

**LEARNING FROM THE PAST? OR DESTINED TO REPEAT  
PAST MISTAKES?: LESSONS FROM THE ENGLISH LEGAL  
SYSTEM AND ITS IMPACT ON HOW WE VIEW THE ROLE OF  
JUDGES AND JURIES TODAY**

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“History informs us of past mistakes from which we can learn without repeating them. It also inspires us and gives confidence and hope bred of victories already won.”  
-William Hastie

“The best administration of justice may be most safely secured by allowing the representation of all classes of the people in courts of justice.”  
-Lelia Josephine Robinson

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## PART I. INTRODUCTION

Under our Anglo-American adversary trial system, a party's counsel has the primary responsibility for finding, selecting, and presenting evidence. The Federal Rules of Evidence are silent on the issue of whether the jury may participate in the questioning of witnesses, and this practice is typically left up to the discretion of the court.<sup>1</sup> The Federal Rules of Evidence do, however, grant judges the power to call and question witnesses.<sup>2</sup> Under the Federal Rules and federal case law, a trial judge has the discretion to examine any witness to clarify testimony and to bring out needed facts that have not been elicited by the parties.<sup>3</sup> Judges must continue to avoid extreme exercises of the power to question and avoid the appearance of favoring one side over another.<sup>4</sup> A judge must never assume the role of an advocate or a prosecutor.<sup>5</sup> Research shows that jurors may be sensitive to a trial judge's demeanor and are more likely to be influenced if the judge's demeanor suggests her view of a witness's credibility or of a litigant's position.<sup>6</sup> Serious problems arise when a

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1. See *United States v. Sutton*, 970 F.2d 1001, 1003 (1st Cir. 1992) (allowing the practice of reading juror submitted question and commenting that "[a]lthough we think that this practice may frequently court unnecessary trouble, we find no error in the circumstances of this case."); *United States v. Collins*, 226 F.3d 457, 464 (6th Cir. 2000) (holding that it was not automatic reversible error for the court to solicit questions from the jury before each witness left the stand); *United States v. Hernandez*, 176 F.3d 719, 724-25 (3d Cir. 1999) ("Allowing jurors to pose questions during a criminal trial is a procedure fraught with perils. In most cases, the game will not be worth the candle. Nevertheless, we are fully committed to the principle that trial judges should be given wide latitude to manage trials."); *but cf.* *United States v. Thompson*, 76 F.3d 442, 449 (2d Cir. 1996) (disapproving of the lower court's inviting jurors to question each witness).

2. FED. R. EVID. 614. See also FED. R. EVID. 706:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and *may appoint expert witnesses of its own selection.*

*Id.* (emphasis added).

3. FED. R. EVID. 614(b); see *United States v. Green*, 293 F.3d 886, 892-93 (5th Cir. 2002); *United States v. Reyes*, 227 F.3d 263, 265 (5th Cir. 2000).

4. Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 386 (2004) ("Federal judges have always had the right to comment on the evidence and even to express an opinion about the facts as long as it is clear the jury has the final word.").

5. *Green*, 293 F.3d at 893 ("The judicial investigatory power is to be used to help the jury understand the evidence; the court must be careful not to express a bias or to confuse the roles of the judge and prosecutor.").

6. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 257 (2000).

judge uses leading questions,<sup>7</sup> shows bias against one party by her comments,<sup>8</sup> or appears to sit outside her proper neutral role.<sup>9</sup>

Federal Rule of Evidence 614(b) gives little guidance as far as the proper role for judges in the adversarial trial. Both the Advisory Committee Notes to the Federal Rules of Evidence and the noted evidence scholar John Henry Wigmore credit this rule with common law origins.<sup>10</sup> However, looking into the history of our Anglo-American system reveals that our modern criminal trial looks as different from the perspective of our own legal history as it does from a comparative law perspective.<sup>11</sup> This is to say that, at the least, the lawyer-centered trials we find so common today were not the norm in early sixteenth and seventeenth century England.<sup>12</sup> Prior to the advent of our adversarial system, the judge and jury played central and powerful roles.<sup>13</sup>

My thesis proposes that we review our understanding of the historical underpinnings of the limited roles of judges and juries in active cross-examination to understand our modern adversarial system, its flaws, and its triumphs. Perhaps, in understanding how and why the roles of judges and juries have become so limited in our Anglo-American justice system, we can strike a better balance in determining the future role of judge and jury participation in modern trials. The ultimate question we must ask is as follows: will extracting more information from the witnesses lead to a greater

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7. *See, e.g.*, *Pollard v. Fennell*, 400 F.2d 421, 424-25 (4th Cir. 1968). In *Pollard*, the district judge repeatedly and consistently demonstrated that he was not content to permit counsel to interrogate the witnesses. The Fourth Circuit noted:

It must be remembered that this was a trial before a jury, and the impact of a question by the court on both the witness and the jury, together with the natural reluctance of counsel to object to the court's questions, which is even greater when the questioning is in the presence of a jury, should not be underestimated.

*Id.* at 424.

8. *See, e.g.*, *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1329-31 (8th Cir. 1985). In *Hale*, the district judge's comment that "I have put air in a lot of tires, but I never had one blow up on me" was deemed improper. *Id.* at 1330. The appellate court reasoned that "[w]hile remarks made by a district judge within the hearing of the jury are often necessary, the judge should take care not to give the impression that he or she prefers one litigant over another." *Id.* (quoting *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330, 334 (5th Cir. 1981)).

9. It is well within the authority of judges to question witnesses. FED. R. EVID. 614 advisory committee's note. However, that authority is "abused when the judge abandons his proper role and assumes that of advocate." *Id.*

10. FED. R. EVID. 614(a) advisory committee's note ("While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established.") (citations omitted); 9 JOHN HENRY WIGMORE, EVIDENCE AT TRIALS IN COMMON LAW § 2484 (1981).

11. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 1-9 (2003).

12. *Id.* at 2, 7-9; *see generally* 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 1-29 (1956).

13. John Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1198-99 (1996); *see* J. S. COCKBURN, A HISTORY OF ENGLISH ASSIZES, 1558-1714, at 112 (1972).

truth-finding? Or, conversely, could it bring greater bias to the system and prevent attorneys from shaping and executing their narratives?

## PART II. EVOLUTION OF THE JUDGE AND JURY IN THE BRITISH ADVERSARIAL SYSTEM

### *A. Medieval Origins*

In medieval times, conflict was resolved through trial by battle.<sup>14</sup> Individuals would resolve conflict through individual confrontations; a private individual would state the facts and offer “to prove the accusation ‘by his body.’”<sup>15</sup> The accused would deny the allegation and seek to prove his innocence in the same manner.<sup>16</sup> If a judge declared the dispute valid, a duel was scheduled to resolve the conflict.<sup>17</sup> Typically, the altercation would proceed until the death or concession of one of the parties.<sup>18</sup>

The trial by battle was integrated into the trial by ordeal—both were premised on the idea that God would decide the ultimate victor and justice would be served.<sup>19</sup>

14. See ROLLS OF THE JUSTICES IN EYRE (Doris M. Stenton, ed., 1937); Edward L. Rubin, *Trial by Battle. Trial by Argument*, 56 ARK. L. REV. 261, 262-71 (2003); JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 56-57 (1898).

15. Rubin, *supra* note 14, at 263 (citing GEORGE NEILSON, TRIAL BY COMBAT 36-39 (1891); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 337-41 (Univ. of Chi. Press 1979) (1769); HENRY DE BRACON, ON THE LAW AND CUSTOMS OF ENGLAND 385-403 (Samuel E. Thorne trans., 1968)).

16. Rubin, *supra* note 14, at 263; see BLACKSTONE, *supra* note 15, at 341.

17. Rubin, *supra* note 14, at 263.

18. *Id.* at 263-64.

19. *Id.* at 265; see Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 119-21 (2000). Olson provides that “All forms of the medieval proofs involved a spiritual act and/or took place within a holy place, the proof by hot iron often reserved for the cathedral.” *Id.* at 119. Olson continues:

The proofs cited most routinely are the ordeal of the iron, which consisted of [the accused] carrying a red-hot iron for a specified distance, and the ordeal of the cauldron, which required him to pluck an object from boiling water. An affirmative judgment required that the wound heal cleanly within three days time. The ordeal of cold water, in which a bound person was immersed into a pool of blessed water and sank if innocent, was also widespread. In England, this ordeal was used in cases presented before the king’s traveling justices from 1166 onward. The ordeal of walking on hot ploughshares was employed less frequently but was still prevalent in eleventh century Italy and England. The list should also include the ordeal of the cursed morsel whereby an accused received a piece of bread or cheese and judgment depended upon his ability to swallow nearly an ounce of food.

*Id.* at 117 (footnotes omitted).

Since the result of battle was God's revelation that the victor had sworn truthfully, it necessarily meant that the loser had sworn falsely, and since swearing falsely was a great sin, not only in religious terms, but in the secular terms of an honor-based society, the loser could be punished, even executed.<sup>20</sup>

Trial by jury has its roots in Norman culture.<sup>21</sup> The Domesday Book (also known as the Book of Winchester), the great survey of England prepared for William I of England, was compiled by convening twelve knights or lawful men from every Hundred to provide the desired information.<sup>22</sup> A group of royal officers would visit each county and hold a public inquiry in the great assembly known as the county court, with representatives of every township and of the local lords in attendance.<sup>23</sup> The unit of inquiry was the Hundred (a subdivision of the county, which then was an administrative entity), and the return for each Hundred was sworn to by twelve local jurors, half of them English and half of them Norman.<sup>24</sup>

Juries were typically self-informing, serving as witnesses rather than finders of fact.<sup>25</sup> In England, "there was a tradition of community-based judicial systems: a county or shire court system."<sup>26</sup>

As their name might suggest, these courts would involve the entire community in the dispute. While there was at times a "judge" presiding over the proceedings, he was not a member of the court. . . . Since the community was thought to be in the best position to make crucial determinations of fact (a task that still belongs to the jury), the actual decision—guilt or innocence, liable or not—was made by the community itself.<sup>27</sup>

A well-established practice of trial by witness emerged in reaction to the twelfth-century civil war when Henry II passed a series of statutes or "assizes" that displaced traditional local law and informal adjudication with royal law

20. Rubin, *supra* note 14, at 256-66 (citing BARON MONTESQUIEU (CHARLES LOUIS DE SECONDAT), *THE SPIRIT OF LAWS* 548-53 (Anne Cohler et al. trans., 1989) (1748); NELSON, *supra* note 15, at 38)).

21. Rubin, *supra* note 14, at 272; THAYER, *supra* note 14, at 50.

22. Rubin, *supra* note 14, at 272.

23. See generally GEORGE BURTON ADAMS, *CONSTITUTIONAL HISTORY OF ENGLAND* 88-89 (1921).

24. See Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 *DENV. U. L. REV.* 1, 9 (2001); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980) (recounting the history of open courts) (citing Sir Frederick Bart Pollock, *English Law Before the Norman Conquest*, in *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 88, 89-90 (1907)); see also THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF COMMON LAW* 110-111 (5th ed. 1956).

25. Robert H. White, *Origin and Development of Trial by Jury*, 29 *TENN. L. REV.* 8, 17 (1961).

26. Justin C. Barnes, Comment, *Lessons From England's "Great Guardian Of Liberty": A Comparative Study of English and American Civil Juries*, 3 *U. ST. THOMAS L.J.* 345, 348 (2005) (citing MAURIZIO LUPOI, *THE ORIGINS OF THE EUROPEAN LEGAL ORDER* 206 (Adrian Belton trans., 2000) (1994)).

27. *Id.* (footnotes omitted).

and more formal judicial procedures.<sup>28</sup> The Assize of Clarendon, convened in 1166 by Henry II, consisted of men from each township who would testify under oath to implicate members of their township suspected of committing a crime.<sup>29</sup> A system of writs developed in which defendants were required to attend court.<sup>30</sup> The prosecutor in these cases was the Crown, and typically the assize trial was by ordeal.<sup>31</sup>

Henry III's government abolished trial by ordeal in 1215, which left the courts "without a means of determining the guilt or innocence of the accused."<sup>32</sup> An expedient and practical solution was to ask the assembled group that had declared that the accused was suspected of a crime to judge whether the accused was in fact guilty of the crime.<sup>33</sup> This was suitable because the gathered group was already assessing the guilt or innocence of a person simply by accusing him.<sup>34</sup> Those who had been convicted under this method could appeal to a presenting judge in an action that resembled a trial on the merits.<sup>35</sup>

During this time, jury proceedings were characterized by the "reliance on the exercise of royal authority, [the] compulsion of jurors to participate in the adjudicatory process, and [the] utilization of the men of the neighborhood . . . to provide the information upon which to base decisions."<sup>36</sup> This contrasts

28. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 627 (2007).

29. Rubin, *supra* note 14, at 272.

30. *Id.* at 627.

31. *Id.* at 272 ("This typically involved unpleasant tasks such as carrying hot iron or being thrown into a body of cold water; if the person was innocent, God would so indicate by allowing the wound to heal cleanly, or the water to receive the person and allow him to sink."); see also Trisha Olson, *The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100-1450*, 22 J.L. & RELIGION 63, 65-66 (2006) (citing RICHARD FIRTH GREEN, *A CRISIS OF TRUTH* 81-83 (1999)); Olson, *supra* note 19, at 117; Paul R. Hyams, *Trial By Ordeal: The Key to Proof in the Early Common Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 90, 90 (Morris S. Arnold et al. eds., 1981). For discussion of other forms of adjudication and dispute settlement used in Europe during the rise of the assize system, see Michael Clanchy, *Law and Love in the Middle Ages*, in *DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST* 47, 53-57 (John Bossy ed., 1983); Thomas Kuehn, *Arbitration and Law in Renaissance Florence*, 23 *RENAISSANCE & REFORMATION* 289-92 (1987).

32. Rubin, *supra* note 14, at 273 (citing J.H. BAKER, *AN INTRODUCTION TO LEGAL HISTORY* 87 (3d ed. 1990); THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVE ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800*, at 3 (1985)).

33. *Id.* (citing LEONARD LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* 6-8 (1999)).

34. Rubin, *supra* note 14, at 273.

35. *Id.* For a discussion of the methods involved in "recruiting" men of the community to serve on juries, see Anthony Musson, *Twelve Good Men and True? The Character of Early Fourteenth-Century Juries*, 15 *LAW & HIST. REV.* 115, 126-135 (1997).

36. Stephan Landsman, *The Civil Jury In America: Scenes from an Unappreciated History*, 44 *HASTINGS L.J.* 579, 583 (1993); see generally James J. Willis, *Transportation Versus Imprisonment in*

with a more traditional approach that relied on the actions of the litigants to settle disputes either by ordeal or combat.<sup>37</sup>

The petit jury began to emerge in its modern form in 1351-52, when “the first formal division between the indictment and the trial assizes was enacted.”<sup>38</sup> The idea of resolving criminal issues locally was replaced by more efficient public prosecutions and presentation of evidence to juries.<sup>39</sup> This marked the birth of the modern jury, which continued to develop over many centuries.<sup>40</sup> Historians contend that the jury flourished because of the increased commercialization of England, due to a jury’s efficiency and popularity.<sup>41</sup> The need for efficient dispute resolution arose in the wake of the breakdown of the small townships, which had been stable communities with stable populations.<sup>42</sup> There was a shift from the self-informing jury (based on the ideas of local justice) to more public prosecution (based less on individual knowledge of a suspect).<sup>43</sup> Societal norms were changing; more people were moving away from small villages and towns to cities, and the population of the cities was becoming more transient.<sup>44</sup> As social mores changed, the prosecution model and the court structure also had to adapt to meet different needs.

#### *B. Assize Courts Through the Eighteenth Century*

Assize courts were the periodic criminal courts.<sup>45</sup> Assizes presided over property crimes, felonious killings, and statutory and common law offenses such as murder and manslaughter.<sup>46</sup> The procedures in these courts varied depending on locality.<sup>47</sup> Most criminal prosecutions began with an examination of the suspect by a local magistrate, who took information from

*Eighteenth- and Nineteenth-Century Britain: Penal Power, Liberty, and the State*, 39 LAW & SOC’Y REV. 171, 197 (2005) (discussing the jury’s independence from government interference).

37. See Olson, *supra* note 19, at 119-21.

38. Rubin, *supra* note 14, at 273-74.

39. See John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203-06 (1988); Rubin, *supra* note 14, at 274.

40. Rubin, *supra* note 14, at 274.

41. Landsman, *supra* note 36, at 583.

42. Rubin, *supra* note 14, at 275.

43. GREEN, *supra* note 32, at 6-12; Rubin, *supra* note 14, at 276.

44. LANGBEIN, *supra* note 11, at 108; 2 RADZINOWICZ, *supra* note 12, at 1-3, 18-25.

45. While this section of the article begins with an analysis of the assize courts in the sixteenth century, there is a great deal of history concerning earlier assize courts and the role of judges in those courts. See ROLLS OF THE JUSTICES IN EYRE, *supra* note 14.

46. See generally Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750-1850*, 23 LAW & HIST. REV. 133, 137-40 (2005) (describing prosecutions in the assize courts in the context of larceny cases).

47. I do not mention specifically the “Old Bailey,” which was the popular name for London’s criminal court established by charter from Henry I early in the twelfth century. Its jurisdiction was roughly equivalent to that of courts of assizes elsewhere in England. See Malcolm M. Feeley & Deborah L. Little, *The Vanishing Female: The Decline of Women in the Criminal Process, 1687-1912*, 25 LAW & SOC’Y REV. 719, 722 n.6 (1991).

the suspect.<sup>48</sup> Local magistrates would bind the suspects over to quarter sessions or assizes or commit the accused to jail to await trial.<sup>49</sup> The magistrate would also interview the victim prosecutor, demand appearances at trial, and attend the trial to certify particular evidence.<sup>50</sup>

Justices of the Peace also began to play a more prominent role in prosecutions.<sup>51</sup> Statutes in the sixteenth century required Justices of the Peace in felony cases to compile statements from the accused, the complainant, and material witnesses, and to bind over these individuals to appear at trial in higher courts.<sup>52</sup> Justices of Peace also had the power to issue search and arrest warrants.<sup>53</sup> A Justice of the Peace was not required to seek out witnesses who were not among the original petitioners; however, some Justices would go beyond the statute and investigate more thoroughly.<sup>54</sup>

Suspects often did not even survive incarceration to make it to the assize trial.<sup>55</sup> The prisons were “notoriously decrepit [and] unfit to ‘keep the prisoners free from wind and weather.’”<sup>56</sup> Trials were conducted in public, and were “nasty, brutish, and essentially short.”<sup>57</sup>

Pretrial procedure was developing slowly. Those bound over for prosecution were presented to the grand jury, who would return a bill.<sup>58</sup> Victim prosecutors were typically sworn in by the Marshal.<sup>59</sup> A time and a place were set for the assize by summons directed to each sheriff in the circuit.<sup>60</sup> Sheriffs would, in turn, issue warrants to the bailiffs for jury service, as well as draw up grand jury panels and lists of all the justices, mayors, coroners, stewards, chief constables and bailiffs in the county. The sheriffs

48. COCKBURN, *supra* note 13, at 102; *see also* Bruce P. Smith, *The Emergence of Public Prosecution in London, 1790-1830*, 18 YALE J.L. & HUMAN. 29, 33-39 (describing prosecutions at the Old Bailey).

49. COCKBURN, *supra* note 13, at 102; *see also* Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537 (1999).

50. COCKBURN, *supra* note 13, at 102-03.

51. LANGBEIN, *supra* note 11, at 40-41; *see* Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325 (2002).

52. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317-24 (1973) (contending that Marian Bail and Committal Statutes of 1554-55 empowered English Justices of the Peace to perform some investigative functions and serve as back-up prosecutors if complainant failed to appear at trial); *see also* Smith, *supra* note 48, at 61.

53. LANGBEIN, *supra* note 11, at 40.

54. *Id.* at 41 (citing JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 38-45 (1974)).

55. COCKBURN, *supra* note 13, at 107.

56. *Id.* (citation omitted).

57. *Id.* at 109.

58. *Id.* at 111.

59. *Id.*

60. *Id.* at 61.

also cataloged the suspect's alleged actions.<sup>61</sup> Judges were accompanied by the clerk of assize.<sup>62</sup>

Most historians describe the early criminal trials from the sixteenth to the early eighteenth century in England as primarily private prosecutions.<sup>63</sup> These trials were typified by many practices that, from the perspective of a more adversarial system, seem unusual. The English Assize trial, or what Professor Langbein calls the "accused speaks" trial, was characterized by lawyer-free exchanges between the victim prosecutor and the accused defendant.<sup>64</sup> Defendants were required to answer the charges but were not put under oath.<sup>65</sup> Cases were decided rapidly, typically within minutes.<sup>66</sup> There was no plea bargaining, and defendants were often cautioned not to plead guilty so they could beg mercy in sentencing from the court.<sup>67</sup> In addition, the relations between judge and jury were very informal.<sup>68</sup>

In the absence of counsel to direct witnesses or present evidence, the task fell to judges to direct felony trials.<sup>69</sup> Cockburn describes the arrival of the judges into town as an occasion "met by trumpeters . . . attended by pike- and liverymen, specially clothed for the occasion," and "welcomed . . . with bells, music, and occasionally a Latin oration."<sup>70</sup> One common feature of the assize trial was "the constant and pervasive influence of judicial interference."<sup>71</sup> "Judges commonly interjected comments at every stage of the 'altercation' between prisoner and witnesses."<sup>72</sup>

Pre-trial procedure saw swift changes after the passage of the Marian Committal Statutes in 1555.<sup>73</sup> This introduced the role of the Justice of Peace to the pre-trial process and worked to reinforce citizen prosecution.<sup>74</sup> The Justices of the Peace could issue search-and-arrest warrants, and they had committal power.<sup>75</sup> However, the statute did not require the Justices of the

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61. COCKBURN, *supra* note 13, at 61.

62. *Id.* at 62.

63. Smith, *supra* note 48, at 29 (explaining that an official system of public prosecution did not emerge until the mid-nineteenth century); LANGBEIN, *supra* note 11, at 2, 11.

64. LANGBEIN, *supra* note 11, at 48.

65. *Id.* at 14.

66. *Id.* at 16.

67. *Id.* at 18-20; *see also* Nancy Amoury Combs, *Copping A Plea To Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 46-48 (2002).

68. LANGBEIN, *supra* note 11, at 22.

69. *Id.* at 15.

70. COCKBURN, *supra* note 13, at 65.

71. *Id.* at 122.

72. *Id.*

73. These statutes were named after Queen Mary. For a discussion of the specific ramifications of the Marian statutes, *see* J.M. Beattie, *Sir John Fielding And Public Justice: The Bow Street Magistrates' Court, 1754-1780*, 25 LAW & HIST. REV. 61, 89-90 (2007); *see also* United States v. Crawford, 541 U.S. 36, 52-53 (2004) (citing Sir JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883)).

74. LANGBEIN, *supra* note 11, at 40-41.

75. *Id.* at 40

Peace to go outside the original victim's testimony or to gather witnesses.<sup>76</sup> The Justices of the Peace were also allowed to bind over witnesses and the victim (that is, to issue an order compelling persons to appear at trial).<sup>77</sup> These measures were put in place as a reaction to the perceived under-prosecution of crimes.<sup>78</sup> Under-prosecution was linked to various circumstances: laziness in bringing charges; adverse feelings towards the use of the death penalty; lack of money for the victim; and intimidation.<sup>79</sup> The character of the Justice of the Peace infused the Marian system with a new pro-prosecution energy; instead of the victim having the discretion to decide whether to prosecute and also having to find and bind over witnesses with limited resources, it was now the job of the Justice of the Peace to help the victim prepare his case.<sup>80</sup>

Many criticized the position of the Justice of the Peace as injecting a strong prosecutorial bias.<sup>81</sup> There was no power to dismiss for lack of evidence, and thus an accusation could result in severe hardships and imprisonment for the accused.<sup>82</sup> The prosecution had a clear advantage in that the Justice of the Peace helped hold over the witnesses and the accused.<sup>83</sup> Further, the victims and witnesses for the prosecution were placed under oath at trial, whereas the defendant was not under oath.<sup>84</sup>

The life of an assize judge was not always easy. Some judges found themselves paying out of pocket for expenses, and others found deplorable conditions in housing and facilities.<sup>85</sup> But not all assize judges found their jobs so burdensome; indeed, some assize judges enjoyed lavish "gifts of money, drink, game, fish and other provisions . . . received from sheriffs, gentry, and corporations on their circuit."<sup>86</sup> The assize system provided for uniformity and local expertise without decentralization of the justice system.<sup>87</sup> Upon consideration of "the importance of assizes to local justice and administration, the durability of the system, and the extent to which it has been exported to countries overseas," it becomes apparent how vital this process was to the development of our modern system.<sup>88</sup>

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76. *Id.* at 41.

77. *Id.* at 43-44.

78. *See id.* at 41, 150.

79. *Id.* at 150-51.

80. LANGBEIN, *supra* note 11, at 43.

81. *See id.*

82. *See* Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 517-22 (2007).

83. LANGBEIN, *supra* note 11, at 41.

84. *Id.* at 51-52.

85. *See* COCKBURN, *supra* note 13, at 57.

86. *Id.* at 56.

87. *Id.* at ix-xi.

88. *Id.* at ix.

Juries were difficult to empanel and enforce.<sup>89</sup> Respected free-holders were typical jurors.<sup>90</sup> Judges used contempt proceedings to have jury bills returned as directed.<sup>91</sup> Service on ten or more panels was not uncommon.<sup>92</sup> In addition, judicial bullying was commonplace; judges threatened to extend assizes indefinitely and to imprison jurors or deprive them of food and rest.<sup>93</sup> Judges sometimes even enacted punishments for verdicts contrary to the instruction.<sup>94</sup>

A typical assize session proceeded with the first batch of bills dispatched by lunch on the first day.<sup>95</sup> Proceedings on the indictments began with jailers leading groups of prisoners, manacled and chained together, into the court.<sup>96</sup> “[P]risoners were called to the bar one by one, in the order in which their indictment appeared on the file.”<sup>97</sup> “The indictments were then read in English to the accused and each [pled] guilty or not guilty.”<sup>98</sup> This process continued until the number of prisoners indicted reached an amount “convenient” for trial by one petit jury.<sup>99</sup>

At trial, Crown witnesses were heard first.<sup>100</sup> The examination of the accused, taken by the Justice of the Peace, was read to the jury only if the examination constituted evidence for the Crown.<sup>101</sup> Until 1702, the defendant and any defense witnesses remained un-sworn; judges either asked the defendant to stand in fear of God or told the jury not to attach too much weight to the testimony.<sup>102</sup> Defense witnesses were not barred from court proceedings, but the judge had almost unfettered discretion to allow or

89. *Id.* at 111; Willis, *supra* note 36, at 197.

90. COCKBURN, *supra* note 13, at 111; James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 140-45 (1983).

91. COCKBURN, *supra* note 13, at 114.

92. *Id.* at 119.

93. *Id.* at 114-15.

94. *Id.*; *see, e.g.*, Mitnick, *supra* note 39, at 206:

The much-celebrated decision in *Bushell's Case* concerned a writ of *habeas corpus* sued out by Edward Bushell, who had served as a juror in the infamous trial of the Quaker leaders William Penn and William Mead for unlawful assembly and conspiracy. On rendering their verdict, the jurors were fined for acquitting the defendants against the weight of the manifest evidence and the direction of the court, and Bushell was subsequently jailed for refusing to pay his fine.

*Id.*

95. COCKBURN, *supra* note 13, at 116.

96. *Id.* at 117.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 120; LANGBEIN, *supra* note 11, at 48-56.

101. COCKBURN, *supra* note 13, at 120; *see* LANGBEIN, *supra* note 11, at 48, 258.

102. COCKBURN, *supra* note 13, at 121.

exclude witnesses.<sup>103</sup> Those charged with treason or felonies were allowed no legal representation.<sup>104</sup>

A defendant faced great pressure to speak in his own defense; the jury expected a defendant to give a clear accounting of events without the luxury of “hiding behind counsel” to make evidentiary objections or arguments.<sup>105</sup> The need for a defendant to address the court and provide evidence on his own behalf, and the view that defense attorneys impeded truth-finding, kept defense counsel out of the court.<sup>106</sup>

### C. Role of Other Public Officials

Other public officials performed certain aspects of the investigation and presentation of evidence to the fact-finder.<sup>107</sup> “At trial a variety of public officials might assume forensic roles in presenting evidence. For example, the law officers of the crown traditionally tried cases . . . deemed to affect the critical interests of the state.”<sup>108</sup> “Several governmental and quasi-governmental entities—including the Mint, the Bank of England, the Post Office, and the Treasury—employed officials ‘whose responsibility included investigating and prosecuting criminal cases on behalf of the department.’”<sup>109</sup>

### D. Changes at the Turn of the Seventeenth Century

At the turn of the seventeenth century, there was an increase in the severity of punishment, and the death penalty was extended to cover hundreds of offenses, both petty and severe.<sup>110</sup> The death penalty was strictly enforced—from 1688 to 1718, half of the offenders sentenced to death were executed.<sup>111</sup>

There was also a growth of public prosecution coinciding with the movement to strengthen the moral fiber of the nation.<sup>112</sup> In 1691, the the

103. LANGBEIN, *supra* note 11, at 53-56.

104. COCKBURN, *supra* note 13, at 121.

105. LANGBEIN, *supra* note 11, at 48; COCKBURN, *supra* note 13, at 122 (“Since the accused commonly had no counsel, no notice of the evidence against him, and no opportunity to frame his defen[s]e, assize trials at this point normally degenerated into what Sir Thomas Smith called an ‘altercation’ between prisoner and prosecutor and witnesses.”).

106. LANGBEIN, *supra* note 11, at 61-63.

107. Smith, *supra* note 48, at 37; LANGBEIN, *supra* note 11, at 113.

108. *Id.* at 37.

109. *Id.* (quoting LANGBEIN, *supra* note 11, at 113).

110. 2 RADZINOWICZ, *supra* note 12, at 1 (noting that “[i]n the latter part of the eighteenth century more than three quarters of all executions were for offences against property.”); *see generally* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990).

111. 2 RADZINOWICZ, *supra* note 12, at 1.

112. *Id.* at 2-4.

Society for the Reformation of Manners was created.<sup>113</sup> While initially created to uphold moral values, these moral reform societies also became tools of law enforcement.<sup>114</sup> Often a society would establish “a number of paid and well-trained agents” in the different districts of the town.<sup>115</sup> Each agent was provided with blank warrant forms covering the various offenses that were to be prosecuted, focusing mainly on vice and immorality.<sup>116</sup> These warrants were taken before a magistrate and certified.<sup>117</sup> After certification, the warrants would be delivered to constables by society members.<sup>118</sup> A member of the society was always in attendance at each Quarter session.<sup>119</sup>

In addition to grass-roots type organizations, the government also took steps to curb the rate of crime.<sup>120</sup> Increases in thefts, robberies, and murders were “attributed to the lack of ‘due and sufficient Encouragement given, and Means used, for the Discovery and Apprehension of such Offenders.’”<sup>121</sup>

#### 1) Statutory Rewards

A number of “parliamentary awards” were offered under statute for the prosecution of property offenses and other crimes.<sup>122</sup> “The government, local authorities, private companies and even private individuals all offered [financial] inducements to robbers, thieves, embezzlers and murderers to betray their accomplices and to spy upon their companions.”<sup>123</sup> Initially, there was an *ad hoc* system of rewards, and amounts varied significantly.<sup>124</sup> Later,

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113. *Id.* at 4. This society and others like it were composed of “persons of Eminency in the Law, Members of Parliament, Justices of the Peace, and considerable Citizens of London of known Abilities and great Integrity.” *Id.* For a modern perspective on efforts to legislate moral reform, see Mario Rizzo, *The Problem of Moral Dirigisme: A New Argument Against Moralistic Legislation*, 1 N.Y.U. J.L. & LIBERTY 790 (2005).

114. 2 RADZINOWICZ, *supra* note 12, at 4, 8; see also ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION 39 (1999) (noting that, in general, the Societies for Reform of Manners “were decidedly less interested in individual or personal immorality; their target was public vice, their goal community virtue and orderliness.”); Norma Landau, *Indictment for Fun and Profit: A Prosecutor’s Reward at Eighteenth-Century Quarter Sessions*, 17 LAW & HIST. REV. 507 (1999).

115. 2 RADZINOWICZ, *supra* note 12, at 14–16.

116. *Id.* at 14.

117. *Id.*

118. *Id.*

119. *Id.*; see also Charles J. Reid, Jr., *Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged*, 79 CORNELL L. REV. 1158, 1190 (1994).

120. See sources cited *supra* notes 114 & 119.

121. 2 RADZINOWICZ, *supra* note 12, at 29.

122. *Id.* at 57; Landau, *supra* note 114, at 507.

123. 2 RADZINOWICZ, *supra* note 12, at 33; Landau, *supra* note 114, at 507–08 LANGBEIN, *supra* note 11, at 148.

124. 2 RADZINOWICZ, *supra* note 12, at 35. For example, in 1681 there was a reward of 500 pounds offered for the discovery of the person who had defaced the Duke of York’s portrait in Guildhall. *Id.*

these rewards became institutionalized through Royal Proclamation, orders, or letters.<sup>125</sup>

## 2) Pardons

A system also evolved in which a person accused of crime could receive pardons for all crimes “of the same nature” if he procured the conviction of two of his associates.<sup>126</sup> These “positive engagements of immunity” turned thief against thief, relying on the theory that it takes a criminal to catch a criminal. This system also encouraged false accusations.<sup>127</sup> In addition to these statutory pardons, a more *ad hoc* system developed to secure accomplice testimony.<sup>128</sup> In exchange for a full confession, an accused could petition the magistrate for a more lenient punishment.<sup>129</sup> The recommendation of a lighter sentence or pardon was conditioned on a conviction of the accomplices.<sup>130</sup> The idea was that the accuser became a witness for the Crown and the evidence would be used to convict.<sup>131</sup> This system arguably provided the material incentive to induce perjury and often resulted in false accusations made by “desperate villains.”<sup>132</sup>

## 3) Defense Counsel

In England, the practice of prohibiting defense counsel in felony trials continued until 1836.<sup>133</sup> Defense counsel was allowed into normal

125. *See id.* at 57. “One of the earliest, if not the earliest, statute which made provision for a ‘parliamentary award’ was passed in 1692 with a view to encouraging the discovery and capture of highwaymen.” *Id.* It offered forty pounds for the capture and successful prosecution of the offender, with the reward to be paid a month after the conviction upon production of a certificate signed by the judge who had tried the offender. *Id.*

126. *Id.* at 40-41; LANGBEIN, *supra* note 11, at 158; *see also* United States v. Ford (*The Whiskey Cases*), 99 U.S. 594, 604-05 (1878) (noting practice of “approvement” under English common law, where accused could implicate accomplice for pardon).

127. LANGBEIN, *supra* note 11, at 158-60. For example, the Bum Boat Act protected customs and revenue by providing an incentive system for crimes against vessels on the Thames River. *See* 2 RADZINOWICZ, *supra* note 12, at 40-42.

128. *See* LANGBEIN, *supra* note 11, at 158.

129. 2 RADZINOWICZ, *supra* note 12, at 43; *see* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 366-67 (1986) (“Both the authorities and private prosecutors actively sought the cooperation of accomplices as the most likely means of apprehending and convicting offenders. What was offered was usually described as a pardon. But in fact . . . accomplices were most often in practice granted immunity from prosecution.”).

130. 2 RADZINOWICZ, *supra* note 12, at 48-49; *see* BEATTIE, *supra* note 129, at 367; LANGBEIN, *supra* note 11, at 160.

131. 2 RADZINOWICZ, *supra* note 12, at 43.

132. LANGBEIN, *supra* note 11, at 160-63; 2 RADZINOWICZ, *supra* note 12, at 43-44.

133. COCKBURN, *supra* note 13, at 122; John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1054.

subcategories, however—the inroad had occurred earlier felony trials, first by statute and subsequently by the discretion of judges on an *ad hoc* basis.<sup>134</sup>

Practices first began to change after the Treason Act of 1696.<sup>135</sup> As a reaction to the instability in the 1670s and 1680s and to a series of major treason trials—including the Popish Plot in 1678, the Rye House Plot of 1683, and the Monmouth's Rebellion—this act extended the right to counsel for defendants in treason trials.<sup>136</sup> The Treason Act's purpose was to provide additional safeguards against perceived abuses by the Crown and the bias of the bench.<sup>137</sup> However, the Act only extended the right to counsel in pre-trial matters; lawyers were not allowed to address the jury.<sup>138</sup>

In the 1730s, judges began allowing defense counsel for ordinary felony trials.<sup>139</sup> While it is not clear how the practice began, it seems to have been premised on the discretion of the judge and used, at least initially, on an *ad hoc* basis.<sup>140</sup> When counsel was allowed into felony trials, it was for the limited purpose of examining and cross-examining witnesses—lawyers were not allowed to address the jury to argue on the defendant's behalf.<sup>141</sup> Defendants

134. Langbein, *supra* note 133, at 1068.

135. LANGBEIN, *supra* note 11, at 78-85.

136. The treason trials of 1685—the “Bloody Assizes”—that followed an abortive rebellion by the Duke of Monmouth marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments. See LANGBEIN, *supra* note 11, at 68, 76; see also Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 220-22 (2005).

137. LANGBEIN, *supra* note 11, at 79-82.

138. *Id.* at 84-85. Even when defense counsel were allowed a role in the English felony cases, counsel preformed their duties “under judicial sufferance”:

[W]hat they might do for their clients was limited by the bench. . . . [I]n particular, [judges] constrained defense lawyers' activities in such a way that the accused were forced to continue to speak for themselves in court. The right to full defense by counsel was not granted until the passage of the Prisoner's Counsel Act of 1836. Until that legislation was enacted, lawyers acting for accused felons were allowed . . . to do what the judges had always done for the defendant: to examine and cross-examine witnesses and to speak to rules of law. Counsel were not allowed, however, to act in those areas in which defendants had always been on their own. In particular, counsel were not allowed to speak to the jury on their client's behalf or to offer a defense against the facts put in evidence. Until 1836, prisoners who said that they wished to leave their defense to counsel were told that that was not possible and that they must speak for themselves.

J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trials in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 230-31 (1991).

139. LANGBEIN, *supra* note 11, at 84-85, 177; see Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 93 (1995).

140. LANGBEIN, *supra* note 11, at 78-85.

141. Langbein, *supra* note 133, at 1054. The English common law did not provide for the defendant's right to subpoena witnesses to testify on his behalf; rather, the right to call witnesses in England was not established until legislation was passed in the late seventeenth and

continued to play a vital role in the trial, and were required to testify and provide vital evidence in the trial.<sup>142</sup> A defendant was not allowed the “right to remain silent,” nor was the defendant allowed to “hide behind” counsel’s arguments.<sup>143</sup>

In admitting counsel, judges were responding to a complex set of developments in the pattern of prosecution: the urbanization of the cities; increases in crime and criminality; and more transient criminal populations.<sup>144</sup> Experimentation with organizing and paying for police also gained prevalence.<sup>145</sup> Towards the end of the eighteenth century, solicitors played a growing role in the work of investigating cases.<sup>146</sup> Investigation and prosecution became synonymous.<sup>147</sup> In addition to the Treason Act and the ever-increasing role of prosecutors, the government also passed more reward systems.<sup>148</sup>

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early eighteenth centuries, which was interpreted to provide for the right of compulsory process. *Id.* at 1055-56.

142. LANGBEIN, *supra* note 11, at 85.

143. Beattie, *supra* note 138, at 230-31; see also Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986):

The notion of an attorney, that is one who is legally authorized to act in place of another and whose actions are binding on the other, did not come easily to English practice. For a long time, a person could not employ an attorney to make a plea in the person’s place without a specific grant of authority from the King. The underlying idea was that everyone should physically appear in court to represent themselves in the pleading stage of an action. At the trial stage, the trier of fact rather than the litigant examined witnesses and developed facts.

*Id.* at 6.

144. See LANGBEIN, *supra* note 11, at 108.

145. *Id.* For a discussion of similar eras of experimentation with new approaches to policing in the midst of demographic shifts, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 358-65 (1993).

146. LANGBEIN, *supra* note 11, at 120-23; see also Martineau, *supra* note 143, at 5-6:

The significance of orality in English court proceedings can best be understood by examining the history of the two branches of England’s legal profession, solicitors and barristers. Essentially, solicitors handle the client’s affairs outside of the courtroom while barristers act as courtroom advocates. With regard to litigation, solicitors prepare the documents filed with the court while barristers speak for the clients in open court. These differences stem from the beginning of the English system when both the plea and the trial stages of litigation were oral. The plea stage was done by the litigant alone.

*Id.* at 5-6 (citations omitted).

147. See LANGBEIN, *supra* note 11, at 109.

148. See *id.* at 148.

Because judges were so powerful, they had the discretion to allow defense counsel for the limited purpose of cross-examining witnesses.<sup>149</sup> With time, this discretionary practice turned into a substantive right.<sup>150</sup> The interjection of counsel into the trial effectively ended the altercation trial.<sup>151</sup> It silenced the accused, marginalized the judge, and broke up the working relationship of the judge and jury.<sup>152</sup> What began as *ad hoc* safeguards for defendants—the allowance of attorneys and exclusionary rules of evidence—eventually became doctrinal law. Ironically, it was trial judges’ great discretion in allowing these changes that eventually led to their marginalization from their traditional roles in the trial.

In addition to allowing defense counsel into the trial, judges also began to create rules of character, corroboration, and confession to protect the defendant.<sup>153</sup> Counsel played no role in the initial development of evidence law, but the interjection of counsel put pressure on the bench to turn discretionary practice into rule.<sup>154</sup> In addition, lawyers turned out to be crucial to consistent application of the rules.<sup>155</sup> Creation of the law of evidence, like the decision to allow defense counsel, limited the work of judges.<sup>156</sup> What would seem to have been an improvement in safeguarding criminal defendants and a response to the prosecutorial initiatives of the eighteenth century had “unbalanced the trial” and risked prosecution-sponsored perjury.<sup>157</sup>

In the 1730s, altercation gave way to adversarial criminal trial, and lawyers assumed a more commanding role at trial.<sup>158</sup> Observers of the English trial system during this time viewed the judge as a stranger in his own courtroom.<sup>159</sup> The slow pace of the development of the law of evidence and the interjection of counsel into the trial allowed the institution of defense counsels to take a stronghold in the case.<sup>160</sup> In the second half of the eighteenth century, the defendant was silenced and the accused could just defer to counsel—a concept that made its way into the pre-trial process. The initial idea was that defense counsel would supplement the questions by the court.<sup>161</sup> As lawyers grew increasingly adept at the gathering and presentation of evidence, the bench was placed “at an awkward disadvantage.”<sup>162</sup> Now the judge, instead of being the powerful director of evidence, came to court

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149. *Id.* at 177.

150. *Id.*

151. *Id.*

152. *Id.*

153. *See* LANGBEIN, *supra* note 11, at 177.

154. *Id.* at 242.

155. *Id.*

156. *Id.* at 179.

157. *Id.* at 251.

158. By the end of the eighteenth century, one-quarter to one-third of defendants in the Old Bailey had benefit of counsel. *Id.* at 170.

159. LANGBEIN, *supra* note 11, at 253.

160. *See id.* at 177, 251.

161. *Id.* at 291.

162. *Id.* at 312.

lacking pretrial preparation, which undercut the idea that the court could be counsel for the accused.<sup>163</sup> This signaled a structural shift in trial procedure and made way for the division of the burdens and articulations of the case between prosecution and defendant.<sup>164</sup> A trial was no longer a free-form inquiry.<sup>165</sup> Unfortunately, the trial judge became “largely ignorant of the case he was about to try.”<sup>166</sup> In essence, the interjection of defense counsel changed the theory of criminal trials. Jurors no longer joined the conversation, asked for witnesses, or volunteered information.<sup>167</sup> In the last quarter of the eighteenth century, it was rare for jurors to comment on the case.<sup>168</sup> Judges retreated from the old pattern of involvement in the merits of the jury’s verdict, eventually losing their ability to identify and correct juror error.<sup>169</sup> In addition, judges became more circumspect about commenting on the evidence.<sup>170</sup> It may be argued that the “justice system” reached a point where it abandoned the truth-seeking role of judge and jury and turned to a more adversarial system. While a two-sided adversarial system was better for a defendant than a one-sided partisan system, something was lost: now, neither side was seeking the truth.<sup>171</sup> The reaction to perceived deficits in the pretrial procedure prior to the allowance of counsel for the accused led to deficiencies when the judge processed the case for the jury. All of these factors led to allowing counsel to participate in criminal trials on behalf of the accused.

### PART III. MODERN TRIALS

In the United States, when one wants to resolve a dispute, there is a trial. Each side selects its own advocate, and the judge and jury make their decisions based on the evidence presented in court. “We have relied on trials for our entire history as a nation.”<sup>172</sup>

The modern trial “can be characterized as trial by argument.”<sup>173</sup> Typically each of the opposing sides argues its case “according to a set of fixed and formal rules.”<sup>174</sup> Similar to trial by combat, the modern adversarial trial

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163. *Id.*

164. *Id.* at 313.

165. LANGBEIN, *supra* note 11, at 313.

166. *Id.*

167. *See id.* at 321.

168. *Id.* at 320.

169. *Id.* at 321.

170. *Id.* at 321-22.

171. LANGBEIN, *supra* note 11, at 332.

172. Rubin, *supra* note 14, at 261.

173. *Id.* at 277.

174. *Id.*

purports to “find truth” through conflict.<sup>175</sup> One of the major tools used in this combat is cross-examination.

Cross-examination has been heralded as the result of common law tradition and the definitive forensic device for uncovering the truth.<sup>176</sup> However, serious concerns arise with reliance on cross-examination as the exclusive engine for truth-finding.<sup>177</sup> Many practitioners misuse the device or abuse witnesses in the process.<sup>178</sup> Trial becomes sport, or a battle to be won, instead of a process designed to uncover the truth.<sup>179</sup> Prosecutors may lose sight of the goal of seeking justice and rely on the adversarial process to produce suitable results.<sup>180</sup> Could allowing more participation by the judge and jury during trial fix the defects inherent in an adversarial system?

### *A. Role of Judges*

The modern judge is the “chief operating officer” of the trial.<sup>181</sup> Her job is to make sure that the trial progresses quickly, efficiently, and predictably.<sup>182</sup> The Federal Rules of Evidence allow a judge some discretion to call witnesses and to cross-examine these witnesses.<sup>183</sup> Further, a judge may, when

175. *But see* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1367-68 (1985) (arguing that the purpose of trials is to produce verdicts that the parties will accept, not to reveal the truth).

176. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §1362 & n.1; Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 117 (1997) (“The older handbooks on advocacy frequently allude to the almost supernatural power of the experienced trial lawyer—the power to confront and break the false witness.”).

177. Underwood, *supra* note 176, at 119-20.

178. *See* FED. R. EVID. 412 advisory committee’s note (“The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”); R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801, 803-07 (1995).

179. Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 13-14 (2006).

180. *See* Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 220-22 (2005).

181. STEVEN FRIEDLAND ET AL., EVIDENCE LAW AND PRACTICE. 30 (3d ed. 2007).

182. *Id.*

183. Federal Rule of Evidence 614 provides for the judge’s right to question witnesses:

(a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

appropriate, comment on the evidence. While these measures are allowed, most courts stress extreme caution,<sup>184</sup> and the case law shows that such practices are not always condoned.<sup>185</sup> Judges must practice restraint, avoid acting in such a way as to “tilt” or direct the jury’s verdict, and refrain from attempting to control jury deliberations.

To avoid reversal or censure, judges today must sit as referees, processing the case to the jury, instead of asking the questions that need to be asked.<sup>186</sup> Criticism abounds for judges cross-examining witnesses—the result is considered to taint the process, creating the perception that the judge is biased or commenting on the evidence.<sup>187</sup> It has been argued that courts should avoid involving themselves in the presentation of evidence because doing so encroaches on the traditional adversarial system of justice.<sup>188</sup> This argument might be persuasive if a pure adversarial system, free of defects, could be

184. *United States v. Washington*, 417 F.3d 780, 784 (7th Cir. 2005) (“[T]he judge must refrain from ‘assum[ing] the role of an advocate for either side.’” (quoting *United States v. Martin*, 189 F.3d 547, 553 (7th Cir. 1999))). While the trial judge may, when the situation warrants, discuss the evidence he must do so impartially and abstain from advocacy for either party. *Boatright v. United States*, 105 F.2d 737, 739 (8th Cir. 1939); *Cline v. United States*, 20 F.2d 494, 496 (8th Cir. 1927); *Cook v. United States*, 18 F.2d 50, 52 (8th Cir. 1927); *Hurwitz v. United States*, 299 F. 449, 451 (8th Cir. 1924); *Weare v. United States*, 1 F.2d 617, 618 (8th Cir. 1924); *Stokes v. United States*, 264 F. 18, 25-26 (8th Cir. 1920).

185. *See, e.g.*, *Quercia v. United States*, 289 U.S. 466, 470 (1933); *United States v. Godwin*, 272 F.3d 659, 679-81 (4th Cir. 2001); *United States v. Fernandez*, 480 F.2d 726, 737-38 (2d Cir. 1973); *United States v. Cassagnol*, 420 F.2d 868, 879 (4th Cir. 1970); *Pollard v. Fennell*, 400 F.2d 421, 424 (4th Cir. 1968); *Bursten v. United States*, 395 F.2d 976, 983 (5th Cir. 1968); *Blumberg v. United States*, 222 F.2d 496, 501 (5th Cir. 1955); *United States v. Green*, 429 F.2d 754, 760 (D.C. Cir. 1970); *Blunt v. United States*, 244 F.2d 355, 365-66 (D.C. Cir. 1957). *Cf.* FED. R. EVID. 614 advisory committee’s note (“While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. . . . [T]he judge is not imprisoned within the case as made by the parties.”); *Griffin v. United States*, 164 F.2d 903 (D.C. Cir. 1947); MCCORMICK ON EVIDENCE § 8, 16 (Kenneth S. Broun ed., 6th ed. 2007) (1954); JOHN M. MAGUIRE, JACK B. WEINSTEIN, ET AL., CASES AND MATERIALS ON EVIDENCE 303-304 (5th ed. 1965); WIGMORE, *supra* note 10, at § 2484.

186. There are many judges who would disagree with this assessment. *See, e.g.*, *United States v. Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974) (“The precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. He is not a ‘mere moderator.’”) As Justice Frankfurter put it, “Federal judges are not referees at prize-fights but functionaries of justice.” *Johnson v. United States*, 333 U.S. 46, 54 (1948) (Frankfurter, J., dissenting in part).

187. *See, e.g.*, *United States v. Norris*, 873 F.2d 1519, 1525-26 (D.C. Cir. 1989); *Kramer v. United States*, 408 F.2d 837, 841 (8th Cir. 1969); *Texas Pac.-Mo. Pac. Terminal R.R. v. Welsh*, 179 F.2d 880, 881-82 (5th Cir. 1950); *Pariser v. New York*, 146 F.2d 431, 433 (2d Cir. 1945). Some would argue that the jury’s purpose is to “ascertain the truth.” *See, e.g.*, Mark C. Roberts, II, *Evidence—Witnesses—Jurors May Not Pose Written Questions To Witnesses in Criminal Cases*, 24 ST. MARY’S L.J. 1421, 1422 (1993).

188. Kenneth R. Levine, Note, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461, 1481 (1985).

achieved. A major flaw in the current system, however, is that an advantage in resources can lead to an advantage in litigation.

Critics claim that allowing a judge to have more control over the process would restrict an attorney's ability to direct her case.<sup>189</sup> More control by judges would mean less control by attorneys. Arguably, the attorney is in the better position to present evidence on behalf of the party. Others argue that the judge is not in the best position to participate in the gathering of evidence because there is the possibility the investigation will not be done well, particularly given that the judge is not subject to the same incentives and motivations to pursue complete fact-finding.<sup>190</sup>

### *B. Role of the Modern Jury*

The basic role of the modern jury is to solve factual disputes presented during the course of the trial within the confines and rules given to it by the court.<sup>191</sup> The jury system is premised on the idea that jurors remain passive and hear information from the advocates, and typically do not ask questions.<sup>192</sup> The core of the adversarial process is the promise that, through the sharp clash of proofs presented by adversaries in a highly structured forensic setting, "truth" will emerge. The information upon which the jury may base its decision must be sanitized by the trial process.<sup>193</sup>

Tracing the roots of the adversary system back to early English common law, we see that juries were originally required to be neither neutral nor passive, but rather were expected to actively investigate disputes and report their conclusions to a judge or court officer acting on behalf of the sovereign.<sup>194</sup> Over several centuries, English (and later American) trial procedure evolved so that opposing litigants, represented by professional advocates both before and during trial, presented evidence to a jury in open court. Eventually, the jury came to be viewed as a completely "neutral and passive decision-maker."<sup>195</sup> Juries are expected to refrain from making any judgments until the conclusion of the contest and are strictly prohibited from

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189. It has been urged the narrative is the strongest tool that a lawyer has to convince a jury. See generally Abbe Smith, *Telling Stories And Keeping Secrets*, 8 UDC/DCSL L. REV. 255, 255 (2004).

190. Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175, 177 (2003).

191. Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 119 (1991).

192. Lisa M. Harms, Comment, *The Questioning of Witnesses by Jurors*, 27 AM. U.L. REV. 127, 129 n.10 (1977) (citing Jack Pope, *The Proper Function of Jurors*, 14 BAYOR L. REV. 365, 366-67 (1962)).

193. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2 (1984).

194. See White, *supra* note 25, at 15.

195. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROB. 285, 288 (1999); see also LANGBEIN, *supra* note 11, at 64-65.

becoming actively involved in the gathering of evidence.<sup>196</sup> “Adversary theory suggests that if the decision-maker strays from the passive role, he runs a serious risk of prematurely committing himself to one or another version of the facts and of failing to appreciate the value of all of the evidence.”<sup>197</sup> Rules of evidence evolved and were honed to achieve this end.<sup>198</sup>

There have been many calls for reform of the jury system.<sup>199</sup> The Federal Rules of Evidence neither directly permit nor directly restrict jurors from asking witnesses direct questions.<sup>200</sup> Potential problems perceived to exist in the oral questioning of witnesses by jurors in open court include prejudice to a party and loss of control of the trial by the court. Several courts have discouraged the process of questioning by jury members in open court because the jury is thought to be unqualified to conduct such an examination,<sup>201</sup> while other courts have allowed the practice.<sup>202</sup> Furthermore,

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196. However, in many jurisdictions, jurors are allowed to ask questions and add an aspect of truth-seeking to the entire process. See Jonathan M. Purver, Annotation, *Propriety of Juror Asking Questions in Open Court During the Course of Trial*, 31 A.L.R. 3d 872, 878-80 (1970).

197. LANDSMAN, *supra* note 193, at 2-3; see generally Blinka, *supra* note 179, at 13-14 (outlining adversary theory).

198. LANGBEIN, *supra* note 11, at 243-46; see generally Blinka, *supra* note 179, at 15-21.

199. For example, in the Second Circuit, “twenty-eight judges throughout the circuit began the experimental use of one or more of the following procedures,” including in relevant part:

4. Advising jurors that they may seek to have questions asked of any witness at the conclusion of that witness’s examination;
5. Affirmatively advising jurors that they may take notes;
6. Furnishing the jury with a post-delivery written copy of the charge, which the jury may take into the jury room for use during deliberations; and
7. Tape-recording the court’s charge and furnishing the jury with the tape and a player for use during deliberations.

Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted By District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 424 (1985) (citations omitted).

200. The only guidance the Federal Rules of Evidence give is Rule 611, which states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

FED. R. EVID. 611(a). The rule goes further to state that “The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” FED. R. EVID. 611(b).

201. *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995).

202. For example, the Arizona Supreme Court amended its Criminal Procedure in 1995 to state:

counsel may fear that its objections to juror questions will put the party in a difficult position.<sup>203</sup> Commentators disagree about the pros and cons of jury participation in questioning witnesses.<sup>204</sup>

#### IV. CONCLUSION: LESSONS LEARNED

Can all of the shortcomings of the modern adversary system be solved by increasing the roles judge and jury? Because no one person or entity in our

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Jurors shall be instructed that they are permitted to submit to the court written questions directed to witnesses or to the court; and that opportunity will be given to counsel to object to such questions out of the presence of the jury. Notwithstanding the foregoing, for good cause the court may prohibit or limit the submission of questions to witnesses.

17 ARIZ. R. CRIM. P. 18.6(e). The Supreme Court of California has approved of the practice of permitting jurors to submit questions, through the trial court, for witnesses. In *People v. Cummings*, 850 P.2d 1, 47, 48 (Cal. 1993), the court rejected the argument that such a procedure violated due process by permitting jurors “to depart from their role as neutral fact finders and detached observers.” *See also* *People v. Davis*, 896 P.2d 119, 167-168 (Cal. 1995). The Florida Supreme Court has authorized the practice, but it is important to point out that the court did not endorse it. The court stated that the existence of discretionary authority to allow jurors to ask questions does not imply that juror questions must be allowed, or even that they should be allowed. *See* *Morris v. State*, 931 So. 2d 821, 828-29 (Fla. 2006); *Watson v. State*, 651 So. 2d 1159, 1163 (Fla. 1994).

203. In *Allen v. State*, 807 S.W.2d 639, 641-42 (Tex. App. 1991), the court writes:

Permitting a juror to spontaneously ask a direct, oral question of a witness could create substantial problems as follows:

1. It places counsel “in the intolerable condition of offending [jurors] by objecting or permitting improper or impossible prejudicial testimony to come in without objection;”
2. It causes [jurors] involved to lesson [their] objectivity and causes a premature judgment on some issue of the case;
3. It produces tension or actual antagonism between [jurors] and witnesses as a result of the interaction.

*Id.* (quoting *People v. McAlister*, 213 Cal. Rptr. 271, 277 (Cal. Ct. App. 1985)).

204. *See* Roberts, *supra* note 187, at 1424:

Courts and scholars debate the merits of allowing jury questions. Advocates generally cite five reasons for allowing jury questioning. First, such a system allows jurors to better understand evidence presented to them by permitting them to follow up or clarify evidence presented. Second, jury questioning allows juries to obtain evidence that may have been left out accidentally by counsel. Third, jury questioning more deeply involves the jury in the trial. Fourth, jury questioning alerts the parties as to what jurors are thinking, and provides insight into which issues need clarification or further development. Last, allowing jury questioning enhances the jury’s confidence in arriving at a verdict.

*Id.* at 1424 (citations omitted); *see, e.g.*, *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979) (discussing the propriety of occasionally allowing jurors to question witnesses).

adversarial trial is seeking the truth, sometimes the truth gets lost in the gamesmanship. There is good reason to believe that an active judge and jury have always been a part of the direct history of the modern adversarial trial. Some of the earliest records of the sixteenth and seventeenth century trials show that lawyers rarely participated in criminal trials, as they were thought to impede truth-finding. Therefore, it was the province of the judge to order the presentation of proof, call witnesses, and aid the defendant in cross-examining witnesses. The roles of judges as active truth-finders in common law trials (neutral decision-makers on legal issues, representatives of the Crown, commentators on the persuasiveness of evidence, and oftentimes confronters of the witnesses) contrasts with our perception of judges' roles in today's adversary trial system.

These roles were crucial to the sustained validity of a state-run system of justice. We are too fast to discount this history when we make arguments that judges should have limited discretion or that jurors should sit passively without taking notes or actively engaging in the questioning of witnesses. There were many problems with the historical "informed jury," including local bias and specific knowledge of the alleged crime or the defendant. These issues have been solved in our current adversarial system through effective use of *voir dire*. The problems of the past, in this regard, will not be repeated in our current system.

In addition to the clear historical precedent, research shows that allowing jurors to ask questions does not disrupt the trial process.<sup>205</sup> We can easily integrate a more active jury into our adversary system with few negative consequences.<sup>206</sup> Research shows that there are benefits to providing jurors with a more active role, including enabling jury members to pose questions to witnesses.<sup>207</sup>

First, allowing jurors to ask questions gives great benefits to the jury members themselves.<sup>208</sup> Allowing jurors to ask questions promotes juror understanding and, much as with classroom experiences, allows the jurors to interact with and work through the evidence. Further, juror questioning can

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205. See Michael A. Yarnell, *The Arizona Jury, Past, Present and Future Reform—Executive Summary*, Nov. 7, 2005, <http://michaelyarnell.com/TheArizonaJury-ExecutiveSummary.pdf>.

206. See, e.g., Shari Seidman Diamond et al., *Jurors' Unanswered Questions*, 41 CT. REV. 20, (2004), available at <http://aja.ncsc.dni.us/courtrv/cr-41-1/CR41-1Diamond.pdf> (Research performed on jury participation supported by research grants from the State Justice Institute, the National Science Foundation and the American Bar Foundation). For a good resource guide to jury trial innovations in the United States, see Nat'l Ctr. for State Courts, *Jury Trial Innovations, Resource Guide*, <http://www.ncsconline.org/WC/Education/JurInnGuide.htm>.

207. Diamond, *supra* note 206, at 21; see also *State v. Fisher*, 789 N.E.2d 222, 226-28 (Ohio 2003) (reviewing federal and state cases on questioning of the witnesses by the jury).

208. Diamond, *supra* note 206, at 21.

aid in the comprehension of expert witnesses and scientific testimony.<sup>209</sup> In addition, jurors tend to feel more satisfaction with their service when they feel important and connected to this unique experience.<sup>210</sup>

Not only do jurors benefit, but counsel may benefit as well. Juror questions can signal counsel about issues that have not been fully developed and need to be addressed further.<sup>211</sup> Questions posed by the jury may allow the court to correct juror misperceptions in a timely manner.<sup>212</sup> Judges can issue collaborative instructions on these points to alleviate any jury misunderstanding. Further, allowing jurors to pose questions improves communication between the juror and the advocate, allowing a two-sided exchange of information.

With all the positive consequences of juror interaction, there are also some perceived negative consequences.<sup>213</sup> Attorneys worry that jurors will ask inadmissible questions and will become upset when the questions are not allowed.<sup>214</sup> Further, counsel might be at a disadvantage if he or she objects to a question a juror has posed. Studies, however, show that jurors ask relatively few inadmissible questions, and the fear of hurt feelings is easily solved through pre-instruction by the judge.<sup>215</sup> It also helps that the judge can explain to the jury why the law does not permit an answer to the question.<sup>216</sup> Certainly, this is better than the typical “granted” or “sustained” that jurors

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209. See B. Michael Dann et al., *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?*, NAT'L INST. JUST. J., Nov. 2006, at 2, available at [http://www.ojp.usdoj.gov/nij/journals/255/trial\\_innovations.html](http://www.ojp.usdoj.gov/nij/journals/255/trial_innovations.html).

210. Diamond, *supra* note 206, at 21.

211. *Id.*

212. *Id.*

213. Dann, *supra* note 209, at 6.

214. Yarnell, *supra* note 205, at 12-14.

215. For example, Recommended Arizona Jury Instructions (Civil) 4th, Preliminary Instruction No. 11, titled “Questions By Jurors,” provides:

.If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If a particular question is not asked, please do not guess why or what the answer might have been.

REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 4th, *Questions by Jurors* 14 (2005), available at <http://www.myazbar.org/SecComm/Committees/CIJI/CIJI-PDF/Preliminary.pdf>.

216. See Diamond, *supra* note 206, at 24.

hear in response to an objection. Research does not show a lengthy delay because of juror questioning—and, to the extent that some delay does arise, swift procedure does always lead to justice.

It is a fundamental aspect of citizenship to share in government. “The jury, which is the most energetic means of making the people rule, is also the most effective means of teaching it to rule,” said Alexis de Tocqueville. Full and active participation of jurors and judges needs to be recognized as an integral part of the development of the modern adversarial trial. Only after many centuries did attorneys assume an active role in a trial, and not until the mid 1800s were attorneys permitted to address the jury directly to argue on behalf of the accused. Let it be a lesson learned that keeping the tradition of active juror participation alive is a part of our direct history, and this history teaches the importance of helping the judge and jury find truth.