworth, doubtless because the State Trials do not give cause to suspect it. The State Trials were typically conducted before ad hoc trial commissions, and at these occasions it was not unusual for the accused to make use of challenges to eliminate some of the prospective jurors. In ordinary jury practice at the Old Bailey challenges were quite rare. According to the December 1678 pamphlet, the clerk at the Old Bailey faithfully made the ritual proclamation to the accused that they should "look to their Challenges,"³⁸ but none did. The OBSP record only a few challenges throughout our period.³⁹ Hence, although the vast medie-

³⁶ See note 41 *infra*.

³⁷ At provincial assizes several juries were used as the court worked its way through its docket. See THE OFFICE OF THE CLERK OF ASSIZE, *supra* note 33, at 9-16. Beattie has studied the system in Surrey in the years 1736-1753:

Prisoners were arraigned in groups of a dozen or more and one panel of jurors were charged with them; but most often at the Surrey assizes when the first trials were completed substantially the same panel of jurors were given another group in charge. The panels often differed by one or two men; and if the calendar was long enough and four or five juries had to be sworn, the character of the trial jury might change over the course of a four or five-day session. But normally the jury that ended the assize session differed by only a few men from the dozen who had heard the first case.

Beattie, *supra* note 29, at 165.

³⁸ *Exact Account*, *supra* note 33, at 5.

³⁹ E.g., John Bellingham, OBSP (Oct. 1699), at 4 (7 jurors challenged); James Russell and another OBSP (May 1716), at 5 (entire jury challenged); Giles Hill, OBSP (Sept. 1720), at 7: "The Jurors were the same as in the other London Trials, except Edward Jarman, the

val law of challenge was preserved in the law books of the time,⁴⁰ this book learning was virtually dead letter in the ordinary courts. If modern voir dire practice is traced to these medieval roots, the history is not—according to the Old Bailey sources—a direct and uninterrupted one.

Not only did a single Old Bailey jury commonly try dozens of cases at a single sessions, but most of the dozen jurors who sat at any one sessions were veterans of other sessions. Cockburn's comprehensive name index to the assize files makes it easy to illustrate this point for the assize courts on the Home Circuit in Elizabethan-Jacobean times. We take an example from the Sussex file, chosen randomly from a middle year of the two reigns, a trial jury impaneled (for five cases involving eight defendants) at East Grinstead assizes on 24 February 1595. The assize files, which are incomplete, show that at least eleven of the twelve jurors saw prior and/or subsequent jury service; one man is known to have served on fifteen trial juries, the others on from one to seven.⁴¹ The OBSP show a similar pattern. For my illustrative purposes it has not been worth the trouble to quantify this data in any systematic fashion, but examples leap out. Thus, in a good but incomplete collection of OBSP for the period 1720-1727, it is reported that on the Middlesex jury William Tame and Henry Goddard served six times, John Mills and Thomas Phillips five, and Edward Percival four. Many other names recur as often. In a vast metropolis jurors were recurrently drawn from a miniscule cohort.⁴²

Foreman, who being Challenged by the Prisoner, *James Cooper* was swore in his stead." The December 1684 pamphlet reports the court replacing the whole Middlesex jury twice and the London jury once, for no apparent reason. OBSP (Dec. 1684), at 2, 6. On another occasion the court dismissed a Middlesex jury that acquitted a group of murder defendants against the wishes of the court; they were immediately tried for a related offense by the new jury, which convicted one of manslaughter. William Sikes and others, OBSP (Jan. 1697), at 3-4. (The archive sources cited *supra* note 29 would permit quantitative study of challenge practice.)

⁴⁰ See, e.g., 2 HAWKINS, *supra* note 3, at 412-20.

⁴¹ CALENDAR OF ASSIZE RECORDS: SUSSEX INDICTMENTS: ELIZABETH I, at 294 (Entry No. 1529) (J.S. Cockburn ed. 1975); CALENDAR OF ASSIZE RECORDS: SUSSEX INDICTMENTS: JAMES I (J.S. Cockburn ed. 1977). Seven of the jurors had also seen prior and/or subsequent service on county grand juries (an average of more than four times per man), and five of them are recorded as having served on a coroner's jury.

See also J.S. MORRILL, *THE CHESHIRE GRAND JURY: 1625-1659: A SOCIAL AND ADMINISTRATIVE STUDY* 9-15 (1976). Although devoted to a peculiar county in a peculiar epoch, Morrill's study documents the recurrent patterns of selection for grand jury service, concluding that the system produced "a semi-permanent core of grand jurymen who provided an important element of continuity . . ." *Id.* at 10.

⁴² These examples are culled from the Guildhall Library OBSP collection for the period January 1720-October 1727. Beattie, working from assize records as well as pamphlet sources

A cardinal assumption that underlies the law of evidence and criminal procedure today is that jurors are inexperienced, and hence require to be and can be shielded, guided, and controlled. But in early modern times most juries were full of jurors who were "old hands" at the job, and at the Old Bailey those who were not experienced at the start of a sessions were veterans by the end.

The substantive criminal law probably held few mysteries for these experienced jurors, especially since the comparatively uncomplicated but still nominally capital felony of larceny in its various forms constituted the vast bulk of Old Bailey cases. A few fact patterns recur endlessly in the OBSP reports: (1) a shoplifter is observed by the proprietor or by a bystander and apprehended in the act or in flight; (2) a silver tankard is missing from a pub just after the accused has used it; he is seized with it, or observed to leave with it, or attempts to pawn or sell it, or is found to have it in his lodgings; (3) household or commercial goods are missed, and a servant or apprentice is found with them or with the supposed proceeds; (4) money, jewelry, and/or clothing is taken in highway robbery; the accused is apprehended fleeing, or with the loot, or he is identified by an accomplice who turns state's evidence; and (5) a pleasure-seeking victim loses money or jewelry in a bawdy house or a pub while intoxicated; his erstwhile companion claims to have received the goods as favors or in payment for sexual services. Old Bailey jurors must have been for the most part as familiar with these plots and with the simple legal issues they presented as the professional judges who presided at the trials. I shall have occasion in the next subsection to suggest that this point helps explain some significant aspects of Old Bailey trial procedure.

B. The Pace of Trial

Ordinary criminal trials took place with what modern observers will see as extraordinary rapidity. We have already noticed that thirty-two cases were processed to verdict in the courtroom at the Old Bailey in the two-day sessions of December 1678. Throughout the next decades an average of twelve to twenty cases per sessions day went to jury trial. These were full jury trials on pleas of not

resembling the OBSP, mentions similar practices in Surrey in the period 1736-1753. Beattie, *supra* note 29, at 165.

Professor James S. Cockburn is undertaking a study of patterns of jury service on the Home Circuit, which will shed light on the question to what extent assize practice corresponded to Old Bailey practice. His preliminary results suggest that, at least in Elizabethan times, jury service was less repetitive than we think it to have been in the Old Bailey in the years under study in the present article.

guilty; guilty pleas were as yet a quantitatively insignificant component of common law criminal procedure.⁴³

So rapid was trial procedure that the court was under no pressure to induce jury waivers. We cannot find a trace of plea bargaining in the Old Bailey in these years. Rather, an opposite tendency is evidenced. The OBSP report several cases in which, when an accused pleads guilty on arraignment or starts to plead guilty before the jury after having pleaded not guilty on arraignment, the court urges him to go through with the contest. Thus, Mary Price (1718), charged with murdering a child, "pleaded Guilty; at which the Court being something surprised, would have permitted her to withdraw her Plea; but she still persisted to plead Guilty. The Court then told her she would do well to consider what she did, for that it was Murder was laid to her Charge, which perhaps if she pleaded Not Guilty, might not be proved upon her, but if she confessed it she must be hanged."⁴⁴ Stephen Wright (1743), caught robbing a physician in his surgery at gunpoint, told the court he wanted to admit his guilt in order to spare the court trouble. He hoped he might "be recommended to his Majesty's mercy by the Court and the Jury"⁴⁵ (a reference to the system of royal review and occasional commutation of capital sentences on the advice of the trial judges, a practice to which we shall refer below⁴⁶). The court "informed him, if there were any favorable Circumstances in his Case, if he pleaded guilty, the Court could not take any Notice of them; and that the Jury cannot report any favorable Circumstances, because the Circumstances do not appear to them: Upon which he agreed to take his Trial."⁴⁷ If the implication to Wright was that the judges could only advise the monarch of facts found by a jury, that was certainly false and therefore misleading.⁴⁸ We see again a positive judicial preference for disposing of cases by jury trial. The authoritative and experienced Judge Matthew Hale, writing sometime before 1676, says that "it is usual for the court . . . to advise the party to plead and put himself upon his trial, and not presently to record his confession . . ."⁴⁹ Nevertheless, a few hopeless defendants did insist

⁴³ The few guilty pleas that we do see in these sources were typically uttered either in emotional despondency or in the knowledge that benefit-of-clergy would nullify the otherwise applicable sanction.

⁴⁴ OBSP (Jul. 1718), at 6.

⁴⁵ OBSP (Feb. 1743), at 115.

⁴⁶ See text and notes at notes 95-101 *infra*.

⁴⁷ OBSP (Feb. 1743), at 115.

⁴⁸ See text and notes at notes 95-101 *infra*, where we discuss the use of pardons to overcome jury verdicts with which the trial bench disagreed.

⁴⁹ 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 225 (S. Emlyn ed. 1736)

on pleading guilty. Mary Aubry (1689), who murdered her husband, was told "[t]hat she having confessed she was guilty, she must suffer for it; but that the Court was so favorable, that if she were minded to put herself upon the Country, and take her Trial, she might have it; but still she pleaded *Guilty*, and her Confession was recorded."⁵⁰

In the same vein it should be remarked that the OBSP report countless instances in which guilt was only nominally contested—where the accused is expressly said to make no reply or defense; or where no defense is mentioned in the face of strong evidence; or where the accused makes only a halfhearted, unsubstantiated, inevitably hopeless denial as his total defense; or where the accused brings only character witnesses and does not attempt to contradict or explain the prosecution evidence. These, too, are cases of jury trial. The Old Bailey made no effort (in our modern parlance) to "divert" them into nonjury channels.

In our own era jury trial is such a time-consuming process that, especially in the great cities, we have had to develop incentives to induce most accused to waive their right to jury trial. How could jury trial be so rapid in metropolitan London in the years we are studying? Factors connected with jury composition explain part of the phenomenon, in particular the want of voir dire; since in practice the prosecution and defense took the jury as they found it, no time was spent probing jurors' backgrounds and attitudes. At the trial itself a number of features that we now find unfamiliar combined to accelerate the proceedings. In the following extract we reproduce in full a quite unexceptional case—the first one reported in the December 1678 OBSP—which illustrates a good deal of the routine procedure.

Then the [London] Jury were charged to enquire of *John Baltee*, upon the Indictment before mentioned [charging that he stole a silver tankard valued at £5 on December 3], whether Guilty or Not Guilty of stealing the Tankard of *Thomas Browning*.

To prove the Charge, one *Elizabeth Web* gave this Evidence, That the Prisoner at the Bar brought the Tankard to her house, and told her, he would either Pawn it, or sell it: And being asked whose it was, he said, It was not his own, but a Gentleman's hard by [i.e., one who was financially embarrassed], who had sent him with it to Pawn or Sell. She looking upon the Tankard, saw the Name of the Owner, and the sign where he lived, engraven upon it, to whom she

(2 vols.) (posthumous publication, Hale died in 1676) [hereafter cited as HALE]. Cf. 2 HAWKINS, *supra* note 3, at 333.

⁵⁰ OBSP (Feb. 1688 [1689]), at 3.

sent immediately to know whether he had given the Prisoner Order to Sell it or Pawn it: and kept the Prisoner till he came, which when he did, he owned [i.e., identified] the Tankard, but denied the Prisoner had it with his Consent, and so they carried him before the Justice.

Browning the Owner of the Tankard deposed that he was a Cook, living behind the *Exchange*, that the Prisoner, the third of *December* last, came in there with some other Persons to drink, and stole the Tankard, and confessed the Matter before Sir *William Turner*.

Sir *William Turner's* Clerk witnessed his Confession before Sir *William*, and [testified that at that time] he said, he was a poor fellow and in distress, and so took it to relieve his Wants.

The Prisoner being asked what he could now say to it, denied that he took it out of the house; but said that a Man, whose name he could not tell, gave it him to pawn: he confessed his being at that House that day; but was innocent of Stealing the Tankard. But not being able to prove his affirmation, it was left to the Jury to give what Credit they would to them [*sic*; it].⁵¹

After an unrelated case was tried with equal dispatch, "[t]he Jury then without coming from the Bar, agreed of their Verdict, which [in the first case was that] *John Baltee* was guilty of the Felony he was indicted for."⁵²

Let us now gloss this text with a particular view toward understanding why such trials were so rapid.

(1) *Witnesses' recollections were fresh.* Baltee was convicted on Wednesday for a theft committed on Tuesday of the previous week. Even by the then-current standards of the Old Bailey, he was brought promptly to trial. Most of the crimes tried at the December sessions had been committed in November or October, although the trial of Thomazine Davies on Thursday, December 12. was for a theft that she was charged to have committed on Sunday, December 8.⁵³

(2) *Pretrial procedure contributed to efficient courtroom prosecution.* In the Baltee case the accusing testimony of the two private citizens (the pawnbroker who suspected the theft and the victim whom she summoned to the scene) was afforded through the evidence of Sir William Turner's clerk. Turner was "the Justice"⁵⁴

⁵¹ *Exact Account*, *supra* note 33, at 5-6.

⁵² *Id.* at 6.

⁵³ *Id.* at 26, 27-28.

Old Bailey sessions were held eight times a year, an average of once every six weeks, whereas county assizes sat twice a year, or once every six months. Consequently, the lag between crime and trial would often have been greater at assizes.

⁵⁴ *Id.* at 6. Turner had been mayor of London in 1668-1669. See 2 A.B. BEAVEN, *THE ALDERMEN OF THE CITY OF LONDON* 91, 187 (1913); "all ex-Mayors who retained their seats in

(meaning justice of the peace, hereafter JP) to whom the two citizens brought Baltee upon apprehending him. Turner was administering the so-called Marian committal procedure, named after the act of 1555 whose origin and function I have elsewhere explained at length.⁵⁵ The statute required the JP to whom Baltee was brought to examine him about the offense and to bind over the "material" witnesses against him to appear at trial. It also directed that the JP's examination of the accused be reduced to writing and transmitted to the trial court. The statute did not by terms oblige the JP to investigate the case more widely, or to appear in person at the trial, although those steps were implicit in the procedure and were widely taken.

In the present case the culprit was questioned by the JP immediately after being caught in the act⁵⁶ and he confessed to the crime. This is a routine pretrial scenario in the OBSP reports. Here, the JP's personal clerk was present and doubtless served as the scribe. The JP could then save himself the bother of going to the trial by sending the clerk to testify to the circumstances of the confession.

Traces of the Marian pretrial procedure are constantly before us in the Old Bailey trial reports. Sometimes the JP or his clerk is recorded testifying about his investigation; sometimes the prosecuting complainant or somebody else testifies about it. In addition, we can be sure that the JP's hand has shaped many cases that the OBSP do not credit to him. These are trial reports, and only infrequently do they have occasion to show us the JP's work of selecting and binding over the prosecution witnesses in the pretrial process; furthermore, we suppose that routine confessions elicited by the JP supported many of the uncontested cases that are reported only

the Court of Aldermen were made Justices of the Peace for the City." *Id.* at xxi.

The OBSP from the 1730s provide many glimpses of the work of the most prominent of the contemporary JPs, Sir Thomas de Veil, who was the predecessor of the novelist Henry Fielding as "court justice" for Middlesex. The court justice was specially compensated by the crown and conducted major investigations. See generally SIDNEY & BEATRICE WEBB, *THE PARISH AND THE COUNTY* 337-42 (1906). The origins of the institution are not well understood; the Webbs' account follows a pamphlet of unknown provenance: *Memoirs of the Life and Times of Sir Thomas Deveil, Knight, One of His Majesty's Justices of the Peace for the Counties of Middlesex, Essex, Surrejy, and Hertfordshire, The City and Liberty of Westminster, The Tower of London, and the Liberties thereof, &c.* 22-25 (London 1748).

⁵⁵ LANGBEIN, PCR, *supra* note 17; Langbein, *Origins*, *supra* note 17.

⁵⁶ By today's standards a striking proportion of the Old Bailey cases involved defendants caught in the act or taken with stolen goods. We can understand why identification evidence would predominate in an age before professional policing and well before the development of scientific techniques for generating and evaluating many of the types of circumstantial evidence now familiar to us (such as fingerprints). The defensive possibilities open to caught-in-the-act offenders are intrinsically limited, and this must be a significant factor in explaining the rapidity of such trials.

cursorily in the OBSP.

In an age before police and prosecutorial functions were properly professionalized, the Marian procedure injected an official investigatory element into difficult cases. As illustrated by Baltee's case, the pretrial procedure contributed to the rapid pace of trial procedure in two main ways. It generated a large quantity of pretrial confessions supported by the authoritative and persuasive testimony of a public official or his deputy. And by having the JP bind over the material witnesses and weed out the rest, the procedure got the best witnesses into court while saving the court from having to hear a lot of inconsequential testimony.

(3) *No lawyers appeared for prosecution or defense.* In felony cases the prosecution was permitted to have counsel whereas (until the end of our period) the defense was not. In the State Trials where prosecuting counsel appears regularly, there was much complaint about this disparity (a topic to which we return in Part Four of this article). In ordinary felony trials at the Old Bailey, however, there was no disparity, because the prosecution was also in practice unrepresented. In the relatively detailed December 1678 pamphlet from which Baltee's case comes there is no mention of prosecuting counsel in any of the thirty-two cases tried at that sessions.⁵⁷ Neither the government nor the private prosecutor (technically, anyone whom the JP bound over to prosecute; in practice the victim or his kin) cared to engage counsel.

What we today think of as the lawyers' role was to some extent filled by the other participants in the trial, especially the judge. But a lot of what lawyers now do was left undone, which naturally shortened the proceedings. We have already mentioned the want of a lawyer-conducted voir dire, and we may now remark on the absence of opening and closing statements, examination and cross-examination, and evidentiary and procedural motions. The OBSP reports are sometimes detailed enough to show the judge conducting sustained questioning of witnesses. In other instances we can infer that the judge was serving as examiner. For example, in our extract it seems likely that the one-paragraph statement attributed to Baltee is a composite of both the story that he volunteered and (where it says that Baltee "confessed being at that House that day") his answers to judicial questioning. Nevertheless, after allowing for

⁵⁷ We exclude a misdemeanor prosecution in which "Mr. Lane, Comptroller of the Chamber of London, being of Counsel for the King," appeared against some soldiers for the offense of riot, committed in a dispute about the right to take custody of a certain prisoner. The defendants pleaded guilty and begged the mercy of the court before counsel spoke against them, and they did not, therefore, go to jury trial. *Exact Account*, *supra* note 33, at 20-21.

some judicial examination, and for some examination of witnesses by the accused, we can be confident that there was much less probing of witnesses' statements than we expect in modern counsel-conducted trials. (There was also a little less to probe, since lawyers were not coaching the witnesses beforehand.)

(4) *The accused spoke in his own defense.* The accused spoke unsworn. In many OBSP cases we see him cross-examine prosecution witnesses and producing and questioning witnesses of his own. He was, therefore, performing functions that would later be assumed by counsel. So long as he was without counsel there was scarcely any possibility of distinguishing the accused's role as defender and as witness. Throughout the period we are studying it was expected that he would reply to any evidence adduced against him that lay within his knowledge. Thus, in the Baltee case, the accused was "asked"—by the judge, of course—"what he could now say to" the prosecution testimony just concluded.

The OBSP do not always report what the accused said. Sometimes only prosecution evidence is reported, presumably because the defense was not very interesting. But from the 1670s through the mid-1730s I have not noticed a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination. Without counsel to shoulder the nontestimonial aspects of the defense, the accused's privilege would simply have amounted to the right to forfeit all defense, and we do not wonder that he never claimed it.⁵⁸

In general the accused will virtually always be the most efficient possible witness at a criminal trial. Even when he has a solid defense, the accused has usually been close to the events in question, close enough to get himself prosecuted. It is one of the great peculiarities of modern Anglo-American procedure, on which Continental observers often remark, that we have so largely eliminated

⁵⁸ Compare L.W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 325 (1968), basing himself on a few seventeenth-century State Trials and concluding that by the early eighteenth century the privilege against self-incrimination "prevailed supreme in all" trial proceedings. For a concise corrective see J.E. SCARBORO & J.B. WHITE, *CONSTITUTIONAL CRIMINAL PROCEDURE: CASES, QUESTIONS, AND NOTES* 466-69 (1977).

A garbled notion of the privilege seems to underlie a ruling of the bench in the case of Sarah Malcolm (1733), accused of murder. The Court refused to allow the prosecution to put in evidence the JP's pretrial examination of her, because it had been taken on oath. The Court is reported to have ruled: "If it [the pretrial examination] is upon Oath it cannot be read, for Persons are not to swear against themselves; all Examinations ought to be taken freely and voluntarily, and not upon Oath, and then we can read 'em." OBSP (Feb. 1733), at 90-91.

the accused as a testimonial resource.⁵⁹ When we reflect on the rapidity of the Old Bailey trials under study, we should keep in mind that the trier invariably had access to the accused.

(5) *Judicial instruction was perfunctory.* In the Baltee case the jurors are reported to have had no instruction beyond being "left . . . to give what Credit they would to" the accused's defense.⁶⁰ The brevity of this instruction is characteristic of OBSP cases throughout our period. The judges could and often did express themselves quite forcefully on the merits in criminal trials, but they did not tarry with their comments.

The skimpy instructions reported in the OBSP are surprising to the modern eye, but they fit well enough in the system we have been describing. The juries were laden with veterans, who needed less instructing. The practice of trying several cases at a time was not conducive to giving detailed instructions at the conclusion of each. Since there was no effort to divert open-and-shut cases from jury trial, a high proportion of the cases tried were exceedingly simple. Even seriously contested cases for the most part raised only simple issues of law and law-applying. The standard of proof, a main component of the modern jury instruction, was as yet inchoate; the presumption of innocence and the beyond-reasonable-doubt standard were not really formulated until well after our period, as already indicated.⁶¹

For many of the same reasons, jury deliberations could also be perfunctory. The London jury convicted Baltee (as well as the accused in an unrelated case) "without coming from the Bar,"—that is, with such dispatch that the jurors did not need to retire from the courtroom for deliberations.⁶²

C. Jury Control

In the 1660s the indistinct division of responsibility within the trial court between judge and jury produced a conflict that came to

⁵⁹ Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 526-30 (1973).

⁶⁰ *Exact Account*, *supra* note 33, at 6.

⁶¹ See note 11 *supra*.

⁶² *Exact Account*, *supra* note 33, at 6. Beattie suggests that in the 1730s the judges were encouraging the jurors to render verdicts "at the conclusion of each case," with the result that they did not have "to withdraw very often." Beattie, *supra* note 29, at 174. Deep into the next century, Continental observers were still fascinated with the speed of English jury deliberations. Gneist wrote: "Among a hundred criminal cases only roughly three to five remain on the average in which it is necessary [for the jury] to go into the deliberation room." R. GNEIST, *VIER FRAGEN ZUR DEUTSCHEN STRAFPROCESSORDNUNG MIT EINEM SCHLUSSWORT ÜBER DIE SCHÖFFENGERICHTE* 150-51 (Berlin 1874).

a head in 1670 in one of the most famous precedents in English law, *Bushell's Case*.⁶³ The decision established the principle that jurors could not be fined for returning a verdict contrary to the instructions of the trial judge. Most of what has been written⁶⁴ about the judge-jury relationship in our period has had *Bushell's Case* as the centerpiece and has celebrated the triumph of jury autonomy over judicial authoritarianism.

Like so much of the rest of the political jurisprudence of the State Trials, *Bushell's Case* presents a distorted perspective on the ordinary criminal trial. The OBSP, which commence in the decade after *Bushell's Case*, show us that the judge exercised so much influence over the jury that it is difficult to characterize the jury as functioning autonomously; and that in the rare cases where judge and jury found themselves in conflict, the judge had ways to prevail without fining jurors. We shall suggest that this routine Old Bailey practice throws some light back on *Bushell's Case* itself.

(1) *Comment and instruction.* In the years we are studying the judge dominated jury trial. We have previously mentioned how, in lieu of counsel, the judge often served in effect as examiner-in-chief of both the witnesses and the accused. Both in this capacity as examiner, and especially when instructing a jury, the judge possessed what seems to have been a wholly unrestricted power to comment on the merits of the case. The judge was certainly under no duty to comment on the evidence, and in many cases he seems not to have bothered. Further, the OBSP reporters omitted much, probably most, of what the judges were saying to the juries; these harmonious internal workings of the trial court were of no particular interest to the OBSP readership. Nevertheless, over the years enough examples were transcribed to suggest the range of judicial comment. The judges' remarks show that they did not regard the jury as an autonomous fact-finder. The jury alone rendered the verdict, but the judge had no hesitation about telling the jury how it ought to decide. We find the jury routinely following the judge's lead in these cases.

The detailed December 1678 sessions pamphlet contains some splendid examples. Anne Mounsdel, prosecuted for theft, denied the testimony of two eyewitnesses and claimed that one, the owner of the stolen goods, had in fact lent them to her. "But against the

⁶³ The fullest report is Vaugh. 135, 124 Eng. Rep. 1006 (K.B. 1670). Other versions: T. Jones 13, 84 Eng. Rep. 1123; 1 Freem. K.B. 1, 89 Eng. Rep. 2.

⁶⁴ Including the perceptive accounts of Plucknett and Thayer: T.F.T. PLUCKNETT, *supra* note 12 at 134-38; J.B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 160-70 (1898).

Positive Oaths of two Witnesses, her bare word the Court thought not a sufficient Counter-proof; however they left it to the Jury."⁶⁵ In a quite similar case "the Court told the Jury, the Witnesses' Oaths were to outweigh her bare Allegations, and left the Matter to them for the Value."⁶⁶ In the case of Ralph Leech, prosecuted on very strong evidence for stealing a quantity of silk stockings, it is reported: "The Prisoner, who was an old Man, with a very gray head, by Trade a Silk Stocking Trimmer, and of a plentiful Fortune, had nothing to say for himself, but that he took them for money [that the prosecutor] owed him, which poor excuse was not accepted by the Court, but they directed the Jury to find him Guilty, upon so plain an Evidence."⁶⁷ In all of these cases the jury returned guilty verdicts.

The "directed verdict of guilty" in the last case shows how far the judge could intrude upon the ultimate fact-evaluating and law-applying function of the jury. The OBSP also report numerous directed verdicts of acquittal, and some of these appear to turn on considerations of fact that would today be regarded as strictly within the province of the jury.⁶⁸ The judge was not always so explicit about the outcome he desired; the jury seems to have been eager for the judge's guidance, and the judge could often content himself with uttering a broad hint of his view of the merits. In the case of Henry Nowland and Thomas Westwood (1730), tried for highway robbery, "[t]he Court observed, That the Witnesses which appeared to the Prisoners' Characters seemed to stand in need of some Persons of Reputation to support their own; the Jury found them both Guilty. Death."⁶⁹ William Harris (1729) was prosecuted for theft when he returned a purse to its owner that he claimed to have found; the purse contained £29 when he returned it rather than the £46 that the owner claimed to have lost. "Upon the whole,

⁶⁵ *Exact Account*, *supra* note 33, at 11.

⁶⁶ *Id.* at 8 (defendant Mary Read). The concluding phrase refers to the jury's power to reduce the gravity of the crime, and hence to affect the sentence, by declaring in its verdict that the stolen goods had a value below certain limits, in practice always less than alleged in the indictment. See discussion in text and notes at notes 120-121 *infra*.

⁶⁷ *Exact Account*, *supra* note 33, at 23.

⁶⁸ *E.g.*, Margaret Haines, OBSP (Oct. 1681), at 4 (bigamy; "the court took pity on her, and directed the Jury to Acquit her").

⁶⁹ OBSP (Jan. 1730), at 21. Sentences were not, of course, pronounced by the jury, but by one of the trial judges, at the conclusion of the sessions. At the Old Bailey it was the Recorder of London who normally pronounced sentence. See GILES JACOB, A NEW LAW DICTIONARY (unpaginated; see under alphabetical entry "Recorder") (4th ed. London 1739). Cf. *Exact Account*, *supra* note 33, at 25. When death sentences were imposed, the OBSP reporters added that information to the trial accounts in the fashion of the extract quoted in text, using bold face type for dramatic effect.

it appeared to the Court, That the Prisoner might have kept all the Money, and probably have come to no Damage, and the greatest part of it being returned, the Jury acquitted him."⁷⁰

(2) *Provisional termination short of verdict.* In modern practice we say that "jeopardy attaches" at the outset of a criminal trial.⁷¹ The double jeopardy rule would therefore prohibit the prosecution or the court from interrupting a case that was going badly in order to try it afresh on another day to another jury. In the period we are studying jeopardy did not attach until the jury's verdict was entered. Hale's *History of the Pleas of the Crown*, written before 1676, notes that although Coke's *Institutes* says that a case cannot be withdrawn from a jury

yet the contrary course hath for a long time obtained at *Newgate* [i.e., the Old Bailey], and nothing is more ordinary than after the jury sworn, and charged with a prisoner, and evidence given, yet if it appear to the court, that some of the evidence is kept back, or taken off, or that there may be a fuller discovery, and the offense notorious, as murder or burglary, and that the evidence, though not sufficient to convict the prisoner, yet gives the court a great and strong suspicion of his guilt, the court may discharge the jury of the prisoner, and remit him to the jail for farther evidence, and accordingly it hath been practiced in most circuits of *England*, for otherwise many notorious murders and burglaries may pass unpunished by the acquittal of a person probably guilty, where the full evidence is not searched out or given.⁷²

Thus, in the case of Hugh Coleman (1718), tried for bigamy, when the court saw that the evidence would be insufficient to convict, it apparently halted the trial short of verdict and "advised the Wives to provide themselves with better Evidence, till which time he was to be secured."⁷³

In the OBSP for our period, which comprises the decades immediately following Hale's death, such cases are not, as he would have it, "ordinary." We cannot say from these sources whether the practice was declining, or whether the OBSP reporters had a bias against relating half-told stories (which would be understandable given the readership), or both.

⁷⁰ OBSP (Dec. 1729), at 11-12.

⁷¹ "The general rule is that, where the jury has been impaneled for the trial of a criminal case, jeopardy has attached . . ." *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931).

⁷² 2 HALE, *supra* note 49, at 295; see 9 HOLDSWORTH, *supra* note 6, at 234.

⁷³ OBSP (Feb. 1717[1718]), at 5-6.

This practice interests us in the context of jury control, because it gave the judge a way to withdraw a case from the jury when he saw that the present trial would lead to an inappropriate verdict—usually the acquittal of a seeming culprit on account of missing but obtainable evidence. We can see why this power would have been convenient in a system of predominantly private prosecution in which evidence-gathering and coordination of witnesses for trial was always, despite the enormous improvement worked by the Marian procedure, a potential weak point. It is then tempting to wonder whether the judge used this power of provisional termination more broadly, in fully-tried cases in which he thought he saw the jury inclining to a result he opposed. We think that there was a good deal of formal and informal communication from the jurors to the bench during the course of trials, and that in a case in which the judge cared to find out, he could get a good indication of how the jury was inclining before he let the case go to verdict.

Jurors were much more talkative than we now expect. The OBSP frequently report a juror asking questions of the witnesses or the accused, or asking for certain witnesses to be called, or making observations about the facts or about particular testimony or about the character of witnesses and accused.⁷⁴ In this atmosphere it seems likely that there was also some plain chatter between judge and jurors, especially at those county assizes where the practice was for the jurors to "divide themselves at the Bar, some on one side, some on the other."⁷⁵ In the case of William Holms (1732), tried at the Old Bailey for highway robbery, the trial judge must have had an informed sense of what the jury was going to do when, after the judge developed contradictions in the prosecutor's testimony and the accused produced strong alibi witnesses, the following exchange occurred:

Prisoner. My Lord, I have 30 or 40 People ready to speak to my Character.

⁷⁴ A remarkable instance: Thomas Headly and another, OBSP (Oct. 1732), at 244 (highway robbery), where a juror examined a witness thus: "You say you have known [the prosecutor] from 9 years old. How old do you take him to be now? I have a particular Reason for asking." After the witness replied the juror continued: "I ask, because it is not above a Year and a Half ago when he voluntarily came to me to be Security for a Man, and gave his Note accordingly, but when the Note became due he pleaded Nonage." Not surprisingly, the jury acquitted.

In the case of Thomas Gray, OBSP (Jul. 1735), at 93 (highway robbery), "[t]he Jury withdrew and after a short stay returned into Court, and desired that for their farther Satisfaction, the People at the *Stag and Hounds* [public house] might be sent for. A Messenger was immediately dispatched, and brought the Man of the House and his Wife back with him." The court questioned them about the details of the accused's alibi; the jury acquitted.

⁷⁵ THE OFFICE OF THE CLERK OF ASSIZE *supra* note 33, at 12.

Court. There is no need of calling any.

.....
The Jury, without going from their Seats, gave in their Verdict not guilty.⁷⁶

(3) *Disclosure of jury rationale.* The modern jury is not only autonomous within its sphere, but taciturn: it does not give reasons for its verdict. Unlike, for example, the modern German "jury" system where the trial judge deliberates with the jurors and prepares a written statement of reasons for their collaborative decision,⁷⁷ our system excludes the trial judge from the jury's deliberations; he never has an authoritative basis for knowing what motivated the jury's decision. It is, therefore, extremely difficult for the trial judge (or for a reviewing court) to detect and correct an erroneous verdict. We think that this has been the source of much of the pressure that has led to ever more complex jury instructions and to the development of the common law of evidence with its distinctive exclusionary bent. Since error is unlikely to be corrected, the emphasis has been placed on preventing it.

When we turn back to Old Bailey practice in the years under study, we find that these presuppositions of the modern system do not hold true. We have already mentioned that the judge, while not actually participating in the jury's deliberations, could exercise a potent influence on the jury's formulation of its verdict through his power of comment. We have further said that the judge could get some insight into jurors' thinking before they left for deliberations. It turns out that the judge could also discover the reasons for a proffered verdict when the jury returned from deliberations, because in many cases the jury either volunteered the information or supplied it under questioning by the judge. (In the next subsection of this article we shall see what remarkable use the judge could make of such information.)

The OBSP quite commonly purport to tell us why a case was decided as it was. In the compressed reports of the earlier decades, it is not always easy to discern the meaning of the purported explanation. For example, Robert Ward (1684), charged with stealing three guineas that were missed from a room to which he had just before had access, "denied it, and it not being manifest by any positive Evidence upon his Trial [that] he had the Guineas Charged upon

⁷⁶ OBSP (Sept. 1732), at 191.

⁷⁷ See Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEG. STUD. 135 (1972); J.H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 61-63, 119-46 (1977).

him, he was Acquitted."⁷⁸ This explanation of the reason for the result could be a report of the jury's own statement, but it could also be nothing more than the reporter's hunch about what persuaded the jury. Another possibility is that the jury decided in accordance with the result indicated in the judge's comment and instruction, and that the reporter expressed the substance of the judge's reasoning as the reason for the jury's verdict.

Fortunately, numerous case reports are free of such ambiguity. A very clear case of the jury volunteering its rationale occurs in the trial of Giles Hill (1720) for murder. The jury had initially returned from deliberations without a verdict and asked to have two witnesses recalled and further examined, which was done. The jury retired again and returned with a verdict, reported thus:

The Jury after long Consideration, and having (as aforesaid) further informed themselves by the Re-examination of the Witnesses, declared that they were satisfied, and that they gave credit to the Affirmative and Positive Evidence, which was not disproved by the Negative Evidence: and that one of the Jury had known Mr. Hewett [a key defense witness] several Years, and believed he was an Honest Man; and so they brought in the Prisoner Guilty of Manslaughter.⁷⁹

The reports often ascribe a highly specific reason or set of reasons for the jury's decision, which makes it appear quite unlikely that the source was other than the jury itself. Francis Butler (1687) was accused of stealing a silver tankard from a pub; "but he pleading Innocence, and the Tankard no where found, the Jury in consideration that the Prosecutor might be mistaken in the Prisoner, Acquitted him."⁸⁰ At the same sessions John Holt was prosecuted for stealing pigs; it was alleged that he sold three of them in Smithfield on a certain day, "but he making out where he was at that time, and giving a pretty good account of his Behavior, the Jury supposed [that] the [accusing] Witness might be mistaken in the person, and so Acquitted him."⁸¹ At the next sessions George St. George was tried for highway robbery. The victim had had him apprehended at the scene, "but he pleading he was not one of those that abused the Prosecutor, and that he had been about other Affairs, the Jury considering that by reason of the Consternation the Prosecutor was in at the time when he was Robbed, and darkness of the Night, the

⁷⁸ OBSP (Dec. 1684), at 4.

⁷⁹ OBSP (Sept. 1720), at 7, 8.

⁸⁰ OBSP (Jul. 1687), at 1.

⁸¹ *Id.* at 3.

Prosecutor might be mistaken, and so they Acquitted the Prisoner."⁸²

These cases in which the jury's rationale is disclosed usually involve acquittals, but not always. In the case of Abraham Wood (1719), charged with highway robbery, the jury's reason for disbelieving his defense is reported. He claimed that he was being falsely prosecuted for refusing to join the prosecutor, whom he had newly met, in committing other robberies; "but this Story did not avail him, he being not able to prove it, and the Jury believing that if [the prosecutor] had robbed on the Highway he would not have declared it so freely to Strangers, found him Guilty. Death."⁸³

(4) *Rejecting verdict.* The picture of the criminal trial that emerges from the OBSP reports for our period is that of a proceeding conducted rapidly, under the dominant influence of the judge, and with the judge and jury in harmony. Nevertheless, although the Old Bailey processed thousands of cases over these decades without disagreement between judge and jury, it is not to be expected that every verdict that the jury returned would please the judge.

We cannot know whether there were very many cases in which the judges quietly recorded verdicts with which they disagreed. What the OBSP do allow us to see is that in some cases the judges persisted in opposing fully formulated verdicts. It was open to the judge to reject a proffered verdict, probe its basis, argue with the jury, give further instruction, and require redeliberation. This remarkable practice is particularly well illustrated in the case of Stephen Arrowsmith (1678), charged with what we now call statutory rape, the last case we shall draw from the December 1678 sessions pamphlet that has served us so often in this study. The case deserves to be reproduced in full despite its length:

The [London jury] were charged with . . . *Stephen Arrowsmith* for the Rape committed on *Elizabeth Hopkins*. To prove which, a Girl of between 9 and 10 years of Age, gave this Testimony without being Sworn.

That she saw in a Room, the Prisoner lying a top of the little Girl, but what they did she knew not, but the Girl's Petticoats were up, nor did she cry out.

The Girl that was ravished, being between 8 and 9, testified that he had to do with her for half a year together every Sunday, that she was hindered from crying the first time, by his stopping her mouth, and that he gave her money afterwards; and she never discovered [i.e., revealed] it, till some of her friends observing her to go as if

⁸² OBSP (Aug.-Sept. 1687), at 3.

⁸³ OBSP (May 1719), at 2.

she were very sore, examined her, and by telling her she would be in danger of hanging in Hell, got her to confess, that the Prisoner was her father's Prentice [*i.e.*, that the accused, who was her father's apprentice, was the culprit].

One Mrs. Cowel did testify that upon observing her going, and other Circumstances, she did resolve to examine her, and made her confess, which she did, and being searched, was found shamefully abused, and sent to the Doctor's to cure.

The like was attested by one Mrs. Sherwin, and by a Midwife, who said, she had got a very foul disease by it.

The Prisoner with a great many tears denied the Fact, and desired some Witnesses might be called. Among whom there was a maid that lived at the Doctor's where the Girl was for Cure, who testified that the Girl upon Taxing her [*i.e.*, upon being asked], why she did conceal it, said, she took Pleasure in it, and that upon Examination there were no Symptoms on the Prisoner, as the Doctor said, of any such disease as the Girl had, which was indeed the Pox; which was also attested by one Mrs. Rawlins; and the Prisoner, protesting his Innocence, alleged that they offered a Composition [*i.e.*, that the child's parents offered to forego prosecution in exchange for payment].

All which notwithstanding, the Court with great detestation and abhorrence of so Horrid and Vile an Offense, told him the Matter was so plain against him, that he must have as great impudence to deny it, as he had wickedness to Commit it; that her consent would not save him, for the Statute [of 18 Eliz. 1, c.7] provides, that a Child under 10 years of age, should not be abused with, or without her Consent. That the First Violence whereby he stopped her Crying, made the Rape, had it been a Woman above 10; that if the Parents were so wicked, as to offer a Composition, yet that made not him innocent.

The Jury not seeming satisfied with the Evidence, the Lord Chief Justice Scroggs and others [perhaps the other judges in the commission who are elsewhere in the pamphlet identified as the Lord Chief Baron of the Exchequer, who was then William Montagu, and the Recorder of London, who was George Jeffreys⁴⁴] were of opinion, that

⁴⁴ The Recorder is referred to a few lines later in the Arrowsmith report, *Exact Account*, *supra* note 33, at 15, the Lord Chief Baron, *id.* at 25. For identifications see E. FOSS, *TABULAE CURIALES* 67 (London 1865); *RECORDERS OF THE CITY OF LONDON: 1298-1850*, at 14 (London 1850). See also note 69 *supra*.

It was customary for two royal court judges and the recorder to be commissioned to sit at each Old Bailey session. We suspect that for routine dockets the judges spelled each other, hence that much of the time only one judge was actually presiding. In major political cases, however, the full commission certainly did sit. See, e.g., Penn & Mead, 6 *ST. TR.* 951 (1670), and the Popish Plot trials, discussed in J.P. KENYON, *THE POPISH PLOT* (1972). In these cases the English trial bench was collegial, a custom that has disappeared from Anglo-American criminal procedure but continues to be highly characteristic of modern Continental procedure.

the Girl that was Ravished, might give in her Testimony upon Oath; but it was forborn for the present, and left to the Jury. Who were sent together to consider of their Charge, with an Officer sworn to keep them according to Law.

After a considerable space of time the Jury returned, and having answered to their Names as called, agreed that the Foreman should speak for them, and gave in this Verdict.

That Stephen Arrowsmith was not guilty of the Rape; which Verdict Mr. Recorder, not conceiving it to be according to their Evidence, would not take from them without further deliberation, and labored to satisfy them of of the Manifestness of the Proof. One of the Jury being an Apothecary, said it was his opinion, that a Child of those years could not be Ravished. Which the Court told him was to Elude the Statute, that having provided a Punishment, had done it in vain, if there were no offense, and so he did tax the Wisdom of a whole Parliament; Which ought not to be. Others of the Jury, because the Girls were not sworn, doubted of the sufficiency of their Testimony, and they had nothing but hearsay from the other Witnesses. But the Court told them, in regard such Offenders never call others to be by while they commit such actions, they could expect no other Testimony than from the Party injured, which they had, and with it [that] of an eye Witness, both [of] whom they forbore to Swear, because of the tenderness of their Age; but if they insisted upon it, they should be Sworn.

Upon this the Jury went out again, and while they were deliberating, information was given to the Court, that they had the two Children with them, which was against the Law. Whereupon the Officer appointed to keep them, was sent for, and it being sworn against him, that he had admitted them in, he was sent to *Newgate* [the jail near the Old Bailey], though he alleged [that] another Officer brought them to him as from the Court, but that Officer swore the contrary, and therefore the other was detained in Custody. The Jury being sent for about this matter, when they came, said, they sent not for the Children, nor desired to have them; and the Court to give further satisfaction, swore the Children, having examined them, whether they understood the nature of an Oath, and the danger of Perjury, which they gave a Rational account of. And the Jury went away again.

[The jury returned with the verdict] That Stephen Arrowsmith was guilty of the Rape, and they were discharged till the next morning . . .⁴⁵

Arrowsmith was sentenced to death the next day.⁴⁶

⁴⁵ *Exact Account*, *supra* note 33, at 14-16.

⁴⁶ *Id.* at 30.

The Arrowsmith case illustrates several facets of the judicial domination of jury trial. We see the bench initially relying upon its power of comment, telling the jury "with great detestation" that the case against the accused was "plain," despite plausible defense evidence. We see the court detecting that the jury was differently inclined ("The jury not seeming satisfied with the Evidence"), a sign that there was informal communication between judge and jurors about the case. Some of the jury must have been concerned that the two children, the only eyewitnesses, had testified unsworn, and the court tried to assure them that the oaths were unnecessary.⁸⁷

When the jury returned from deliberations with a verdict of acquittal, the court rejected it as being not "according to their Evidence." Hale's treatise confirms this practice. "If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered."⁸⁸ The tradition that the jury would lightly disclose the

⁸⁷ Hale, writing not long before this case, says that "very young people under twelve years old I have not known examined upon oath, but sometimes the court for [its] information have heard their testimony without oath, which possibly being fortified with concurrent evidences may be of some weight, as in cases of rape, buggery, witchcraft, and such crimes, which are practised upon children." 2 HALE, *supra* note 49, at 284 (citations omitted). However, elsewhere in his treatise in discussing "rape . . . committed upon a child under twelve years old," Hale says "that if it appear to the court, that she hath the sense and understanding that she knows and considers the obligation of an oath, though she be under twelve years, she may be sworn; thus we find it done in cases of evidences against witches, an infant of nine years old was sworn." 1 Hale, *supra* note 49, at 634 (citing MICHAEL DALTON, *THE COUNTRY JUSTICE* 261, 1st ed. London 1618) (Hale cites another edition) (for Dalton's original source, a pamphlet published in 1613, see LANGBEIN, *PCR supra* note 17, at 123 & n.71). Hale continues his discussion of what to do if the child is

an infant of such tender years, that in point of discretion the court sees it unfit to swear her . . . I think she ought to be heard without oath to give the court information, though singly of itself it [i.e., the unsworn testimony] ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are, 1. The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, though there may be other concurrent proofs of the fact when it is done. 2. Because if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those, that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered.

1 HALE, *supra* note 49 at 634-35. Hale is saying that since the child's unsworn testimony will be freely received as hearsay, it might as well be heard directly. On the underdeveloped state of the hearsay rule and the law of evidence in general in these years, see text and notes at 110-115 *infra*.

⁸⁸ 2 HALE, *supra* note 49, at 299-300 (citations omitted).

reasoning for a verdict became especially important in this situation, because it enabled the court to probe the basis of the proffered verdict, hence to identify the jury's "mistake" and to correct it. Thus, in the Arrowsmith case, the court discovered that the chemist's opinion that an eight-year-old "could not be Ravished" had been influential, and the court refuted it (concluding that he ought not to "tax the Wisdom of" the legislature; there was no sphere for law nullifying in this view of the jury's function). The court also learned that some of the jurors were still bothered that the child eyewitnesses were unsworn; it tried again to persuade the jury to credit the testimony without oath, and then finally swore the children after a disturbance connected with the children caused the court to recall the jury from its second deliberation on the case. On the third deliberation, the jury did the court's bidding and returned an opposite verdict from the one first delivered.

The Arrowsmith case illustrates the outer extreme of judicial dominance of jury trial, and such cases occurred extremely rarely. The system could not have functioned if it had often been put to such internal tests of strength. The rapidity of proceedings and the heavy caseloads presupposed the harmony and juror deference that we have depicted as characteristic. The judges had so much influence that they seldom had to go to the brink to get their way. We do have report of some other instances of verdicts being rejected and then revised,⁸⁹ as well as cases in which the jury persisted after being reinstructed.⁹⁰

When the court saw a conflict looming, it could often prevent trouble by requiring the jury to find a special verdict. The jury was

⁸⁹ *E.g.*, *Watts v. Brains*, Cro. Eliz. 779, 78 Eng. Rep. 1009 (K.B. 1599); *Chichester's Case*, Aleyn 12, 82 Eng. Rep. 888 (K.B. circa 1647). Baker has transcribed another such case from manuscript from Newgate Sessions of 1616. Baker, *supra* note 15, at 313 & n.11. Cf. *Walters*, 12 St. Tr. 113, 122 (Old Bailey 1688).

⁹⁰ For cases before *Bushell's Case* (1670) in which juries were fined for persisting in verdicts with which the court disagreed, see the authorities cited at note 107 *infra*. An early post-*Bushell's Case* instance of judge-jury disagreement appears in one of the earliest OBSP exemplars, titled *News from Islington, or The Confession and Execution of George Allin, Butcher, Who Now Hangs in Chains Near to Islington* (London 1674 [1675]) (Guildhall shelfmark A.5.4. no. 34), the pamphlet for the February 1675 sessions. One Harker, an ostler, was indicted for horse stealing and again for stealing money fastened upon the horse. The horse and most of the money had been recovered when the culprit was apprehended. "[T]he Jury . . . brought him upon the first indictment for stealing the horse not guilty, upon the second they found him [guilty]; notwithstanding the Court not being satisfied with their first Verdict, sent them out again to consider of it, but they brought in the same again that he was not Guilty of Stealing the Horse, for that as they said they understood the Gentleman's [i.e., the prosecutor's] Horse was delivered to [Harker] to hold while the Gentleman went in, which made a Lawful possession, and therefore could be no Felonious taking him away, but the Court seemed to be of another opinion." *Id.* at 2-3. Cf. 2 HALE, *supra* note 49, at 310.

made to state the facts, and the court determined whether criminal liability attached.⁹¹ The effect was that the court preempted much of the jury's normal adjudicatory function. The OBSP provide a variety of examples, including cases in which the court rejected a proffered general verdict of guilty and required the jury to formulate a special verdict instead.⁹² The power to order special verdicts became controversial toward the end of the eighteenth century in the next epoch of jury-centered political jurisprudence that culminated in Fox's Libel Act of 1792.⁹³

(5) *Remedying conviction-against-direction.* If the jury did convict against the wishes of the judge, the judge could still defeat the verdict. Hale says that "if the jury will convict a man against or without evidence, and against the direction or opinion of the court, the court hath this salve, to relieve the person convict before judgment, and to acquaint the king, and certify for his pardon."⁹⁴ This post-trial practice can be glimpsed only infrequently in the OBSP, which were hurried to press while the trials were fresh, hence well before the pardon process had run its course. We see it in a supplementary OBSP pamphlet⁹⁵ devoted to the sensational case of Sir Francis Charteris (1730), which was published after the royal review. Charteris, a noted rake⁹⁶ with important political connections,⁹⁷ was convicted of raping a servant; six weeks later "His Majesty, having heard severally the Opinions of the . . . Judges upon

⁹¹ For some detail on the workings of such a case see William Chetwynd, OBSP (Oct. 1743), at 312-13, reprinted in 18 ST. TR. 290, 315-17.

⁹² E.g., John Wilder, indicted as an accessory to the escape of a convicted felon from Newgate; "upon the whole the Jury considered the Matter, and brought him in guilty of the Fact. But the Court being of Opinion that some point of Law would arise, directed the Jury to find it Special, which they did." OBSP (Sept. 1710), at 2. A similar case: Rookwood, OBSP (Jan. 1674 [1675]), at 3-5 (robbery).

⁹³ 32 Geo. 3, c. 60 (1792).

⁹⁴ 2 HALE, *supra* note 49, at 309-10.

⁹⁵ The trial is briefly reported in the regular OBSP (Feb. 1730), at 17, with the advice that a further pamphlet devoted to the case will appear when "the Assizes in the several Counties are ended, and the Judges returned to Town . . ." The special print is titled initially in the fashion of the regular OBSP, but with addition of particulars: *The Proceedings at the Sessions of the Peace and Oyer and Terminer for the City of London . . . in the Old Bailey, on Friday the 27th February Last . . . upon a Bill of Indictment Found against Francis Charteris, Esq.* . . . (London 1730).

⁹⁶ See 4 DICTIONARY OF NATIONAL BIOGRAPHY 135-36 (1937-1938 ed.); 3 E.B. CHANCELLOR, THE LIVES OF THE RAKES: COL. CHARTERIS AND THE DUKE OF WHARTON (1925). For a contemporary account see THE HISTORY OF COLONEL FRANCIS CHARTERIS: CONTAINING THE BIRTH, PARENTAGE, EDUCATION, RISE, PROGRESS AND MOST MEMORABLE EXPLOITS OF THAT GREAT MAN, DOWN TO HIS LATE CATASTROPHE IN NEWGATE (3d ed. London n.d. [1730]) (British Library shelfmark G. 1661). Charteris' reputation for evil was still being discussed in the courts a good generation later: Bembridge, 22 ST. TR. 1, 135 (1783).

⁹⁷ 3 CHANCELLOR, *supra* note 96, at 138-41.

the said Case, who all agreed in their Report, was pleased . . . to order that" Charteris be pardoned.⁹⁸ In the eighteenth century royal review of judicial recommendations for pardon and commutation became a regular and systematic part of ordinary criminal procedure.⁹⁹ Juries knew of it, indeed they sometimes made use of it themselves by returning a guilty verdict to which they coupled a request that the court recommend the convict to royal mercy. For example, Jane French (1732) fell into bad company and aided a theft of her master's goods, but turned in her cohorts when she was detected. She was convicted and sentenced to death. "But both the Jury and the Prosecutor recommended her to the Court for a favorable Report to his Majesty,"¹⁰⁰ and she escaped the sentence.¹⁰¹

The prospect of judicial manipulation of the royal pardon power must have constituted a significant deterrent to a jury that might otherwise have been prepared to convict against the wishes of the court. The jury was not likely to insist on its view when the judge had a trump that would render the effort futile. So effective was this judicial remedy that it seems to have virtually eliminated the conviction-against-direction as a sphere of conflict between judge and jury.

(6) *Remedying acquittal-against-direction.* In a case in which the jury was disposed to acquit against the wishes of the bench, the judges never developed an ultimate remedy as effective as the royal pardon in the opposite case of conviction-against-direction.¹⁰² However, over the centuries the judges had been accustomed to have their way by threatening to fine jurors who decided against instructions, a threat whose effect was enhanced on the occasions when a jury persisted and the fine was imposed. It was this power that the judges surrendered in 1670 in *Bushell's Case*.

The modern reader, brought up on the legend that *Bushell's Case* secured the autonomy of the jury against the intervention of the judge, will find it striking that in the Old Bailey (where *Bushell's Case* originated¹⁰³) there was for so many decades after-

⁹⁸ *The Proceedings*, *supra* note 95, at 17.

⁹⁹ See D. Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 40-49 (D. Hay, et. al, eds. 1975); I. L. Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, at 107-37 (1948); A. E. SMITH, COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA: 1607-1776, at 90-97 (1947).

¹⁰⁰ OBSP (Feb. 1732), at 89.

¹⁰¹ Guthrie, *supra* note 25, at 7.

¹⁰² If the jury "stand to their verdict, the court must take their verdict and record it . . ." 2 HALE, *supra* note 49, at 310.

¹⁰³ In the case of Penn & Mead, 6 ST. TR. 951 (1670).

wards so little trace of jury autonomy. To be sure, jurors were no longer fined for returning verdicts contrary to judicial direction, although the judges retained and exercised¹⁰⁴ the power to fine them for other misbehavior. But the picture that we have assembled of judicial dominance and jury subordination in the sixty-five years immediately after *Bushell's Case* justifies us in saying that *Bushell's Case* made no practical difference to the conduct of criminal procedure. *Bushell's Case* did indeed become a landmark in expanding the province of the jury, but not for about a century after it was decided.

The want of jury autonomy throughout the period we are studying sheds a little light on *Bushell's Case* itself. We think that the judges had so many other channels of influence and control over the work of the criminal jury that the power to fine jurors for acquittal-against-direction was simply not worth fighting for when it became a subject of political controversy in the 1660s. The reason for decision voiced in the opinion in *Bushell's Case* is dishonest nonsense,¹⁰⁵

¹⁰⁴ An early OBSP reports an instance a decade after *Bushell's Case*: A juror who had been refused his request to avoid jury service voted against the eleven other jurors in the first two cases tried to them. It was sworn by two of the other jurors that the dissenter had said, "If I must be on [the jury], I'll . . . plague them . . ." The court "laid a Fine of fifty pounds upon him. For though Jurymen, 'tis said, are not by Law to be punished by Fines, for giving Verdicts according to their Consciences, yet it seem both just and necessary that such misdemeanors of resolved stubbornness be restrained." OBSP (May, 1680), at 1,2.

¹⁰⁵ Bushell was one of the jurors who acquitted Penn and Mead, see 6 ST. TR. 951 (1670), against the direction of the Old Bailey bench, for which he (as well as the others) was fined 40 marks. Upon his refusal to pay, Bushell was jailed. He then brought habeas corpus to the Court of Common Pleas, in effect challenging the legality of his detention. The sheriffs of London in their return to the writ alleged that Bushell and the other jurors acquitted Penn and Mead "against plain and manifest evidence and contrary to the direction of the Court in matter of law . . . in contempt of the Lord King and of his laws, and to the great impediment and obstruction of Justice, and moreover to the bad example of all other jurors delinquent in like case[s]." VAUGH. 135, at 136, 124 Eng. Rep. 1006 (author's translation from Latin original). Common Pleas concluded that the return was insufficient and released Bushell, laying down the rule that trial judges may not fine or imprison jurors for disobedient verdicts.

Vaughan's wandering opinion has many strands, but the essential ground is that the judge cannot direct a verdict (of conviction) nor fine jurors for a verdict contrary to his direction because "he can never know what evidence the jury have . . ." The jurors "may have evidence from their own personal knowledge," evidence disproving that offered in court or "stigmatiz[ing]" the witnesses who testified in court. Hence the judge must always lack the basis for determining that a verdict is contrary to the evidence. VAUGH. at 147, 124 Eng. Rep. at 1012.

The idea that jurors bring information of their own to bear upon their verdict—that they have private sources of evidence beyond that adduced at trial—harkens back to the medieval conception of the jury as a self-informing body. Medieval jurors "were men chosen as being likely to be already informed . . ." THAYER, *supra* note 64, at 90. The vicinage requirement, the rule that jurors be drawn from the neighborhood where the crime had been committed, was meant to produce jurors who might be witnesses as well as triers. *Id.* at 91. There was as

and contemporaries knew¹⁰⁶ that the weight of precedent was wholly in favor of the power to fine disobeying jurors.¹⁰⁷ But in the 1660s the country party found it politically convenient to treat this power as one of their grievances against central authority. In the fall of 1667, during the months when the Earl of Clarendon was being

yet no trial in the modern sense of a courtroom instructional proceeding to inform the verdict of a panel of ignorant triers. In the thirteenth century "it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony; they must weigh it and state the net result in a verdict." 2 F. POLLOCK & F.W. MATTLAND, *THE HISTORY OF ENGLISH LAW* 624-25 (2d ed. 1898) (footnote omitted). Medieval juries came to court more to speak than to listen.

The breakdown of this medieval system, the transformation of active medieval juries into passive courtroom triers, is not well understood either in its timing or its causes. Probably in the later fifteenth century, but certainly by the sixteenth, it had become expectable that jurors would be ignorant of the crimes that they tried. For the authorities on which this conclusion is based, see Langbein, *Origins*, *supra* note 17, at 314-15 (from which this and the preceding paragraph in this footnote are derived).

Vaughan was being wilfully anachronistic in basing his result in *Bushell's Case* upon the self-informing character of the jury. He knew that juries in his day were now informed in courtroom trials conducted under judicial supervision. He doubtless knew that it had been held a generation before that when a juror had knowledge of his own, "the Court will examine him openly in Court upon his oath, and he ought not to be examined in private by his companions." *Bennet v. Hundred of Hartford*, Style 233, 82 Eng. Rep. 671, 672 (Upper Bench 1650). Yet Vaughan chose to cite a contrary case from the previous century, *Graves v. Short*, Cro. Eliz. 616, 78 Eng. Rep. 857 (Q.B. 1598), and to pretend that in Vaughan's own time "the better and greater part of the evidence may be wholly unknown to [the judge]; and this may happen in most cases, and often doth . . ." *Bushell's Case*, VAUGH. at 149, 124 Eng. Rep. at 1013.

To be sure, Old Bailey juries did occasionally mention that they had brought to bear on a case the knowledge of one of their members respecting the character of an accused or a witness; see the examples quoted *supra* note 74 and text and note at note 79. Furthermore, undisclosed instances must also have occurred, although we see no reason to think that such cases were quantitatively significant. The sensible way to have taken account of the slight possibility that evidentiary considerations unknown to the judge were responsible for a verdict that the court otherwise thought contrary to manifest evidence would have been to require the jury to tell what it knew. Such a rule would have fit easily into the tradition (discussed at text and notes at notes 77-83 *supra*) that juries so often disclosed their thinking to the judges anyhow. Vaughan himself conceded that it was "ordinary, when the jury find unexpectedly . . . [that] the Judge will ask" why. VAUGH. at 144, 124 Eng. Rep. at 1010.

¹⁰⁶ Roger North attributed to his brother Francis the view that the prohibition on fining jurors for "slighting Evidence, and Directions . . ." was popular, and the Law stands so settled" even though "[t]he Precedents run all for the" power to fine. "What Reason to change it (which was changing the Law) but Popularity?" ROGER NORTH, *THE LIFE OF THE RIGHT HONOURABLE FRANCIS NORTH, BARON OF GUILFORD, LORD KEEPER OF THE GREAT SEAL, UNDER KING CHARLES II. AND KING JAMES II.*, at 66-67 (London 1742) (cited by THAYER, *supra* note 64, at 168 n.1). Hale also remarked on the "many precedents [in the Court of King's Bench] of jurors, that have acquitted persons of murder, or other felony tried in that court, if they have gone against pregnant evidence, that have been fined, imprisoned and bound to their good behavior during their lives." 2 HALE, *supra* note 49, at 310.

¹⁰⁷ See the authorities cited in THAYER, *supra* note 64, at 164-66; in 2 HALE, *supra* note 49, at 310-13; and in Havighurst, *The Judiciary and Politics in the Reign of Charles II*, 66 L.Q. REV. 62, 75 n.75.

impeached, Parliament came close to meting out the same fate to Chief Justice Kelyng for his fining of country jurors on the Western Circuit.¹⁰⁸ In a time of volatile politics, well before the independence of the judiciary was established, these proceedings against Kelyng must have had a great impact on the judges. The Old Bailey practice of the decades after *Bushell's Case* helps us to see why the judges decided in that case to allow themselves to be divested of their ancient power to fine jurors for disobedient verdicts. However convenient the power to fine, it was but one of many devices through which the judges dominated jury trial. Only in later times when adversarial procedure had caused the judges to lose much of their influence over the jury would it be seen how costly it had been to place jury lawlessness beyond remedy.

III. THE LAW OF EVIDENCE

Our lengthy consideration of the means of jury control practiced by Old Bailey judges has proceeded without mention of the most prominent modern instrument of jury control, the law of evi-

¹⁰⁸ The proceedings are recorded in 9 Journal of the House of Commons (n.d.). The main preliminary entries are those instituting investigation (Oct. 16, *id.* at 4); widening the inquiry (Nov. 15, *id.* at 20); and resolving that Kelyng's deeds were "Innovations" of "an arbitrary and illegal Power," and summoning him to appear for his defense (Dec. 11, *id.* at 35-36). Contemporaries viewed these steps gravely. *E.g.*, 8 THE DIARY OF SAMUEL PEPYS 483-84, 494, 577 (R. Latham & W. Matthews eds. 1974) (entries for Oct. 17, Oct. 21, Dec. 12); HISTORICAL MANUSCRIPTS COMM'N, THE MANUSCRIPTS OF LORD KENYON 80-81 (14th Rep., Appendix, pt. IV) (1894) (G. Alyloff to Roger Kenyon, 21 Nov.); 1 ANCHTELL GREY, DEBATES OF THE HOUSE OF COMMONS FROM THE YEAR 1667 TO THE YEAR 1694, at 62-64 (London 1769); THE DIARY OF JOHN MILWARD 88-89, 159-60, 162-63 (C. Robbins, ed. 1938) (entries for Oct. 16, Dec. 9, Dec. 11; the last concludes: "Mr. Streete and some others moved that before the House proceeded to an impeachment of the Chief Justice, that he might be heard to make his defense at the Bar, whereupon it was ordered that he should be heard at the Bar in the House of Commons on Friday next." *Id.* at 163.)

Kelyng's appearance in the Commons is perfunctorily recounted in the official Journal (Dec. 13, at 37), and described in the diaries of the two parliamentarians Grey and Milward, the latter being particularly detailed. 1 GREY, *supra*, at 67; MILWARD, *supra*, at 166-70. Cf. 8 PEPYS, *supra*, at 578-79. According to Milward's account, Kelyng spoke with deference and emphasized that he had been trying to see to it that Parliament's legislation was applied. Without yielding on the issue of the propriety of fining disobedient juries, he managed to placate the parliamentarians that he had offended, although not to persuade them on the merits. The Journal records that the House resolved to "proceed no further" against him, but to have a bill brought in "for declaring the Fining and Imprisoning of Jurors illegal." A bill "against Menaces, Fines, Imprisonments of Juries and Jurors" was read twice in February 1668 and referred to a committee chaired by John Vaughan, then a member of the Parliament, who was appointed Chief Justice of Common Pleas in May 1668, from which position he would write the opinion in *Bushell's Case* two years later. The full House debated the bill on April 3, returning it for revision to Vaughan's committee, where it died. 9 Journal, *supra*, at 51, 52, 53, 65, 71, 74, 75, 97 (entries for Feb. 15, Feb. 17, Feb. 18, Feb. 19, Mar. 12, Mar. 28, Apr. 3, Apr. 4, May 9). Cf. MILWARD, *supra*, at 187, 190-91, 243 (entries for Feb. 17, Feb. 19, Apr. 3) and 1 GREY, *supra*, at 84 (entry for Feb. 19).

dence. "The great body of the law of evidence consists of rules that operate to exclude relevant evidence" from the jury.¹⁰⁹ Throughout our period the judges showed scant disposition to filter evidence from the jury. We shall illustrate the Old Bailey practice in this regard by considering what are, from the standpoint of Continental observers, two of the most characteristic manifestations of the modern exclusionary system, the rules withholding from the jury hearsay evidence and evidence of past convictions. We shall see that the OBSP present remarkable instances of the use of hearsay well into the eighteenth century, and they reveal a vast reliance on past conviction evidence.

(1) *Hearsay*. In the Arrowsmith case of 1678, reproduced above, the principal witness for the accused "was a maid that lived at the Doctor's" who testified "that upon Examination there were no Symptoms on the Prisoner, as the Doctor said, of any such disease as the Girl had . . ."¹¹⁰ This report of what the doctor said out of court would today be excluded from the jury on account of the hearsay rule.

According to Wigmore, who based himself heavily on the State Trials, the hearsay rule was forming through the later seventeenth century, and received "a complete development and final precision [in] the early 1700s."¹¹¹ Consider, however, the case of Adam White (1726), in which hearsay was accepted just as it had been in the Arrowsmith case a half century earlier. White was charged with ravishing his eleven-year-old daughter. The child testified that the incident occurred in the house of her aunt where she lodged, and that she told no one for several weeks until the mistress to whom she was apprenticed became suspicious. The mistress then testified that "I found a disorder in her linen, she said she was gauld [*sic*; infected with venereal disease; from 'Gaul', the French disease]. I sent for Nurse *Stevens*, who said she believed that it was the foul Disease, and that her Father had given it her. For my part I did not Examine the matter myself, but I sent for a Surgeon, and he said she was not torn, he could not perceive there had been any Penetration, but only a running, though he could not say it was the foul Disease." The report then concludes: "Neither the Aunt, the Nurse, or the Surgeon appearing to give a farther light into the Affair, the Jury Acquitted the Prisoner."¹¹² We see, therefore, that hearsay evi-

¹⁰⁹ C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 53, at 121 (2d ed. 1972).

¹¹⁰ *Exact Account*, *supra* note 33, at 14.

¹¹¹ 5 WIGMORE, *supra* note 5, § 1369, at 12 (J.H. Chadbourn ed. 1974).

¹¹² OBSP (Jul. 1726), at 7.

dence was not excluded, although in the end it appears to have been disbelieved.

To be sure, the OBSP also report occasions on which the judges disapproved of hearsay. William Flemming (1732), prosecuted for highway robbery, claimed that he was being framed, and he produced witnesses to testify that people had been offered money to appear against him. Robert Sloper testified that he heard someone named Cartwright say "that he heard a Man proffer £5 to another to swear the Fact." John Hooper then testified, "I heard *Cartwright* and *Knowls* say so." The trial judge replied: "What they said is no Evidence, they should have been here to have sworn it."¹¹³

Sometimes, instead of disapproving hearsay, the court was content merely to establish that the testimony was based upon hearsay. In the case of Mary Cotterell (1734), accused of stealing a silver watch, the accused argued that her innocence was established when she was searched at the watch house (forerunner of a police station) promptly after the events and the object was not found upon her. David Jones, watchman of Cheapside, who had not been on duty on that occasion, then testified that she had not been searched at the watch house. The judge asked him: "How can you be sure of that, when you did not see her?" Jones replied, "I am very sure of it, for my Brother Watchman told me so." The next sentence concludes the report: "The Jury Acquitted her."¹¹⁴ Like a modern Continental judge, the Old Bailey judge was content in this case to establish the hearsay character of the evidence, hence to allow its weakness to affect its credit, rather than to exclude it from the jury as we would expect under the modern Anglo-American rule.

Old Bailey judges knew that there was something wrong with hearsay, but even as late as the 1730s they do not appear to have made the choice between a system of exclusion or one of admissibility with diminished credit. Even when they disapproved of hearsay, calling it "no evidence," the judges did not give cautionary instructions to the jury to disregard the hearsay as we would require today. Nor was the jury sent from the courtroom in the modern fashion while the judge previewed evidence in order to decide whether to admit it.¹¹⁵

¹¹³ OBSP (Sept. 1732), at 217.

¹¹⁴ OBSP (Apr. 1734), at 112.

¹¹⁵ Writing in the 1770s, Sylvester Douglas (who later compiled the set of King's Bench reports reprinted in 99 Eng. Rep.) expressed the thought that it might be a good idea for the trial judge to determine contested questions of admissibility of evidence out of the hearing of the jury:

Juries . . . by intendment of law are considered as *unacquainted* with the nature of legal evidence. It has often occurred to me that, in trials at *nisi prius*, when evidence is

(2) *Past conviction evidence.* From their inception in the 1680s the regularized OBSP contain innumerable references to the influence of past conviction evidence on the formulation of the verdicts reported. An eyewitness testified to seeing John Cope (1686) steal a coat from a parked coach, "which was such full Proof against him, and he having been in *Bridewell* [prison] for a former Offense, he was found Guilty of the Felony."¹¹⁶ Thomas Dickson (1707) was prosecuted for burglary and theft, and alleged to have had the stolen goods in his possession when taken. "The Prisoner could say little in his Defense, and being an old Offender, the Jury found him guilty of the Indictment."¹¹⁷ John Read (1707), caught selling a stolen horse, "could say little in his Defense, and being an old Horse Stealer, the Jury found him Guilty."¹¹⁸ Mary Skinner (1714), charged with theft and caught with some of the goods, "pretended the Prosecutor lent them to her; but she appeared to be an old Offender, and was found guilty of the Felony."¹¹⁹

The OBSP show no concern with the potentially prejudicial effect of past conviction evidence; there is no hint of instructions to the juries about the limited bearing of such evidence. Rather the impression conveyed by the reports is that past conviction evidence was often influential or decisive in the juries' adjudication. Nor do we think that other aspects of then-current procedure permit us to reconcile the broad use of past conviction evidence with modern thinking about how a jury ought to be informed, although a number of possible distinctions can be made.

It is true, for example, that the jury of that time had a large role in what we think of as sentencing, that is, in determining the sanction. In a significant fraction of the cases that went to trial, the real issue was whether the jury would choose to exercise its power to "value" stolen goods in ways that would affect the applicable sanction. It was understood that the value that the jury assigned

objected to, there is an impropriety in allowing the counsel who offers it, to state what he means to prove in the hearing of the jury, and this for the reason already mentioned; especially as jurymen are too apt to infer, that evidence so offered must be both true, and fatal to the party who objects to it, merely because it is objected to. Perhaps it would be an improvement, when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw, till the point was argued and decided.

3 S. DOUGLAS, *THE HISTORY OF THE CASES OF CONTROVERTED ELECTIONS* 232 (2d ed. London 1802) (1st ed. 1775-1777), cited in 6 WIGMORE, *supra* note 5, § 1808, at 275. (I owe this reference to Mr. Daniel Edelman.)

¹¹⁶ OBSP (Jul. 1686), at 4.

¹¹⁷ OBSP (Apr. 1707), at 1.

¹¹⁸ OBSP (Dec. 1707), at 3.

¹¹⁹ OBSP (May 1714), at 3.

was fictional,¹²⁰ and that the jury was in truth deciding whether to rescue the culprit from the ordinary sanctions of transportation and death by so characterizing the crime that only a lesser sanction could be invoked. If the goods were valued below 12 pence (in practice the Old Bailey juries used the figure of 10 pence), the crime became petty larceny, hence a misdemeanor, and the convict escaped with a whipping or a short jail term. Under certain circumstances the jury could, by valuing goods below other monetary ceilings,¹²¹ bring the culprit under the rubric of benefit-of-clergy, for which the sanction was branding in the thumb. The decision between finding an accused guilty of murder or manslaughter, which also belonged to the jury, can be seen as the choice between capital punishment and branding. It could be argued that in all these situations the jury was in reality discharging a sentencing function, and even today we expect sentencing officers to consult past conviction evidence. But we have seen that the OBSP show that the juries were using past conviction evidence to determine guilt, and with no constraint from the bench. Furthermore, modern juries have the power to affect the sanction by not convicting on all counts or by finding only a lesser included offense, yet we do not, on that account, deem them sentencing officers entitled to learn of the accused's criminal record.

Another possibility is that it was not thought feasible to apply a rule of exclusion to past conviction evidence, since already-branded defendants necessarily carried their thumbs into court.¹²² But many of the former offenses that are laid to Old Bailey defendants would not have left them branded,¹²³ branding itself was sometimes proved by record,¹²⁴ and in any event the judges could have devised, had they cared to, a routine that would have kept defendants' hands out of jurors' sight.

This unrestricted use of past conviction evidence is perhaps

¹²⁰ In Blackstone's famous phrase "this is a kind of pious perjury . . ." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 239 (Oxford 1769).

¹²¹ For instances drawn from the OBSP by nineteenth-century reformers, see 1 RADZINOWICZ, *supra* note 99, at 95-96, 329.

¹²² *E.g.*, William Sims, OBSP (Jul. 1685), at 1 (indicted for stealing cloth): "Upon the Trial it was proved, That part of the Cloth was found in Sims' Lodgings, and that he had a coat made of the same. The Prisoner appearing to be an old Offender, and Burnt in the Hand, having no Evidence in his defense, was thereupon brought in Guilty by the Jury."

¹²³ *E.g.*, William Cole, OBSP (Oct. 1685), at 1 (indicted for stealing two brass pot lids valued in the indictment at four shillings): "it appearing that he had been formerly whipped for his Miscarriages, he was found guilty to the value of 10 pence."

¹²⁴ *E.g.*, Joseph Still, OBSP (Feb.-Mar. 1717), at 2-3 (indicted for murder): "a Record was produced in Court of his having been Convicted at Hertford Assizes, and burnt in the Hand, for robbing the Lady Batterfield . . ."

more understandable if seen as but an aspect of the astoundingly broad use of character evidence in Old Bailey trials throughout our period. Indeed, it is sometimes hard to discern from the report whether a past conviction or less specific evidence of past evil was adduced in a particular case. Anne Gardener (1684), charged with obtaining a quantity of silk by fraud, denied it, "but being known to be a notorious cheat and shoplift, she was found Guilty of the Trespass."¹²⁵ Elizabeth Boyle (1714) was convicted of stealing from two dwelling houses; she was apprehended with some of the loot, "had nothing material to offer in her Defense, and is known to be a very notorious Offender . . ."¹²⁶ Jacob Shoemaker (1717), indicted for attempting to defraud by pawning a brass cup washed with silver as though it were silver, said in his defense that he meant to redeem it. "But there were other Testimonials of the like Practices committed by him; so the Jury found him Guilty."¹²⁷ In the case of Jervis Rhodes (1729) accused of highway robbery, a constable "deposed, That he knew nothing of the Prisoner himself, but when he has been towards *Covent-Garden*, where the Prisoner was known, he had heard People say, as the Prisoner passed along, 'There goes Jervis Rhodes, the greatest Rogue in *England*.' The Jury found him guilty of the Indictment. Death."¹²⁸

The OBSP often recite that the want of character evidence for the accused was material to his conviction, and they also report instances of acquittals based heavily on character evidence. Frances Turner (1712) was accused of stealing sheets and shirts from Mrs. Marfield, "who deposed, That the Prisoner being a Charwoman, and coming to help her wash, she missed the Linen; and that the Prisoner confessed it in the Gate-house. The Prisoner said she was frightened into such Confession, and brought several to her Reputation; (some of whom said the Prosecutor [Mrs. Marfield] was a vexatious Person, and given to pawn Linen and other things unknown to her Husband) whereupon she was acquitted."¹²⁹ When character evidence was not volunteered, jurors sometimes asked for it.¹³⁰

The incessant reliance on past conviction and reputation evidence in the trials of this epoch shows again that the judges had a far from modern conception of their responsibility for overseeing the

¹²⁵ OBSP (Dec. 1684), at 5.

¹²⁶ OBSP (Apr. 1714), at 4-5.

¹²⁷ OBSP (Jan. 1717), at 2.

¹²⁸ OBSP (Dec. 1729), at 24.

¹²⁹ OBSP (Jan. 1712), at 2.

¹³⁰ *E.g.*, John Theobalds, OBSP (Apr. 1732), at 123.

evidence that went to the jury. They were not concerned to prevent the jury from hearing and evaluating potentially prejudicial information.

Our sources, which effectively predate the development of the modern law of evidence, cannot show how the law of evidence took shape, but they do throw some light on its absence. Part of the explanation is simply that trials were less fair; the enlightened values that lead us, for example, to suppress evidence of past convictions, were not yet current. But another part of the explanation is that into the early decades of the eighteenth century there was an alternative system of jury control at common law, just as there is today in Continental systems that employ lay triers without seriously constraining the admissibility of evidence. Our modern exclusionary system is designed for the modern jury: inexperienced, autonomous, taciturn. In the early eighteenth century, we have shown, that jury system also lay in the future. The judges did not need anything as clumsy as the rules of admissibility to keep juries to heel.

We are left to wonder whether Thayer's famous thesis that the law of evidence is "the child of the jury system"¹³¹ may require some modification. Our sources show that for two centuries after the medieval self-informing jury had been replaced by the jury of passive lay triers¹³² no law of evidence was required. Is it true, then, that "the rejection on one or another practical ground, of what is really probative . . . is the characteristic thing in the law of evidence; stamping it as the child of the jury system"?¹³³ Judge and jury functioned for so long without the law of evidence that it is perhaps too simple to see the law of evidence as the law of jury control. If the judges had continued to dominate jury trial, we doubt that they would have needed to develop the law of proof as an instrument of jury control. But various factors, in particular the rise of the lawyers, were about to cost the judges their commanding role in the procedure, and thereby to make the jury much more dangerous. The formation of the law of evidence from the middle of the eighteenth century is more or less contemporaneous with the onset of lawyerization of the criminal trial. My suggestion, therefore, is that the true historical function of the law of evidence may not have been so much jury control as lawyer control.

¹³¹ THAYER, *supra* note 64, at 266.

¹³² See note 105 *supra*.

¹³³ THAYER, *supra* note 64, at 266.

IV. THE COMING OF THE LAWYERS

About 1820 the Frenchman Cottu conducted an inspection tour of English criminal justice on behalf of his government, after which he published a report.¹³⁴ Although he was not always the most astute of observers, he noticed two facets of the trial that Europeans have ever since found striking about Anglo-American procedure. During the examination and cross-examination of witnesses, Cottu says, the judge "remains almost a stranger to what is going on . . ." ¹³⁵ As for the accused, he does so little in his own defense that "his hat stuck on a pole might without inconvenience be his substitute at the trial."¹³⁶ By Cottu's time, judge and accused—who a century earlier were playing main forensic roles in the criminal trial—were yielding the center stage to the lawyers for prosecution and defense.¹³⁷

The OBSP for our period provide a fascinating vantage point from which to observe the onset of this lawyerization of the criminal trial. They allow us to date to the 1730s the breakdown of the rule forbidding counsel to the accused. "A practice sprung up," wrote Stephen, "by which counsel were allowed to do everything for prisoners accused of felony except addressing the jury for them."¹³⁸ Working from the State Trials, Stephen placed this development somewhat later (in the second half of the eighteenth century) than our sources indicate, but he did not mistake its significance. He thought that this was "[t]he most remarkable change" that took place in English criminal procedure from the time of its happening down to his own day.¹³⁹

At least as early as the sixteenth century, and throughout the seventeenth century, defendants in political trials were complaining of the disparity that resulted when the prosecution was represented by counsel while the defense was denied it.¹⁴⁰ The courts' uneasy justification for the rule forbidding defense counsel rested on three main contentions that purported to show that the accused did not need counsel. First, it was said that the trial judge was to serve as defense counsel for the accused—a revealingly nonadversarial con-

¹³⁴ CHARLES COTTU, *DE L'ADMINISTRATION DE LA JUSTICE CRIMINELLE EN ANGLETERRE* (Paris 1820), published in translation as *ON THE ADMINISTRATION OF CRIMINAL JUSTICE IN ENGLAND* (London 1822).

¹³⁵ *Id.* at 88 (1822 ed.).

¹³⁶ *Id.* at 105.

¹³⁷ *Id.* at 88-89. Cf. *id.* at 34.

¹³⁸ 1 STEPHEN, *supra* note 4, at 424.

¹³⁹ *Id.*

¹⁴⁰ *E.g.*, Udall, 1 St. Tr. 1271, 1277 (1590); Lilburne, 4 St. Tr. 1269, 1294-96, 1317 (1649); Love, 5 St. Tr. 43, 52-55, 61 (1651); Twyn, 6 St. Tr. 513, 516-17 (1663); Coleman, 7 St. Tr. 1, 13-14 (1678); Colledge, 8 St. Tr. 549, 570, 579 (1681).

ception. As Chief Justice Hyde put it to a treason defendant being tried in 1663, "the court . . . are to see that you suffer nothing for your want of knowledge in matter of law; I say, we are to be of counsel with you."¹⁴¹ Second, an inchoate notion of the standard of proof in criminal cases was urged as a sufficient safeguard. Chief Justice Scroggs explained to the first of the Popish Plot defendants that "the proof belongs to [the crown] to make out these intrigues of yours; therefore you need not have counsel, because the proof must be plain upon you, and then it will be in vain to deny the conclusion."¹⁴² Third, it was insisted that the accused was more expert about the facts laid to him than any lawyer, hence he needed no intermediation of counsel in telling his story at trial. Roger North, discussing the refusal of counsel to Stephen Colledge, remarks: "Criminals of that Sort, should not have any Assistance in Matters of Fact, but defend upon plain Truth, which they know best, without any Dilatories, Arts or Evasions."¹⁴³

The rule forbidding defense counsel was subject to some major limitations. Perhaps the most important, and certainly the most curious, was that the rule applied only to cases of felony and treason, not to cases of misdemeanor. Hence, defense counsel was freely allowed in cases of petty crimes, but not where life was at stake. To understand this seeming anomaly, it helps if we remember that within the catchall category of misdemeanor were grouped a variety of matters that would today be regarded as civil or regulatory in character—for example, the liability of property owners and parishioners for the upkeep of the roads.¹⁴⁴ When legal issues turned on questions of property rights, the sphere where lawyers were otherwise most prominent, it would have been awkward to forbid assistance of counsel because archaic forms proceduralized these matters as misdemeanor.

Even in cases of felony and treason, the court would allow the accused to be represented by counsel when "some Point of Law arise[s], proper to be debated."¹⁴⁵ If the court did not recognize the issue on its own motion, the accused had to raise it, and to persuade the court of its seriousness, hence he needed to be able to identify it himself. In the seventeenth-century State Trials, there is frequent

¹⁴¹ Twyn, 6 St. Tr. 513, 516-17 (1663).

¹⁴² Coleman, 7 St. Tr. 1, 14 (1678), cited in 1 STEPHEN, *supra* note 4, at 382.

¹⁴³ R. NORTH, *supra* note 106, at 146. Compare EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *37 (London 1747), explaining that counsel is denied when a person accused of treason pleads "not guilty, which goeth to the fact best known to the party"

¹⁴⁴ MICHAEL DALTON, THE COUNTRY JUSTICE 51-55 (London 1618).

¹⁴⁵ 2 HAWKINS, *supra* note 3, at 401.

indication that the accused consulted counsel before trial, partly in order to educate himself to raise legal points on which to ask for courtroom representation. Such requests usually failed. As late as the 1680s the courts exhibited hostility toward the pretrial contacts of accused and counsel and interfered with the accused's courtroom use of notes based upon counsel's advice.¹⁴⁶

Some of the most celebrated political trials in English history, including the Popish Plot, the Bloody Assizes, and the Seven Bishops, occurred during the decade culminating in the Revolution of 1688. It became widely known within a few years of the event that innocent men had been condemned to traitors' deaths in the Popish Plot cases.¹⁴⁷ After the Revolution, respectable members of the political community began to take seriously the problem of the want of safeguard in criminal procedure; the complaints of so many of the State Trial defendants about the denial of defense counsel began to have posthumous effect. Tract writers took up the grievance. Hawles in his well-known *Remarks* on the trial of Stephen Colledge dismisses as "vain" the argument that the judge acts as counsel for the accused. In Colledge's case and elsewhere the judges "generally have betrayed their poor Client, to please, as they apprehended, their better Client, the King" ¹⁴⁸ Another writer asked "what Rule of Justice is there to warrant [the] Denial [of counsel], when in a Civil Case of a Halfpenny Value the Party may plead either by himself or Advocate"? ¹⁴⁹

Among the principal reforms of the Treason Act of 1696¹⁵⁰ was the extension of the right to counsel to the accused. This and other safeguards in the act applied exclusively to treason defendants, and not to persons charged with ordinary felony. It is quite possible to see this restriction as a piece of class legislation: since the only aspect of the criminal law that was likely to touch the members of the political community was treason, they legislated safeguards for themselves and left the underlings to suffer as before. But other factors make this limitation appear more reasonable. First, in trea-

¹⁴⁶ In *Fitzharris*, 8 St. Tr. 243, 332 (1681), the accused was made to give over the notes to his wife's keeping. In *Colledge*, 8 St. Tr. 549, 585 (1681), the accused's notes were taken from him at trial and "seem to have been examined by the King's counsel, who were enabled to manage their case accordingly, not calling certain witnesses whom Colledge could have contradicted or cross-examined." 1 STEPHEN, *supra* note 4, at 406.

¹⁴⁷ See KENYON, *supra* note 84, at 247-49, 255-56.

¹⁴⁸ JOHN HAWLES, REMARKS UPON THE TRYALS OF EDWIN FITZHARRIS, STEPHEN COLLEDGE, COUNT CONINGSMARK, THE LORD RUSSEL, COLONEL SIDNEY, HENRY CORNISH AND CHARLES BATEMAN 22 (London 1689).

¹⁴⁹ [B. SHOWER], REASONS FOR A NEW BILL OF RIGHTS 6 (London 1692).

¹⁵⁰ 7 & 8 Wil. 3, c. 3, § 1 (1696).

son cases the trial judges had not exhibited the impartiality that we see them practicing in ordinary cases at the Old Bailey. In judicial behavior in treason cases "the sentiment continually displays itself, that the prisoner is half, or more than half, proved to be an enemy to the King . . ."¹⁵¹ Second, the substantive law of treason was unusually complex. Third, it was customary to restrict pretrial access to accused traitors, ostensibly to prevent further plotting, and this isolation could hinder defense preparation. Finally, in these cases where the defensive prospects of the accused were thus diminished, it was the invariable practice to have the prosecution conducted by crown counsel, whereas in cases of ordinary crime prosecuting counsel was still exceedingly rare. Accordingly, we can see why the Parliament of 1696 might have decided to correct the one-sided lawyerization of the political trial without thinking to introduce the same right to defense counsel into the ordinary trial where there was in practice no prosecution counsel and hence no disparity. Twenty-five years after the Act, Hawkins explained that "Experience" had shown its framers that there were "great Disadvantages from the want of [defense] Counsel, in Prosecutions of High Treason against the King's Person, which are generally managed for the Crown with greater Skill and Zeal than ordinary Prosecutions . . ."¹⁵²

Apart from the statutory exception for treason, the rule denying defense counsel continued into Hawkins' day in full force. Writing in 1721, he could still contend that any layman "may as properly speak to a Matter of Fact, as if he were the best Lawyer; and that it requires no manner of Skill to make a plain and honest Defense, which in Cases of this Kind is always the best . . ."¹⁵³ Lawyers have as yet no special skills in adducing the facts for the trier, he is saying—a contention that we can understand only when we remember that the law of evidence as a counsel-propelled, jury-oriented exclusionary system lay in the future. Since "it is the Duty of the Court to be indifferent between the King and the Prisoner, and to see that the Indictment be good in Law, and the Proceedings regular, and the Evidence legal, and such as fully proves the Point in Issue," the innocent are better off "having the Court their only Counsel."¹⁵⁴

Finally, Hawkins reminds us in his argument that the judge-

¹⁵¹ 1 STEPHEN, *supra* note 4, at 397.

¹⁵² 2 HAWKINS, *supra* note 3, at 402.

¹⁵³ *Id.* at 400.

¹⁵⁴ *Id.*

dominated, lawyer-free criminal trial of his day still presupposed that the accused would be the major testimonial resource for the defense. The innocent accused has nothing to fear with the court as his counsel, Hawkins says, "[w]hereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defense of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them."¹⁵⁵ Hawkins' naive faith that an innocent accused standing in peril of death at criminal trial was especially well suited to display his innocence through his "Simplicity and . . . artless and ingenuous Behavior"¹⁵⁶ was justly ridiculed in the nineteenth century,¹⁵⁷ but Hawkins was closer to the mark in foreseeing that the intermediation of counsel would sometimes hinder the discovery of the truth.

It appears that in the decade of the 1730s, certainly from 1734-1735, defense counsel began to be permitted to examine and cross-examine witnesses. The OBSP are not reliable enough on this matter to permit us to date this change precisely or to quantify the occurrences. The reporters were simply not alert to the development, doubtless because it was of no particular interest to their lay readers. When they do report the presence of counsel, they do not identify them by name. Sometimes the doings of a lawyer are so brusquely reported that we cannot tell whether he appeared for prosecution or defense.¹⁵⁸ As always, what interested the reporters was the witnesses' and defendants' narratives of the events. Sometimes a case report contains only a single question or remark by counsel. We suppose that counsel was in fact somewhat more active in these cases, and we further suppose that there were other cases in which the reporters allowed the appearance of counsel to go unnoticed.

In the later 1710s and 1720s prosecution counsel is reported appearing in the OBSP in cases of felony perhaps once a year.¹⁵⁹ Mostly these were murder cases in which the victim's family prose-

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., SECOND REPORT FROM HIS MAJESTY'S COMMISSIONERS ON CRIMINAL LAW 6 (London 1836).

¹⁵⁸ E.g., Margaret Hobbs, OBSP (Dec. 1734), at 16.

¹⁵⁹ Joseph Still, OBSP (Feb.-Mar. 1717), at 2 (murder); Edward Williams, OBSP (Apr. 1718), at 1 (murder); Samuel Snow, OBSP (Mar. 1719 [1720]) at 5 (forcible marriage, felony per 3 Hen. 7, c. 2 (1487)); Christopher Graff, OBSP (Dec. 1721), at 8 (rape); Paul Crony, OBSP (Oct. 1722), at 5 (accessory to murder and robbery); George Smith, OBSP (Apr. 1723), at 1 (murder); Jonathan Wilde, OBSP (May 1725), at 5 (theft, and receiving money under pretense of helping to recover stolen goods, felony per 4 Geo. 1, c. 11, § 4 (1717); a legendary case, discussed in Howson, *supra* note 25).

cuted (because the decedent could not), but chose to delegate such unpleasant business to counsel. From 1732 the OBSP show greater frequency of prosecuting counsel, and in a slightly wider variety of felonies,¹⁰⁰ but this seeming increase could be an illusion on account of the increase in the detail of the OBSP reports commencing about 1730.

In 1734-1735 there occur unmistakable instances of lawyers examining and cross-examining for the defense; and already in the year 1736 nine cases are reported.¹⁰¹ Although these cases evidence the abandonment of a rule that the judges had insisted upon for centuries, the OBSP reporters take no notice of the change. Hence, for the answers to the question of why and how the change came about, future scholarship will have to look outside the OBSP. Nevertheless, our sources do throw a little light on the event. For one thing, they show that defense counsel did not instantly supplant, but rather simply afforded, the accused, who continued to perform as examiner, cross-examiner, and concluding orator in his own cause. In the 1730s we detect no articulated division of function between counsel and accused regarding the conduct of examination

¹⁰⁰ Instances of prosecuting counsel 1732-1734: Peter Noakes, OBSP (Jan. 1732), at 64 (murder); John Tapper, OBSP (Feb. 1732), at 82 (murder); Elizabeth Langford, OBSP (Feb. 1732), at 86 (theft of cloth); Daniel Tipping, OBSP (Jul. 1732), at 160, 163 (highway robbery); James Lewis, OBSP (Sept. 1732), at 178 (forging a will, felony per 2 Geo. 2, c. 25 (1729)); John Ashford, OBSP (Sept. 1732), at 217, 219 (sodomy); Edward Dalton, OBSP (Sept. 1732), at 219, 220 (murder); Sarah Malcolm, OBSP (Feb. 1733), at 73 (murder, breaking and entering a dwelling); William Bray, OBSP (Oct. 1733), at 14 (theft of cast iron); Samuel Walker, OBSP (May-Jun. 1734), at 127 (theft from his master's house); Roger Bow, OBSP (May-Jun. 1734), at 133, 134 (murder); Mary Hancock, OBSP (Jul. 1734), at 147, 149 (coining; several connected cases); Humphrey Remington, OBSP (Jul. 1734), at 155, 156 (murder); Mary Chetwin, OBSP (Jul. 1734), at 158 (theft from her master's house); George Turner, OBSP (Sept. 1734), at 171, 172 (murder); Thomas Slade, OBSP (Sept. 1734), at 174 (statutory rape); Isaac Berridge, OBSP (Dec. 1734), at 5 (murder).

¹⁰¹ We set to one side a pair of felony prosecutions from the year 1733 in which defense counsel seem to have trenched upon matters of fact, but which arose out of civil litigation in other courts: Josiah Reader, OBSP (Jun. 1733), at 173 (feloniously confessing a fine effecting a conveyance of certain realty); Edmond Bourk, OBSP (Oct. 1733), at 213 (forging a promissory note). Cases of felony from 1734-1735 in which defense counsel examine or cross-examine witnesses or speak to issues of fact: E ____ J ____, OBSP (Jul. 1734), at 161 (rape); John Smith, OBSP (Jan. 1735), at 34 (theft of money); John Becket, OBSP (May 1735), at 86 (theft of money); Charles Mechlin, OBSP (Dec. 1735), at 14, 15 (murder; "Council" asks questions whose import appears to be defensive); Elizabeth Barker, OBSP (Dec. 1735), at 26, 29-30 (theft of household goods). Unmistakable cases for 1736: Edmund Dangerfield, OBSP (May 1736), at 106 (bigamy); Henry Justice, OBSP (May 1736), at 110 (theft of books from Trinity College, Cambridge); Jacob Dell, OBSP (May 1736), at 125 (receiving stolen goods); James Scott, OBSP (Jun. 1736), at 131 (breaking and entering, and theft of household goods); George Watson, OBSP (Jun. 1736), at 144, 145 (murder); Robert Hussey, OBSP (Jul. 1736), at 164 (bigamy); George Sealy, OBSP (Jul. 1736), at 188 (sodomy); Thomas Winston, OBSP (Dec. 1736), at 4, 5 (theft of copper); Mary Sommers, OBSP (Dec. 1736), at 38 (bigamy).

and cross-examination. The prohibition upon defense counsel addressing the jury in summation continued to be enforced until it was abolished by statute in 1836.¹⁰² Furthermore, we should mention that, since the OBSP seem to evidence a greater use of prosecution counsel in the years just before the advent of defense counsel, it is possible that the resulting disparity may have influenced the judges to relax the former rule; the analogy would be to the developments precipitating the Treason Act of 1696.

One striking fact about the dissipation of the former rule is that the degree of participation permitted to counsel varied among the assize circuits right down to 1836, when legislation eliminated the remaining restrictions upon counsel's right of audience.¹⁰³ We find this point discussed already in 1741 in the trial of Samuel Goodere for murder at Bristol, a case reported in a contemporary pamphlet and reprinted in the *State Trials*.¹⁰⁴ According to the detailed transcript, when the trial judge¹⁰⁵ asked the accused whether he wished to cross-examine a main witness, his counsel intervened and asked the court to "indulge counsel to put his questions for him . . ."¹⁰⁶ Prosecution counsel still thought it worth his while to object, and in the course of his statement he concedes how "variable and uncertain" the rule for which he is arguing has become:

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 mat-

¹⁰² SECOND REPORT, *supra* note 157, at 10-11; 6 & 7 Geo. 4, c. 114 (1836).

¹⁰³ SECOND REPORT, *supra* note 157, at 10n; 6 & 7 Geo. 4, c. 114 (1836).

¹⁰⁴ 17 ST. TR. 1003 (1741).

¹⁰⁵ Who was Michael Foster, then sitting as Recorder of Bristol, later (1745-1763) a King's Bench judge and author of the work commonly called *Foster's Crown Law*, the first important book on English criminal law written after Hawkins. M. FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GAOL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURR[E]Y, AND OF OTHER CROWN CASES. TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW (1st ed. Oxford 1762).

¹⁰⁶ 17 ST. TR. at 1022.

ters of fact, and ought either to ask his own questions of the witnesses, or else propose them himself to the Court.¹⁶⁷

Somehow, the traditional discretion of the trial judge to supervise the proceedings conducted before him came to be used to justify piecemeal departure from the former rule. The suggestion is that the prohibition on defense counsel was not abrogated definitively, but gutted through irremediable acts of judicial discretion.

There is a special irony about this rationale: the judge was so dominant that he could admit the lawyers as an act of grace. Perhaps it was not foreseen that the power to admit them could not be kept perpetually in judicial discretion as the precedents accreted. It was certainly not foreseen that the lawyers could alter the dynamic of jury trial in the most fundamental way, that they could break up the ancient working relationship of judge and jury and cost the judge his mastery of the proceedings. In the Old Bailey at the end of our period in the mid-1730s there was still hardly a sign that adversary procedure and the law of evidence lay just ahead.

No one should be surprised that in the eighteenth and nineteenth centuries English criminal procedure would undergo fundamental changes. There were grievous shortcomings in the procedure that we have observed in the Old Bailey into the 1730s, especially from the standpoint of the accused. Too many cases in the OBSP give us cause to wonder whether innocent people were being condemned. If we look backwards at this Old Bailey practice from the perspective of either of the two mature twentieth-century procedural models, the adversarial and the nonadversarial systems, we should have to say that the accused in the Old Bailey was being denied the safeguards of both. We have seen that he lacked the protections that the adversary system was about to provide for him, in particular the assistance of counsel in gathering and adducing defensive evidence; the rules excluding varieties of possibly prejudicial evidence; and the rules for more benign selection, instruction, and control of the jury. Yet the English were not giving the accused the principal alternative safeguard of the modern nonadversarial tradition: thorough official investigation of exculpatory claims in pretrial and trial procedure.

V. CONCLUSION

If we reflect upon the contrast between the adversarial criminal procedure of today's Anglo-American systems and the nonadver-

¹⁶⁷ *Id.*

sarial procedure of the Continental systems, we should have to conclude that well into the eighteenth century the procedure that we have seen at work in the Old Bailey resembled the modern Continental more than the modern Anglo-American procedure. Most of the characteristics that common lawyers find striking about criminal trials in modern Europe we have observed in the Old Bailey trials of the seventeenth and eighteenth centuries.

(1) In the Old Bailey, as on the Continent today, lawyers for the prosecution and defense were peripheral forensic figures, if present at all. To the extent that evidence was not adduced spontaneously in the altercation of accuser and accused, it was the trial judge who examined the witnesses and the accused, and it was he who, like the modern Continental presiding judge, dominated the proceedings.

(2) The accused took the active role in his own defense, speaking directly and continuously to the court as he does today in the European systems. The privilege against self-incrimination was not yet working to silence the accused and distance him from the conduct of his own defense. The accused was under no pressure to waive his right to trial by pleading guilty; virtually every case of felony did go to trial—as is the practice, for example, in modern Germany.¹⁶⁸

(3) The Old Bailey trial judge deeply affected the adjudication of the jury. He did not actually deliberate and vote with the lay triers as the presiding judge would in the modern Continental mixed courts of professional and lay judges, but he could speak vigorously on the merits and had many ways to influence and control jury verdicts. The Old Bailey judge was a real participant in adjudication, and in this sense his role was closer to that of the Continental judge than to that of the passive traffic controller who presides over modern Anglo-American adversary procedure.

(4) The Old Bailey jury did not prepare a formal statement of the grounds for its verdict in the way that a Continental mixed court states the reasons for its judgment, but the jury did often disclose its thinking to the court, especially when asked. Hence, in the Old Bailey of that day as in the Continental court of our own day, it could be known why the trier decided as it did.

(5) Finally, in the Old Bailey of that day, as in the German or French courtroom of our own day, there was no law of evidence in our sense—no body of rules designed to exclude probative information for fear of the trier's inability to evaluate it. Hearsay and

¹⁶⁸ Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974).

prior conviction evidence were received about as freely as in the modern Continental systems.

We do not want to exaggerate this contrast. The English system of private prosecution, with its emphasis on a nonbureaucratic pretrial procedure, kept the English trial judge from assuming sustained responsibility for investigation. The English did not develop the *Aufklärungspflicht*, the duty to clarify, which drives the Continental judge. In England the busy judges from the central courts at Westminster were loaned to the Old Bailey or to an assize court for a crowded session of at most a few days. Given the caseload that awaited him, the English trial judge had to take whatever case the private prosecutor, aided by the lay JP and the lay constable, had worked up for trial. This was an important factor in exposing Anglo-American procedure to the rapid development of adversary procedure that set in after our period. The lawyers did not have to divest a judicial bureaucracy of the sort that has for so long been in place on the Continent.

The broad similarity between the historic common law criminal procedure and the modern Continental procedure should serve to remind us that adversary procedure cannot be defended as part of our historic common law bequest. The criminal lawyer and the complex procedures that have grown up to serve him and to contain him are historical upstarts.