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THE ORIGINS OF THE CONFRONTATION CLAUSE: AN ALTERNATIVE HISTORY

*Randolph N. Jonakait**

I. INTRODUCTION

The origins of the Confrontation Clause¹ are murky.² Early American documents almost never mention the right,³ and the traditional sources for divining the Framers' intent yield almost no information about the Clause.⁴ The firmest historical conclusion is that "the remembered harms or injuries suffered or feared by the colonists which impelled them to add this right to the panoply of guarantees of the [S]ixth [A]mendment cumulate at best to only a sketchy relevant historical background."⁵

Even so, the United States as amicus in *White v. Illinois*⁶ claimed that "the Confrontation Clause's limited purpose is to prevent a particular abuse common in 16th and 17th century England: prosecuting a defendant through the presentation of *ex parte* affidavits, without the affiants ever being

* Professor of Law, New York Law School. I thank Dr. G. Miller Jonakait, Professor Donald H. Zeigler, and Professor John H. Langbein for their copious comments on an earlier version of this article. I alone, however, must be held responsible for the choices of content and interpretation.

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

2. See *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) ("There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."); *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment.").

3. A defendant's right "'to be confronted with the witnesses against him' is seldom mentioned in early historical documents. The precise source of this use of the word 'confront' is obscure. . . ." Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 67 (1969).

4. Congressional intent is virtually impossible to determine since "[t]he clause was debated for a mere five minutes before its adoption." Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981). See also FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 33 (1969) (reasoning that the development of the Sixth Amendment in Congress can not be truly traced).

5. Larkin, *supra* note 3, at 67.

6. 502 U.S. 346 (1992).

produced at trial.”⁷ Consequently, the government continued, the constitutional right of confrontation should not generally limit the admissibility of hearsay except for “those few cases where the statement sought to be admitted was in the character of an *ex parte* affidavit, *i.e.*, where the circumstances surrounding the out-of-court statement’s utterance suggest that the statement has been made for the principal purpose of accusing or incriminating the defendant.”⁸

The Court’s opinion, by Chief Justice Rehnquist, rejected this contention: “Such a narrow reading of the Confrontation Clause, which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases.”⁹ While not equating the hearsay rule and the Confrontation Clause, a century’s worth of cases had forged a path “that recognizes that ‘hearsay rules and the Confrontation Clause are generally designed to protect similar values’ . . . and ‘stem from the same roots.’”¹⁰ The government’s argument “comes too late in the day to warrant reexamination of this approach.”¹¹

In his concurring opinion, however, Justice Thomas maintained that the Court too easily rejected the government’s contention.¹² Thomas, joined by

7. *Id.* at 352.

8. *Id.*

9. *Id.*

10. *Id.* at 353 (quoting *California v. Green*, 399 U.S. 149, 155 (1970); *Dutton v. Evans*, 400 U.S. 74, 86 (1970)).

11. *Id.*

12. “The Court unnecessarily rejects, in dicta, the United States’ suggestion that the Confrontation Clause in general may not regulate the admission of hearsay evidence.” *Id.* at 358 (Thomas, J., concurring). Thomas suggested “that our Confrontation Clause jurisprudence has evolved in a manner that is perhaps inconsistent with the text and history of the Clause itself.” *Id.*

In Justice Thomas’s view, the crucial phrase of the Confrontation Clause is “witnesses against him.” Citing Wigmore, Thomas concluded that “[t]he strictest reading would be to construe the phrase ‘witnesses against him’ to confer on a defendant the right to confront and cross-examine only those witnesses who actually appear and testify at trial.” *Id.* at 359 (citing 5 JOHN HENRY WIGMORE, EVIDENCE § 1397, at 159 (J. Chadbourne rev. ed. 1974)). The Confrontation Clause would then not prohibit any hearsay admissible under evidence law, a conclusion previously drawn by Justice Harlan in *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

Others looking at the words of the Confrontation Clause, however, have concluded that a strict reading of them leads to a much different conclusion. *See, e.g.*, *Idaho v. Wright*, 497 U.S. 805, 813 (1990) (“We have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause.”); *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (“If one were to read this language literally, it

Justice Scalia, concluded that the Confrontation Clause's origin could be found in the English common-law right of confrontation, which emerged around 1600.¹³ That English right evolved as a response to 16th century interrogations of prisoners and witnesses by magistrates, often in secret. These depositions were then admitted at trial without the witnesses testifying.¹⁴ Sir Walter Raleigh's trial provided an example.¹⁵ The primary goal of the Confrontation Clause was to end such abusive proceedings by adopting the English common-law rights that forbade trials based on *ex parte* affidavits or depositions obtained by magistrates.¹⁶ Consequently, the

would require, on objection, the exclusion of any statement made by a declarant not present at trial.”).

In any event, Justice Thomas rejected his literalist view because of “its tension with much of the apparent history surrounding the evolution of the right of confrontation at common law and with a long line of this Court's precedent For those reasons, the pure Wigmore-Harlan reading may be an improper construction of the Confrontation Clause.” *White*, 502 U.S. at 360.

13. “[A] common-law right of confrontation began to develop in England during the late 16th and early 17th centuries. . . . [T]his Court previously has recognized the common-law origins of the [Sixth Amendment] right.” *Id.* at 361 (citations omitted).

14. Justice Thomas reviewed history and determined that:

[i]n 16th-century England, magistrates interrogated the prisoner, accomplices, and others prior to trial. These interrogations were “intended only for the information of the court. The prisoner had no right to be, and probably never was, present.” At the trial itself, “proof was usually given by reading depositions, confessions of accomplices, letters, and the like; and this occasioned frequent demands by the prisoner to have his ‘accusers,’ *i.e.*, the witnesses against him, brought before him face to face. . . .”

Id. (citation omitted).

15. Sir Walter Raleigh was convicted of treason in 1603 although “the Crown's primary evidence . . . the confession of an alleged co-conspirator . . . was repudiated before trial and probably had been obtained by torture” *Id.*

16. The English common-law right evolved “[a]pparently in response to such abuses The Court consistently has indicated that the primary purpose of the Clause was to prevent the abuses which had occurred in England.” *Id.* at 361-62. Justice Thomas argued that the Court took a wrong turn in *Ohio v. Roberts*, 448 U.S. 56 (1980), when it set the general standards for when hearsay could be constitutionally admitted against an accused. *White*, 502 U.S. at 365-66. Before then, in his view, the Court had correctly articulated the primary goal of the Confrontation Clause. Justice Thomas supported his position by citing cases such as *Mattox v. United States*, 156 U.S. 237, 242 (1895) (“The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . .”), and *California v. Green*, 399 U.S. 149, 156 (1970) (“It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on

historical record does not indicate "that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation. . . . The standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment."¹⁷

Neither Justice Thomas nor the government blazed this historical path. Various scholars have concluded that the central, original purpose of the Confrontation Clause was to prevent the abuses that were found in

'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact."). *White*, 502 U.S. at 365 n.2.

The early cases, however, are not quite as clear cut as Justice Thomas indicates. For example, *Mattox*, the Court's first significant Confrontation Clause decision, also states that the purpose of the Clause is to guarantee that

the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox, 156 U.S. at 242-43. While this principle would exclude all hearsay, that general rule does not always control.

There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to consideration of public policy and the necessities of the case.

Id. at 243. The Court permitted the introduction of prior testimony from an earlier trial of the case, concluding that "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.* at 244.

A few years after *Mattox*, the Court held the introduction of judicial records showing that others were convicted of theft, in a trial for receiving stolen goods, violated the Confrontation Clause. *Kirby v. United States*, 174 U.S. 47 (1899). The Court concluded:

[A] fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offence for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

Id. at 55. The early Confrontation Clause cases can thus be read as placing cross-examination at the heart of the right. See also *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (stating that the Confrontation Clause "was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination").

17. *White*, 502 U.S. at 362-63 (Thomas, J., concurring).

seventeenth century English trials or similar abuses in the vice-admiralty courts that enforced the Stamp Act and other customs laws.¹⁸ These histories all see English abuses as the prime force behind the right, and the Confrontation Clause as constitutionalizing the English protections against such abuses. Traditional histories look to England for the meaning of the American right to confrontation.

This article, however, presents an alternative history. It suggests that while seventeenth century English history, and other English actions, may have affected the development of American constitutional rights,¹⁹ the English abuses focused on by the standard histories were not the prime or immediate cause of the Confrontation Clause. This Sixth Amendment provision did not constitutionalize English procedures.

Instead, the Confrontation Clause, and related Sixth Amendment provisions, sought to constitutionalize criminal procedure as it then existed in the states. By the time the Bill of Rights was ratified, America had developed a criminal procedure that diverged significantly from English procedure. America moved more rapidly than England to an adversary system with defense cross-examination at its core. The trial system developed in the colonies and early states guaranteed the opportunity for meaningful defense advocacy. America had moved to a "testing the

18. Several scholars have argued that the trial of Sir Walter Raleigh was the inspiration for the Confrontation Clause. *E.g.*, Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383 (1990); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987); Frank T. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972). Others have argued that the Stamp Act prosecutions produced the Confrontation Clause, *see, e.g.*, Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959). Still others contend that the Clause originated as result of both the Stamp Act prosecutions and the Raleigh trial. *See, e.g.*, Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992). For an excellent discussion of the standard histories of the Clause, *see* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691.

19. Although the Founding Fathers "were well-read in English constitutional history, and they therefore knew the historical background of their desired rights. . . , as time elapsed a strikingly new concept of individual rights evolved in the American colonies. . . . It certainly is a fact that the colonists went beyond their forebears when drafting laws and constitutions (after 1775)" ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776-1791* 3, 12 (1983).

prosecution" form of trials,²⁰ and the drafters wished to guarantee that system in federal courts.

This adversarial system was adopted in early America for a number of reasons, including the fact that it limited governmental power and permitted ordinary people to act in their own self-interest in determining their fates. By constitutionalizing this criminal procedure, the Sixth Amendment became another cog in our constitutional system of checks-and-balances and granted the people more power.

This alternative history challenges more than just the standard histories' assumption that the Confrontation Clause's purpose was to prevent the type of abuses that the colonists suffered at the hands of the British. The history also suggests that the underlying principle of the Supreme Court's present Confrontation Clause jurisprudence—that the Clause's purpose is to help ensure "the accuracy of the truth-determining process in criminal trials"²¹—lacks a historical basis. The alternative history instead indicates that confrontation should operate with other Sixth Amendment rights that affirmatively grant an accused the opportunity for meaningful defense advocacy. At the core of these rights is the opportunity to challenge the information the government relies upon.

This alternative history has a number of strands. While its key is the criminal procedure used by the constitutional generation, it starts by examining English common-law trials before defense counsel were permitted and the transformation of that procedure as defense lawyers insinuated themselves into criminal trials.

II. ENGLISH COMMON-LAW TRIALS

A. *Before the Defense Lawyers*

The eighteenth century common law did not guarantee a criminal defendant the right to counsel. Instead, it actually prohibited the accused from having representation for serious charges. While the prosecutor was free to have counsel assist in all aspects of the prosecution,²² under the common law, a person charged with an ordinary felony could not have an

20. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994).

21. *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

22. During the eighteenth century, the victim often acted as the prosecutor. J. M. Beattie, *Scales of Justice: Defense Counsel and English Criminal Trials in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 221 (1991).

attorney assist in the development of the facts. A defense attorney could help present legal arguments,²³ but could not present evidence, examine or cross-examine witnesses, or address the jury in opening or closing statements. If these were to be done, the accused, unaided, had to do them.

Common law apologists rationalized that defense lawyers were unnecessary because judges had a duty to protect the rights of the accused.²⁴ Furthermore, since the accused knew the facts best,²⁵ a defense through a skilled intermediary would only impede justice.²⁶

23. Judges had the discretion on whether defendants were permitted to have the assistance of counsel to argue legal issues. Alexander Holtzhoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 4 (1944). When counsel was permitted, it was just to discuss the specific legal issue, and fact based arguments were forbidden. *Id.* Furthermore, “[i]f 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.” John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 308 (1978).

24. It was believed “that the judge was impartial and looked with equal suspicion on both sides in a criminal action. . . .” WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 9 (1955). The popular belief of the day was “that the trial judge was to serve as defense counsel for the accused—a revealingly nonadversarial conception.” Langbein, *supra* note 23, at 307-08.

Judges, however, did not fully act as defense counsel. Although “judges would protect defendants against illegal procedure, faulty indictments, and the like[,] [i]t did not mean that judges would help the accused to formulate a defense or act as their advocates.” Beattie, *supra* note 22, at 223.

25. Langbein, *supra* note 23, at 308.

26. The defenders of the common law rule were “satisfied that the innocence or guilt of accused felons was made abundantly clear by their natural responses to evidence as they heard it for the first time.” Beattie, *supra* note 22, at 223. At the time, it was believed that “a criminal proceeding was so simple that any man could understand what was being done.” BEANEY, *supra* note 24, at 11.

Langbein suggests that defense counsel was thought unnecessary because “an inchoate notion of the standard of proof in criminal cases was urged as a sufficient safeguard.” Langbein, *supra* note 23, at 308. He has also suggested that one purpose in restricting defense counsel was to force the accused to speak for himself. Langbein, *supra* note 20, at 1053.

The denial of defense counsel also indicates that courts wanted the defendant to speak. “According to the early modern conception, the defendant’s vulnerability in court was calculated to reveal truth. Obligated to plead the case alone, defendants could not easily hide either their knowledge or ignorance of the facts. Legal practitioners, therefore, strongly believed that it was better that the defendants speak alone than to have a lawyer represent the case.” Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 L. & HIST. REV. 215, 222 (1993) (citations omitted).

Defense counsel, however, were not banned from misdemeanors. Those charged with the less serious crimes could be represented at all stages of a case, not just for legal arguments.²⁷ In other words, "defense counsel was freely allowed in cases of petty crimes, but not where life was at stake."²⁸ The reasons for this anomaly are in dispute,²⁹ but the forces behind another exception, the one adopted by statute that permitted counsel for treason, are clear.

The political trials preceding the Revolution of 1688 caused the executions of innocent people. Defendants had unavailingly protested the unfairness that allowed the prosecution, but not them, to be represented by counsel.³⁰ A few years later, Parliament, apparently hearing voices from the grave, enacted the Treason Act of 1696,³¹ which granted the right to counsel to those charged with treason.³²

27. English law granted defendants the right to counsel in misdemeanor cases. Holtzhoff, *supra* note 23, at 4. Furthermore, in some misdemeanor trials, "not only was counsel permitted; it was required. Misdemeanor cases of importance were tried before the Star Chamber, where a defendant was compelled to have his answers signed by his counsel." Felix Rackow, *The Right to Counsel: English and American Precedents*, 15 WM. & MARY Q. 3, 4-5 (1954) (citation omitted).

28. Langbein, *supra* note 23, at 308.

29. The paradox may have resulted because of the common law's concern about property rights. As Professor Langbein suggests:

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 roads. 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 misdemeanors.

Id. (citations omitted). Not all misdemeanors, however, were of the regulatory sort, and counsel may have been allowed for petty offenses simply because the stakes were so low. "In these minor cases, or misdemeanors, examples of which were libel, perjury, battery, and conspiracy, the state's interest was apparently deemed so slight that it could afford to be considerate toward defendants." BEANEY, *supra* note 24, at 8.

30. Beattie concludes that the legislation granting the right to counsel in treason cases flowed from the Revolution of 1689 as a means of redressing a wrong the now-dominant Whig political class had suffered in the previous decade—the use of charges of treason to destroy political opponents. The unfairness of a procedure under which the case for the Crown was presented by lawyers, often by the attorney general, while defendants were on their own to respond to what might be several hours of oral evidence, was frequently argued in the 1680's.

Beattie, *supra* note 22, at 224.

31. 7 & 8 Wil. 3, c. 3, § 1 (1696). The Act was passed after "[g]reat abuses took place at treason trials during the years immediately preceding the Revolution of 1688. This fact

This reform effort, however, did not extend beyond treason. The legislators may have been concerned with fairness for treason defendants, who were often from the upper classes, but they did not change the rules for those charged with ordinary felonies, who, of course, were more likely to come from the lower orders.³³ The common law rule forbidding defense counsel for ordinary felonies remained unaltered.

Although the system was formally unbalanced, in practice it was more equal. At the beginning of the eighteenth century neither side usually had a lawyer in an ordinary criminal trial.³⁴ The judge, as a result, was the central figure who performed the tasks that are normally performed by modern day attorneys.³⁵

The judge, not a party or lawyer, was the chief interrogator of witnesses.³⁶ The judge interrogated the accused who, even if he did technically have a privilege against self-incrimination, could not in practice refuse to answer. The defendant, unrepresented by counsel, had to speak to make a defense.³⁷ Consequently, many trials were essentially "duel[s] of wit" between the defendant and the judge.³⁸

led to the enactment of the Act of Parliament of [1696] by which persons accused of high treason were accorded the right to be represented by counsel." Holtzhoff, *supra* note 23, at 6 (citations omitted).

32. The Act represented the first time that treason defendants were afforded the right to counsel. Beattie, *supra* note 22, at 224.

33. One scholar has theorized that since "[m]embers of Parliament were all 'political' figures, . . . the reform in 1695 reveals in eloquent terms their idea of a fair judicial proceeding in a case where they might be involved personally." BEANEY, *supra* note 24, at 9. Meanwhile, although "[a]n argument was made in the 1690's that a similar unfairness existed with respect to the trial of felonies, but that had not then been widely persuasive—perhaps because while defendants in treason trials were usually gentlemen, even peers, the accused in most felonies were the poor." Beattie, *supra* note 22, at 224.

Professor Langbein, while agreeing that this differentiation between treason and ordinary felony defendants might seem to be a piece of class legislation, argued that the distinction made some sense: trial judges had acted less impartially in treason trials than in ordinary felony cases; treason law was complex; treason defendants had little chance to communicate with anyone before a trial; and treason cases normally had a prosecuting attorney while ordinary felonies usually did not. Langbein, *supra* note 23, at 309-10.

34. Although "[t]he victim of a felony . . . was free to hire a lawyer to manage the presentation of his or her case[,] . . . in fact few did so." Beattie, *supra* note 22, at 221.

35. Langbein, *supra* note 23, at 282.

36. In the early eighteenth century, witness interrogation involved a two part process. First, the witness provided a narrative and then he was critically questioned by the judge. Stephan A. Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 514 (1990).

37. Langbein's review of cases from the 1670's through the mid-1730's did not reveal

Few trials featured sustained questioning of the accused or witnesses. By modern standards, little information was generally elicited from the witnesses and even less was challenged.³⁹ By today's standards these trial were exceedingly short.⁴⁰ Indeed, the common law felony trials of 1700 are barely recognizable to the modern eye.⁴¹

Judges, thus, controlled English common law criminal trials through their dominance over the development of facts at trial.⁴² That domination was intensified by judicial authority over the jury. Judges did not treat juries as autonomous fact-finders, but instead treated them as a body bound by judicial views of the evidence.⁴³ Due to this judicial domination, criminal

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

Langbein, *supra* note 23, at 283.

38. ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 77 (1930).

39. Langbein, *supra* note 23, at 283.

40. "[T]hirty-two cases were processed to verdict in the courtroom at the Old Bailey in the two-day session 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 guilty. . . ." *Id.* at 277-78.

41. Many factors combined to make these trials very different from those occurring today.

Criminal trials in the early eighteenth century were typically very brief, no more than half an hour on average, including the jury's deliberation and the announcement of their verdict. Not a great deal of evidence was introduced. The facts at issue were normally presented orally by the victim of the offense, supported by witnesses who, like the victim, gave their evidence briefly and generally under the questioning of the judge. The judge acted as examiner and cross-examiner—although the defendant and jurors could ask questions and often did so by blurting them out, procedure was in that regard rather chaotic. The judge's intention was to present defendants with the evidence they would have to counter to maintain their innocence. Defendants had an opportunity to question each witness in turn and to reply to the evidence, supported by witnesses to the facts and to the character. Accused felons were not allowed counsel, but had to speak entirely for themselves.

Beattie, *supra* note 22, at 222 (citations omitted).

42. "Judicial interrogation of witnesses . . . tended to concentrate power in the court's hands, and made it possible for English judges to act like inquisitors." Landsman, *supra* note 36, at 513.

43. Although "[t]he jury alone rendered the verdict, . . . 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." Langbein, *supra* note 23, at 285.

proceedings were closer to present continental trials than to our modern ones.⁴⁴

B. *The Rise of Defense Counsel and Adversariness*

This system did not endure. The changes began around 1730 when, for reasons now unknown,⁴⁵ the prohibition on counsel was breached,⁴⁶ but

44. As Professor Langbein explained:

[W]ell 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. . . .

(1) In the Old Bailey, as on the Continent today, lawyers for the prosecution and defense were peripheral forensic figures, if present at all. . . . [I]t 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 . . . in modern Germany.

(3) The Old Bailey trial judge deeply affected the adjudication of the jury. . . . [H]e could speak vigorously on the merits and had many ways to influence and control jury verdicts. . . .

(4) . . . [T]he 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 of fact 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.

Langbein, *supra* note 23, at 315.

45. One scholar believes that the change “was almost certainly a consequence of the judges’ perception that the balance in the courtroom between defendant and prosecutor was shifting, and shifting to the detriment of the defendant.” Beattie, *supra* note 22, at 224. Another scholar has theorized that the change came about as a result of some particularly suspicious features of the British criminal justice system. Professor Langbein’s research pointed to the crown-witness prosecution [where some implicated in the crimes testified for the Crown in exchange for not being prosecuted], where the potential for false witness was so distressing that it had led to the strict corroboration rule before 1751. The reward system [whereby successful prosecutors were given money] . . . was another major source of doubt about the reliability of prosecution evidence in major categories of serious crime.

John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 133 (1983).

only partially. Defense counsel still could not address the jury or argue about facts. Attorneys were, however, increasingly allowed to question witnesses.⁴⁷ Limited to this tool, defense attorneys soon became skilled cross-examiners, and this defense cross-examination began to transform the trial process.⁴⁸

The significance of the expanded role of defense counsel cannot be overstated. J. F. Stephen called the rise of lawyers for the accused “[t]he most remarkable change” that occurred in English criminal procedure.⁴⁹ The trial system was transformed when defense counsel became able to cross-examine witnesses.⁵⁰

While judges could still ask questions, challenging judicial examinations were infrequent.⁵¹ Now defense counsel saw probing interrogation as their role.⁵² As a result, trials changed radically. Without defense counsel, the

46. Beattie, *supra* note 22, at 224.

47. “The courts appear to have reinterpreted these limitations [on defense counsel] not as a total ban but simply as a prohibition of speeches, observations, or arguments about the facts. Defense counsel could interrogate witnesses, argue points of law, and seek enforcement of the rules of evidence.” Landsman, *supra* note 36, at 534.

48. Defense counsel was vital in reforming the process.

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

Landsman, *supra* note 36, at 535.

49. 1 J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 424 (1883).

50. Permitting cross-examination by defense counsel led to “a series of major structural changes in the criminal trial.” Langbein, *supra* note 45, at 130.

51. Even when judges questioned witnesses, they did not perform cross-examination in the modern sense. Instead, even though they “had no reason to persecute wrongfully accused persons, neither had the judges any particular incentive to be vigilant on behalf of defendants. In fact, the judges had a considerable incentive to conduct trials in a fashion that would not interfere with orderly processing of their large criminal caseloads.” Langbein, *supra* note 20, at 1052.

52. One scholar noted:

Judges were only occasionally moved to engage in vigorous cross-examinations. . . . For the most part they took the evidence as they found it and sought to have it enlarged upon only to clarify the case to be answered, rather than necessarily to discredit it. They certainly did not prepare in detail for examination and cross-examination; they were not briefed.

issue of guilt or innocence was rarely contested. Instead, guilt was widely assumed by the presiding judge,⁵³ and determining the appropriate sanction was the real purpose of most trials.⁵⁴

With defense counsel, trials moved away from being *de facto* sentencing hearings. Trials as punishment proceedings worked best when the judge and jury could learn about the accused. This occurred when defendants spoke for themselves.⁵⁵ With counsel, however, a defense could be presented without the direct participation of the accused.⁵⁶ Instead of trials being used merely

By the 1780's at least, defense counsel had come to have a different view of the evidence presented against their clients, a different view of the prosecution witnesses, and certainly a different view of their own role in the trial from that of the judge. They had come by then to see themselves as the defendant's advocate. Even if the scope for that advocacy was limited, their cross-examination of the prosecution witnesses could make a significant difference for the accused they defended.

Beattie, *supra* note 22, at 233-34.

53. The judges from that era were more interested in helping the state convict the defendant than they were in acting "as impartial umpires of the law and the protectors of the defendant's rights. It would seem, in fact, that the whole purpose of the court proceedings was to achieve a conviction for the state, much the same as in the modern totalitarian courts." Rackow, *supra* note 27, at 8. See also Langbein, *supra* note 45, at 41 ("Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. In most cases the accused had been caught in the act or otherwise possessed no credible defense.").

54. Langbein, *supra* note 45, at 41.

55. See Beattie, *supra* note 22, at 231-32:

A large part of the business of administering the so-called Bloody Code was the selection of those who were to be hanged as examples. And in that selection, key roles were played by the jury, through its power to reduce a capital to a noncapital charge, and by the judge, through his right to reprieve condemned offenders and recommend them for a royal pardon. . . .

In the exercise of those duties and powers, both the juries and the judges needed to learn something about the prisoner. . . . Hence the importance of having the accused speak for themselves. . . . It is this need for a trial—and a trial of a certain kind—that explains the extraordinary fact that judges did everything in their power in the eighteenth century to prevent the accused, especially those on capital charges, from pleading guilty.

See also Langbein, *supra* note 45, at 123:

In the early decades of the [eighteenth century], an English criminal trial still resembled in the main the unstructured "altercation" amongst accuser and accused. . . . Since the accused had been indicted, he was likely to be guilty. The purpose of trial was to allow him to answer—in the sense of explaining—the charges against him.

56. Langbein, *supra* note 45, at 130. Similarly, the emergence of defense counsel allowed the accused to take advantage of the right against self-incrimination. Previously,

to decide sentences, defense counsel increasingly challenged whether the accused had in fact committed the offense.⁵⁷ As a result, defense counsel, through cross-examination, moved the focus of trials from what the punishment should be to whether the accused was guilty.

Defense counsel also forced a clearer definition of the rules of evidence.⁵⁸ At the beginning of the era, the unchallenged dominance of the judges allowed them to conduct trials with few evidentiary restraints.⁵⁹ Lawyers acting as advocates for the defendant, however, challenged this phenomenon. Consequently, evidence law grew;⁶⁰ more particularly, the hearsay rule developed.

Before the rise of defense counsel in ordinary criminal trials, hearsay was widely used.⁶¹ Lawyers' objections, however, heightened judicial sensitivity to hearsay's dangers.⁶² As a result, the eighteenth century saw increasingly strict hearsay rules.⁶³

the defendant's failure to speak "amounted to a forfeiture of all defense[s]. . . ." Langbein, *supra* note 20, at 1048.

57. The expanded role of counsel produced results almost immediately. A review of the trials at the Old Bailey from October 1754 through May 1756 revealed that out of "the eight cases in which defense counsel appeared, the accused was convicted as indicted in only one, a case of grievous misdemeanor, suborning perjury. Of the seven felonies, three ended in acquittals and the other four in partial verdicts." Langbein, *supra* note 45, at 129.

58. The development of an adversarial criminal system was largely responsible for modern evidence law. John H. Langbein, *The Law of Evidence in the Eighteenth Century* 8 (unpublished manuscript, on file with author).

59. *Cf.* Langbein, *supra* note 23, at 306 ("If the judges had continued to dominate jury trials, we doubt that they would have needed to develop the law of proof as an instrument of jury control.")

60. Previously, evidence law centered around witnesses' competency. Modern evidence law, which is more concerned with trial testimony, came to the forefront late in the eighteenth century and during the nineteenth century. Langbein, *supra* note 58, at 35.

61. Professor Langbein rejects Wigmore's views, based on the state trials, that the hearsay doctrine was formed towards the end of the seventeenth century. Langbein's research, instead, shows "remarkable instances of the use of hearsay well into the eighteenth century. . . ." Langbein, *supra* note 23, at 301. *See also* Landsman, *supra* note 36, at 565 (concluding, after examining trials in 1717, 1722, and 1727, that "hearsay evidence appears to have been treated very loosely indeed. Both verbal and written materials were used with very little restraint.")

62. Beattie, *supra* note 22, at 232.

63. *See* Landsman, *supra* note 36, at 572:

During the course of the 1700s, judges came to recognize the dangers of hearsay. The problem was met by the eventual development of a rather strict rule of exclusion. That rule became ever more formal, and both counsel and the court were increasingly likely to insist on its enforcement. . . . By the 1730s, the rudiments of the hearsay rule were established and at least sporadically applied. By the closing

This result suggests that the hearsay rule grew to empower defense attorneys. As effective use of cross-examination increased, its power became apparent to both judges and lawyers. Counsel naturally sought to protect and expand cross-examination opportunities. They protested denials of cross-examination and objected more to hearsay. Consequently, as the eighteenth century progressed, "courts and counsel moved with increasing frequency to bar witnesses from reciting hearsay material."⁶⁴ In other words, as the value of cross-examination was recognized, hearsay was increasingly barred. The result was a greater likelihood of in-court confrontations and a greater chance that defense counsel could exercise their major tool, cross-examination.⁶⁵ Viewed this way, the hearsay rule was not merely a child of the jury system,⁶⁶ a jury control device,⁶⁷ a tool to control prosecutorial power,⁶⁸ nor a limitation on defense counsel.⁶⁹ The hearsay rule, instead, acted as a grant of power to defense advocates.

decades of the century a more sophisticated rule had been developed and was being applied in a constantly broadening range of cases.

64. *Id.* at 569-70.

65. The rules on hearsay generally required live testimony and thereby "increased the opportunities for contentious examination." *Id.* at 572.

66. Modern scholars "wonder whether Thayer's famous thesis that the law of evidence is 'the child of the jury system' 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 triers no law of evidence was required." Langbein, *supra* note 23, at 20 (citation omitted).

But see BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE:" HISTORICAL PERSPECTIVES ON THE ANGLO AMERICAN LAW OF EVIDENCE 198 (1991) ("The rule against hearsay could not have been created until the modern jury system emerged. Previously, the fact that jurors could rely on their own knowledge precluded the emergence of an effective prohibition on hearsay.").

67. *But see* Langbein, *supra* note 58, at 37-38 (arguing that modern evidence law emerged in order to control juries).

68. The hearsay rule in England did not develop to remove the prosecution's temptation to rely on hearsay. The hearsay rule was developed through ordinary felony cases, which really did not involve the state. The prosecution was usually in private hands, and the private prosecutors, seldom represented by counsel, would have had little power to generate hearsay. Only about half as many victims as defendants decided to retain counsel, and most preferred to just tell their story to the court, instead of calling witnesses and relying on hearsay. Beattie, *supra* note 22, at 229.

69. By the middle of the eighteenth century, the balance of power in criminal trials was shifting from the judge to the attorneys. *See supra* notes 45-63 and accompanying text. As a result "the true historical function of the law of evidence may not have been so much jury control as lawyer control." Langbein, *supra* note 23, at 306.

As the attorneys gained power through cross-examination, judicial power decreased.⁷⁰ In 1700, judges had the central courtroom role. A hundred years later, judges were passive,⁷¹ and defense advocates were the dominant force in trials.⁷² Finally, with defense counsel, a true right against self-incrimination emerged.⁷³ No longer were the words of the accused the central facet of a trial.

The changes were so significant that, in effect, a new trial system was created. Before defense cross-examination, English trials were judge-dominated inquests. Then, during the Eighteenth Century, trials increasingly became adversarial,⁷⁴ and by the early 1800's criminal trials in England were true adversary affairs.⁷⁵ It bears stressing that this transformation was the consequence of the increased activities of defense counsel. More particularly, it came because of defense cross-examination raising questions about the factual bases of prosecutions.⁷⁶ Before English trials embraced defense advocacy, "the most that was ever called for was physical confrontation between the witness and the accused. . . . [The changed system] embodied a new conception of the legal process, one in which the cross-examination of witnesses *by skilled counsel* was of such importance that proceedings were rendered suspect without it."⁷⁷

England developed an adversary system.⁷⁸ America now has one. This, however, does not mean that America simply adopted the English system.

70. See Landsman, *supra* note 36, at 519 ("The growing presence of counsel at criminal trials led to a significant decentralization in litigation and diminution of judicial power.").

71. Langbein, *supra* note 58, at 41.

72. Defense counsel became such a dominant force that a contemporary observer "similarly thought in the 1790's that lawyers acting for the defense had so changed the balance in the prisoner's favor that only a system of public prosecution could restore it." Beattie, *supra* note 22, at 236 (citing PATRICK COLQUHOUN, A TREATISE ON THE POLICE OF THE METROPOLIS 24, 245-46 (2d ed. 1776)).

73. See *supra* note 56 and accompanying text.

74. During the eighteenth century, England had not yet perfected the adversarial trial, but during that time the system moved closer towards that model. Landsman, *supra* note 36, at 500.

75. Stephan A. Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1151 (1990).

76. Langbein, *supra* note 20, at 1069.

77. Landsman, *supra* note 75, at 1168 (citations omitted).

78. The rise of an adversary system also led to other changes in criminal procedure. Instead of "rambling altercation[s.] . . . the criminal trial underwent that articulation of sequence into prosecution and defense 'cases' that so characterizes adversary procedure. . . ." Langbein, *supra* note 45, at 130-31. The distinction as to what is the

Certainly, the English adversary system was not incorporated into our Constitution. The truly significant shifts towards adversariness in England came after, not before, Americans had already begun to constitutionalize what were to become Sixth Amendment rights.

While the expanded role for English defense counsel started in the 1730's, these developments affected only a few trials during the next generation or two. Defense counsel, with the changes they brought, did not really start to become institutionalized until the 1780's.⁷⁹

Furthermore, even during the 1780's, while the English system was increasingly moving towards adversariness⁸⁰—and indeed for a half-century beyond—English defense lawyers still labored under significant restraints. While defense counsel were allowed to participate in felony trials,

[t]hey did so under judicial sufferance, and from the beginning what they might do for their clients was limited by the bench. . . . [I]n particular, they constrained defense lawyer's activities in such a way that the accused were forced to continue to speak for themselves in court. The right to full

prosecutor's case aided the development of burdens of proof and led to the rise of the motion for a directed verdict following the prosecution's case. *Id.*

The new English adversarial procedures did not develop to limit prosecutorial power. Attorneys for the prosecutors little affected this evolution. "Although prosecution counsel had been allowed for centuries, his role in these ordinary felony cases appears less developed than that of defense counsel. He appeared less and he mattered less." *Id.* at 126. Instead, "the growing use and effectiveness of defense counsel begot ever greater use of prosecuting counsel." Langbein, *supra* note 20, at 1070.

79. See Beattie, *supra* note 22, at 228:

Whereas over the previous half-century lawyers had been disclosed in—at most—twenty-five or thirty cases a year, that number rose to 50 in 1780, 122 in 1782, 258 in 1784, and 280 two years later. In two sample years in the next decade, counsel are reported in close to three hundred and four hundred cases respectively. By the end of the century, between a quarter and a third of defendants at the Old Bailey had the benefit of counsel. . . .

See also Langbein, *supra* note 20, at 1068 ("The use of defense counsel remained a relative trickle for another half century, until the 1780s.").

80. See Beattie, *supra* note 22, at 229:

[I]n the 1780s there was not merely an increase in the numbers of lawyers involved in felony trials, but also an apparent change in the attitudes and behavior of those lawyers, especially those acting for defendants. Defense counsel continued to be constrained in what they could do for the accused, but clearly pushed harder than they had before against those constraints and became more aggressive, more actively committed to their clients' interests, and more challenging of the rules under which they were allowed to work. This might explain why more of the accused opted to engage a lawyer.

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 in effect 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.⁸¹

These Eighteenth Century English developments, however, do suggest something important for understanding the Sixth Amendment. If American criminal procedure followed a path similar to England's, then, as America granted defense counsel a role in the development of facts at trial, Americans would have been adopting an adversary system with defense cross-examination at its core. And, as we shall see in the next section, since the states were permitting and guaranteeing a full right to defense counsel before the Bill of Rights was drafted, America could have had an adversary system, dependent on defense cross-examination, in place when the Sixth Amendment was adopted.

III. THE RISE OF THE AMERICAN ADVERSARY SYSTEM

A. *The American Right to Counsel*

Although its strictures had been eroding in practice, the common law formally forbade counsel in most criminal prosecutions. The Sixth Amendment, however, guarantees an accused counsel in *all* criminal cases. In drafting the Amendment, the Framers were not incorporating English law. Instead, they were constitutionalizing an existing American practice that had emerged before the Bill of Rights. Shortly after Independence, twelve of the then thirteen states guaranteed that the accused could be represented by counsel.⁸² While the concept that defense counsel helped ensure fair

81. *Id.* at 230-31 (citations omitted).

82. *Powell v. Alabama*, 287 U.S. 45, 64 (1932). See *HELLER*, *supra* note 4, at 109-10 ("At the time of the adoption of the Constitution, twelve of the original thirteen states had made this renunciation of the common law rule as to counsel part of their constitutional systems."). See also *BEANEY*, *supra* note 24, at 18-22, and *Rackow*, *supra* note 27, at 13-21, for discussions of the constitutional and statutory provisions passed by the newly

proceedings in all cases was in its English infancy, American society by 1776 saw unfettered defense lawyers as essential for criminal justice.⁸³

Indeed, a number of colonies even before the Revolution permitted defense counsel in ordinary criminal cases.⁸⁴ For instance, Pennsylvania in its original charter and by statutes in 1701 and 1718 guaranteed all criminal defendants a right to counsel.⁸⁵ Acts passed in Rhode Island in 1660,⁸⁶ in Delaware in 1701,⁸⁷ South Carolina in 1731,⁸⁸ and Virginia in 1734⁸⁹ also all substantially granted the right to counsel for felonies other than treason.⁹⁰ Some colonies, even without statutes, permitted criminal defendants to be represented by counsel.⁹¹

independent states guaranteeing the right to counsel.

83. *See* *Faretta v. California*, 422 U.S. 806, 827 (1975) ("Colonial judges soon departed from ancient English practices and allowed accused felons the aid of counsel for their defense."). *Cf.* SHAPIRO, *supra* note 66, at 268 n.91 ("Many American colonies permitted defense counsel earlier than the English, despite the fact there initially were few trained lawyers in the colonies.").

84. According to Beane:

[T]he general tendency of the new state constitutions ratified in 1776 and in the succeeding years to include a provision granting the right to counsel suggests that in all American courts the practice of permitting counsel to perform more and more of the functions involved in a criminal defense under a broad interpretation of what constituted 'legal questions' was well established by the year 1776.

BEANEY, *supra* note 24, at 18.

Meanwhile, some colonies did enforce the common law prohibition on counsel. For example, in New York, counsel could only appear in felony cases to argue a point of law. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* 574 (1944).

85. BEANEY, *supra* note 24, at 16.

86. II RHODE ISLAND COLONIAL RECORDS 1664-77 239 (Bartlett 1857), *cited in* BEANEY, *supra* note 24, at 17-18.

87. DEL. CHARTER of 1701, First Part, § 5.

88. 1731 S.C. Acts ch. 552, § 43.

89. IV THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 404 (Hening 1823), *cited in* BEANEY, *supra* note 24, at 17.

90. BEANEY, *supra* note 24, at 16-18. The 1734 Virginia statute allowed counsel for all capital offenses. HUGH F. RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 89 (1965). Since almost every Virginia felony then permitted a death sentence, *id.* at 121, the right to counsel was nearly universal in Virginia.

There is, however, a split in authority on how meaningful the right to counsel was in colonial Virginia. *Compare* SCOTT, *supra* note 38, at 79 (stating that Virginia's procedures did not afford more protection than the English) *with* RANKIN, *supra*, at 100 (stating that defense counsel was permitted to cross-examine witnesses).

91. *See* BEANEY, *supra* note 24, at 16 ("[In Connecticut,] the custom of appointing

This development of the right to counsel is crucial for an understanding of the Sixth Amendment. It shows that early Americans were willing to fashion their own criminal procedure to be more protective of the accused than the common law or English practice was.⁹² It also shows that the Sixth Amendment did not simply adopt English common law or practice. The English neither formally nor informally guaranteed counsel in all criminal cases as the Sixth Amendment did.

Finally, if the American right to counsel brought along a similar transformation of criminal procedure to the one wrought by the presence of defense counsel in England, then the early emergence of that right suggests a true adversary system also emerged early in America. The suggestion that American criminal procedure had moved to an adversary system by the time of the Constitution, however, does not merely depend on an inference about the consequences flowing from America's precocious adoption of a right to counsel. The direct effect of the English developments on the colonies, the American creation of public prosecution, the evolution of an American government based on checks-and-balances, the demise of a paternalistic aristocracy, and the rise of a more democratic society all indicate why America embraced an adversary system.

B. The Effect of the English Developments on America

Americans were influenced by the England's initial steps toward an adversary system. For example, at least some colonial lawyers were preparing at the Inns of Court while English lawyers were expanding defense counsel's role.⁹³ Educated under these circumstances, these soon-to-be American leaders saw the effect of defense counsel and cross-examination.

counsel if the accused requested this assistance apparently existed after 1750. In addition, the court usually advised the prisoner of his right to have counsel, and appointed one without request were the accused to labor under some handicap." See also *infra* note 273 for a discussion of the right to counsel in the colonial Massachusetts courts.

92. Professor Rackow determined that

[T]he right of the accused to the assistance of counsel in making his defense was well known and practiced in the days of the formation of the Union. The early English colonists apparently used a popular form of justice as the basis of their law. . . . [W]here the rules of the common law conflicted with the popular justice already established, it was the common law that gave way; thus, although the common law became widely established, the acceptance of the concept of the "right to the assistance of counsel" is explained.

Rackow, *supra* note 27, at 26.

93. "[N]early one hundred and fifty lawyers [from Maryland, Pennsylvania, Virginia,

Americans were also affected by the English developments through Blackstone, who strongly favored the emerging system.⁹⁴ He attacked the rules restricting defense counsel⁹⁵ and declared that truth was best reached by examination and cross-examination of witnesses in open court.⁹⁶

Even so, the direct contact by a few novice lawyers with the English ferment and the proselytization of Blackstone, while having an effect on America, can hardly explain why Americans moved more quickly to an adversary system than the English did. Other forces, however, were also at work to produce an adversary system prior to the English adversary system. One of these was a perception that America needed a counterweight to its creation of a public prosecutor.

C. The Public Prosecutor

The public prosecutor, now the most important actor in our criminal system,⁹⁷ is not a creature of the common law. The English medieval world

and South Carolina] were educated in the Inner and Middle Temple Inns in London between 1750 and 1775." CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 18 (1966).

94. Blackstone, of course, had a huge influence on the constitutional generation. His book was often used by practitioners "as a shortcut to the law." LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 112 (1985).

95. Blackstone was troubled by the inconsistencies in English law and asked "[u]pon what face of reason can that assistance [of counsel] be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass." 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 349 (T. Cadell ed., 12th ed. 1795).

96. In the early nineteenth century, Blackstone was seen "as the leading proponent of examination in open court." Landsman, *supra* note 75, at 1168. He argued that:

[t]his open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing. . . . [T]he occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. . . . In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness. . . .

3 BLACKSTONE, *supra* note 95, at 373-74.

97. In today's society,

[t]he prosecutor is the dominant figure in the American criminal justice system. The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a diversionary program in lieu of criminal charges; and whether to confer immunity

saw crime as a matter for private vengeance by those wronged.⁹⁸ The court system that emerged from this view "pitted individual against individual. English common law did not make the sharp division between civil wrongs and criminal wrongs in the sense that the American system does at present. All violations of law were wrongs committed by an individual against an individual."⁹⁹

A society that sees criminal law as a private matter between individuals does not need a public prosecutor, and eighteenth century England did not have such an office. Although prosecutions were undertaken in the name of the crown,¹⁰⁰ crimes were personally prosecuted by ordinary citizens.¹⁰¹

Only when the King's prerogatives were supposedly violated, as in the commission of political crimes, did a representative of the King act as prosecutor, and even then this representative was in theory acting as a private citizen.¹⁰² As Joan Jacoby has summarized:

[C]rimes that might be currently considered antisocietal were thought of as violations of an individual's prerogative, very often the King's. A violation of the King's rights were prosecuted by the King's Attorney. Violations of individual rights other than the King's were pursued through the courts by the victim or by his friends or relatives.¹⁰³

from prosecution. In short, the prosecutor holds the power to invoke or deny punishment.

BENNETT GERSHMAN, PROSECUTORIAL MISCONDUCT § 4.1 (1990) (citations omitted).

98. See Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 359 (1986).

99. JOAN JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 8 (1980).

100. Thomas J. Robinson, Jr., *Private Prosecution in Criminal Cases*, 4 WAKE FOREST L. REV. 300, 301 (1968).

101. Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100 (1976). ("The aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or tortious injury.")

102. Cardenas, *supra* note 98, at 361. Although prosecutions were brought by private parties, the English attorney general had special powers. He

could initiate prosecutions but did so only in cases of special importance to the Crown. He did, however, play an occasional part in controlling the excesses of private prosecution. . . . [H]e could dismiss any prosecution, and his decisions in such matters were treated by the courts as entirely within his discretion.

Abraham Goldstein, *History of the Public Prosecutor*, in 3 ENCYCLOPEDIA OF CRIME AND JUST. 1286, 1286 (S. Kadish ed., 1983).

103. JACOBY, *supra* note 99, at 8.

Although the American colonies initially followed the English prosecutorial pattern,¹⁰⁴ a different process began to emerge around 1700. Public officials took responsibility for the prosecution of crimes generally, not just for the limited set of offenses that directly affected the sovereign.¹⁰⁵ As public prosecutors emerged, private prosecution in the colonies disappeared. This evolution of the American criminal justice system was quick and thorough. By the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone.¹⁰⁶ Indeed, it was so established and taken for granted at the inception of the new federal republic that public prosecutors, although not mentioned in the Constitution, were, without debate, granted exclusive control over prosecutions in the federal courts.¹⁰⁷

Public prosecution pushed Americans toward a right to counsel and the resulting adversary system. That force, however, did not stem from the English scheme. Because the accused in England seldom faced a professional prosecuting the case, the English system might, at least on the surface, have seemed fair. In America, however, where advocates increasingly presented the prosecution's case, the unjustness of the defense counsel prohibition must have been apparent. In America, nearly all trials following the common-law rules appeared to be one-sided affairs.¹⁰⁸

104. Goldstein, *supra* note 102, at 1286.

105. "In May of 1704, the Connecticut Assembly passed the law which is generally recognized as creating the first permanent office of public prosecutor on a colony-wide basis. . . ." Kress, *supra* note 101, at 103. Similar patterns occurred in other states. *See, e.g.*, HERMAN G. JAMES, *LOCAL GOVERNMENT IN THE UNITED STATES* 144 (1926) (discussing Connecticut); Cardenas, *supra* note 98, at 369-70 (discussing Virginia); Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720-1740*, 25 AM. J. LEG. HIST. 141, 145 (1981) (discussing North Carolina).

106. Localized public prosecution existed in every colony by the time of the Revolution. Goldstein, *supra* note 102, at 1287.

107. Congress, in the Judiciary Act of 1789, created the district attorneys offices and granted them plenary power to prosecute all federal crimes occurring in their jurisdictions. Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 293 (1989).

108. GOEBEL & NAUGHTON, *supra* note 84, at 574. The Supreme Court remarked of this practice:

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers.

Powell v. Alabama, 287 U.S. 45, 60 (1932).

Permitting the assistance of defense counsel and making the procedures more adversary were a natural response.

This impulse towards equalization, although significant in indicating how much American procedure had diverged from the English,¹⁰⁹ was not the only force that made an adversary system desirable in the New World. Americans also increasingly sought to check all governmental power, including that of the judges. Clearly then, an adversary system was desirable because it helped to balance judicial authority.

D. The Adversary System and Checks-and-Balances

Americans more and more believed that the authority of those in control must be limited. "In resisting the British and in forming their own governments, [Americans] saw the central problem as one of devising means to check the inevitable operations of depravity in men who wielded power."¹¹⁰ A system of checks-and-balances could achieve the common good, it was believed, even though individual rulers could not be counted on to work for it.¹¹¹ The adversary system was yet another layer in the many-tiered American system of checks-and-balances.

As views of crime began to change, a new checks-and-balances system became essential. Regardless of the sources and inspirations of the public

109. PENDLETON HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 1 (1931). ("The fundamental and outstanding procedural difference between the administration of criminal justice in England and that in America lies in the management of prosecutions.")

110. Edmund S. Morgan, *The American Revolution Considered As an Intellectual Movement*, in *PATHS OF AMERICAN THOUGHT* 11, 26 (Morton White & Arthur M. Schlesinger, Jr. eds., 1963). Cf. JOHN PHILIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 50 (1986) ("Power was feared in the eighteenth century, whether it was governmental power, royal power, aristocratic power, or 'mobocracy.' The very existence of power, rather than its abuse, raised concern. All authority was dangerous, but not all power was illegitimate. Only authority checked by procedural rules was 'lawful.'").

111. Americans believed

that it is entirely possible to construct an ideal political society out of bad human materials—to frame a rational scheme of government, in which the general good will be realized, without presupposing that the individuals who exercise ultimate political power will be severally actuated in their use by rational motives, or primarily solicitous about the general good. . . . [This could be accomplished by] the method of counterpoise—accomplishing desirable results by balancing harmful things against one another.

Arthur O. Lovejoy, *The Theory of Human Nature in the American Constitution and the Method of Counterpoise*, in *REFLECTIONS ON HUMAN NATURE* 37, 38-39 (1961).

prosecutor,¹¹² this American creation¹¹³ reflected distinctive views about crime.

Americans had rejected a prosecutorial system that was, in effect, hierarchical¹¹⁴ and replaced it with a more egalitarian model. Victims in England not only had to prosecute their own cases, they regularly had to pay all or most of the costs of their prosecution.¹¹⁵ Consequently, the poor were unlikely to avail themselves of the power of the criminal courts, and crimes against them seldom were punished by legal means.¹¹⁶

112. The exact origin of the public prosecutor is a mystery. Kress, *supra* note 101, at 100. There are several theories as to the position's origin.

Goldstein contends that private prosecutions in Virginia produced compromises that deprived "the Virginia courts of much of the revenue that had been anticipated from fines. Similar developments were occurring in the other colonies. In an effort to make prosecution more evenhanded and more remunerative to colonial government, attorneys general began exercising their authority to prosecute more often, not only in important cases but in routine ones as well." Goldstein, *supra* note 102, at 1286-87.

Heller speculates, "Presumably, [the public prosecutor] was brought about by the lack of lawyers, particularly in the newly settled regions, and by the increasing distances between the colonial capitals on the eastern seaboard and the ever-receding western frontier." HELLER, *supra* note 4, at 21. Van Alstyne has suggested that the public prosecutor descended from the Dutch *schout* since *schouts* prosecuted crimes in New Amsterdam before it became New York City. W. Scot Van Alstyne, Jr., *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125. For a discussion of the *schout* in early New York, see GOEBEL & NAUGHTON, *supra* note 84, at 329-30.

Others have suggested that the American public prosecutor was derived from the prosecutorial system of France or Scotland. See Kress, *supra* note 101, at 101-04; Robinson, *supra* note 100, at 307-11. Langbein suggests public prosecution originated in the English Marian committal statutes which gave prosecutorial powers to the Justices of the Peace. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEG. HIST. 313, 318 (1973).

113. "The American prosecutor is a unique figure, not only in the American system of justice but in the criminal justice systems of the world." JACOBY, *supra* note 99, at xv.

114. *Id.* at 8.

115. See GOEBEL & NAUGHTON, *supra* note 84, at 732 ("The enforcement of criminal law in England depended upon a 'prosecutor,' viz., the complainant, but since a proceeding upon indictment was a King's suit, the prosecutor had to defray his own charges because it was a rule that the King neither pays nor receives costs."). During the Eighteenth Century, however, England did enact some legislation subsidizing prosecution costs. See Langbein, *supra* note 45, at 122 n.495.

116. Prosecution was very expensive "in terms of time, money, and effort of the victim." SHAPIRO, *supra* note 66, at 161. Since only the wealthy could afford to bring an action, unless it was one for a reward, the poor were "deprived of their protection of law." Robinson, *supra* note 100, at 305.

The changed prosecutorial system suggests an American view that criminal law should do more than just protect the rich and property interests.¹¹⁷ Since society in general is harmed by crime, prosecutions should not depend upon the wealth of the victim. Since the community as a whole is affected by crime, a community representative should be in charge of prosecution.¹¹⁸ A system of prosecutions initiated and controlled by public officers was the logical result.

Public prosecution helped level the distinctions among crimes. In England, although the prosecution was entitled to be represented by counsel, counsel regularly appeared only in state trials.¹¹⁹ The ordinary victim-prosecutor seldom incurred that expense.¹²⁰ For this reason, among others, the procedures of state trials were different from those used in the trials of ordinary crimes. In effect, a hierarchy of English crimes existed. Offenses against the King were essentially more important than crimes against ordinary victims. Americans, however, saw all crimes as fundamentally alike. Since the ordinary crime victim stood in the same relationship to the apparatus of criminal justice as the highest born victim, all crimes were to be prosecuted in the same manner.

When crime came to be viewed not merely as a problem between individuals, but a problem for society, the government, as a representative of society, became an antagonist in the process. Thereafter, judges became cast in a different light. Perhaps judges could be trusted to be impartial arbiters when criminal cases were seen as confrontations between individuals. Courts, as instruments of government, however, could not so readily be seen as disinterested when the government became the prime movers in ordinary

117. Langbein's classification of cases at the Old Bailey in London from 1754 through 1756 indicates that the overwhelming proportion of prosecutions were for property offenses. Langbein, *supra* note 45, at 42. This trend extended to colonial America. A review of the criminal court records of 1720-1740 revealed "that men of property administered and directed justice in colonial North Carolina. . . . This suggests the existence of a defined class structure and a court system directed not only by men of property, but for them as well." Spindel, *supra* note 105, at 162.

118. JACOBY, *supra* note 99, at 10. ("[Private prosecution's] basic supposition [is] that crime is essentially a private concern between the aggressor and the victim. The concept of criminal justice that has developed in the United States proclaims the opposite view; the American system conceives of the criminal act to be public occurrence and of society as whole the ultimate victim.").

119. Langbein, *supra* note 23, at 266-67.

120. Many crime victims did not think it was worthwhile to pay the expenses necessary to hire a professional to pursue a prosecution. Beattie, *supra* note 22, at 221. Therefore, even though the prosecution was allowed to hire counsel, "[i]n ordinary felony trials . . . the prosecution was in practice unrepresented." Langbein, *supra* note 23, at 282.

criminal cases.¹²¹ Increasingly, a criminal trial was not seen as a relatively equal contest between an alleged victim and accused, but as a lopsided battle not only with a prosecutor, but with the government in general.¹²² Consequently, the traditional restraints on courts were insufficient¹²³ and procedural protections for the accused needed to grow.¹²⁴

Such concerns were intensified by a deepening distrust of judges and the judicial role. The impartiality and competence of the judges were often suspect.

Traditionally judges had been appointed to the courts because of their social and political rank, not because of their legal expertise; many were not even legally trained. They had exercised a broad, ill-defined magisterial authority befitting their social rank; they were considered members of the government and remained intimately involved in politics.¹²⁵

121. After Independence, because of a new willingness to ignore British precedents, plus the presence in many cases of legal issues for which no precedents existed . . . [a] significant number of new cases now existed in which, once a jury had found the facts, the court was relatively free to find a defendant guilty or not guilty according to its own views of law and justice. The court no longer had a merely passive role in the criminal process.

The increased interest of the government in many cases and the increased power of the courts to affect the outcome of those cases created a danger that courts might abandon their role as arbiter between government and subject, and become an oppressor of the latter.

William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 476 (1967).

122. *Id.* at 477.

123. "[T]he pre-Revolutionary generation . . . did not fear the court because, as the judicial system was then constituted, three trusted safeguards were provided—the jury system, an independent judiciary, and law itself." *Id.* at 467. Around 1760, however, developments began to cast doubt upon whether these safeguards were sufficient, *id.* at 469, and that "[b]y the late 1780's, Massachusetts men had come to believe that the safeguards of a jury trial and an independent judiciary applying settled rules of law were alone no longer adequate to protect their liberty." *Id.* at 477.

124. *Id.* at 478. The early development of a super-technical American criminal procedure "served the needs of the dominant American male—the self-reliant man, who lived in a small town or on the frontier. Such a man was supremely confident of his own judgment, but tended to be jealous of the power of the state." FRIEDMAN, *supra* note 94, at 151.

125. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 324-25 (1992).

The distrust engendered by the judges, coupled with the inordinate power judges had to influence the outcome of common law trials,¹²⁶ meant to Americans that the judicial power had to be checked.

These beliefs led early Americans to the institution of an independent judiciary,¹²⁷ the popular selection of judges,¹²⁸ and a codification movement.¹²⁹ These same forces also led to limitations on the judicial powers to affect the determination of facts. Thus, the multiple provisions to constitutionalize juries,¹³⁰ the increasing restrictions placed on a judge's authority to comment on evidence,¹³¹ and the prohibitions placed on appeals

126. See *supra* notes 35-44 and accompanying text.

127. WOOD, *supra* note 125, at 323-24.

128. American democracy emphasized control by the people. This factor led to a desire to select the judiciary by democratic, and not appointive, means. FRIEDMAN, *supra* note 94, at 126.

129. "The demand for codification of all laws, based on the principle that 'in republics, the very nature of the constitution requires the judges to follow the letter of the law,' emerged with particular vigor after the Revolution." MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 17 (1977). As a result of these concerns, early Americans assaulted the notion of common law crimes because of the "conviction that the common law was both uncertain and unpredictable." *Id.* at 14.

130. Juries "provided a check against overweening power. . . . The local jury, hearing the evidence for itself, provided an alternate source of authority to the judges, who might be appointed by the Crown from among a cadre of imperial officials unsympathetic or hostile to American liberties." Eben Moglen, *Taking the Fifth: Reconsidering the Origin of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1115 (1994). Juries also restrained the power of the government by "check[ing] official power by ensuring that government was less arbitrary." REID, *supra* note 110, at 48.

131. There was a considerable difference in the approaches taken by England and America in this respect. The two systems

had divergent approaches to judicial comment on the facts and expression of opinion as to the credibility of witnesses. Although these practices were accepted in the eighteenth century by both English and colonial judges, they began to be abandoned and prohibited in American jurisdictions beginning in 1795. . . . American suspicion of the judiciary appears to have increased as that of the English waned. . . . English judges became more powerful in relation to jurors from c. 1725 as they increasingly relied on the directed verdict, which reduced jury participation in decision making.

SHAPIRO, *supra* note 66, at 269.

North Carolina, by statute in 1795, and Tennessee, by constitutional provision in 1796, prohibited judges from commenting or charging on the facts to the jury. Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts From 1796 to 1913*, 62 U. DET. L. REV. 595, 600 (1985).

of facts¹³² were all part of a movement to limit judicial power over fact-finding.

The move to adversary procedure did the same. Defense counsel with the power to call and to cross-examine witnesses stripped judges of their exclusive control over the presentation and challenging of evidence,¹³³ and judicial influence over fact-determination lessened.¹³⁴ An adversary trial system, then, dovetailed into prevailing thoughts about checking inordinate governmental power in general, and inordinate judicial power in particular.

E. The Adversary System and Paternalism versus Self-Interest

The new trial system, however, did not just check judicial control over fact determination. It added a balance. The counterweight was an empowered defense counsel who acted as an advocate for the accused. The common law trial system was hierarchical, with the judge acting

Judicial comment was an "encroachment into the province of the jury [that] caused concern among many Americans who, for historical reasons, mistrusted judges." *Id.* at 596.

132. See WARREN, *supra* note 93, at 98 ("[The] struggle [in New York] . . . from 1763 to 1765 . . . to force the courts to allow an appeal to the Governor and Council on matters of fact as well as of law . . . ended in a victory for the colonial contention against such an appeal. . . ."). See also Bernard Bailyn, *The Logic of Rebellion*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION: 1750-1776 60, 68 (1965) (stating that the argument in colonial New York that jury decisions could be appealed on matters of fact as well as on law was considered a "scandalous" attack on the jury system); GOEBEL & NAUGHTON, *supra* note 84, at 235 (stating that a "most violent controversy developed" when the attempt was made to appeal facts).

133. Shapiro, *supra* note 26, at 232.

134. Judicial influence over fact determination was diminished by the rise of both juries and defense counsel. Evidence law can be seen as a check on both the judge and jury: American law distrusts the judge; it gives the jury full fact-finding power and, in criminal cases, the final word on innocence or guilt. Yet the law distrusts the jury as much as it distrusts the judge, and the rules of evidence grew up as some sort of countervailing force. The jury only hears part of the story, that part which the law of evidence allows. The judge's hands are also tied. If he lets in improper testimony, he runs the risk that the case will be reversed on appeal. Hence the rules of evidence bind and control both jury and judge.

FRIEDMAN, *supra* note 94, at 153.

With an adversary system, however, the jury does not necessarily hear everything that evidence law allows. Instead, the jury only hears admissible evidence that is offered by the parties. Thus, counsel, by deciding in the first instance what evidence is offered, acts as a check on both the judge and jury.

paternalistically on behalf of the accused.¹³⁵ The adversary system demolished this. Paternalism was replaced by the idea that individuals, such as an accused, should act in their own self-interest. Perceived this way, the adversary system was just another component of what some have seen as a basic social and political transformation of the revolutionary era.

Colonial society, in these views, was a hierarchical world dominated by a paternalistic aristocracy.¹³⁶ Until shortly before the Revolution, this stratified system was widely accepted by all stations of society.¹³⁷ In this community, government was naturally entrusted to the elite. The colonial world was

'a deferential society' that operated within an integrated structure of ideas fundamentally elitist in nature. That structure of ideas assumed, among other things, that government should be entrusted to men of merit; that merit was very often, though by no means always associated with wealth and social position; that men of merit were obliged to use their talents for the benefit of the public; and that deference to them was the implicit duty of the rest of society.¹³⁸

The Revolution revolutionized this society.¹³⁹ Public authority was no longer automatically ceded to the social elite. A submissive society paternalistically ruled by elites disappeared.¹⁴⁰ Americans "challenged the

135. Opponents of the complete right to counsel often stressed what they considered the advantages of the judge's paternalistic characteristics. Beattie, *supra* note 22, at 253.

136. The American aristocracy was not based on inherited titles, but on birth, wealth, leisure, unearned income, and ultimately reputation. See WOOD, *supra* note 125, at 30-38.

137. At least one modern scholar believes "[w]e will never comprehend the distinctiveness of that premodern world until we appreciate the extent to which many ordinary people still accepted their own lowliness." *Id.* at 30.

138. JACK P. GREENE, *THE REINTERPRETATION OF THE AMERICAN REVOLUTION: 1763-1789* 2, 3 (1968).

139. The Revolution may be the most significant event in our history. [It] not only radically changed the personal and social relationships of people, . . . but also destroyed aristocracy as it had been understood in the Western world for at least two millennia. . . . Most important, it made the interests and the prosperity of ordinary people—their pursuits of happiness—the goal of society and government. . . . In short, the Revolution was the most radical and most far-reaching event in American history.

WOOD, *supra* note 125, at 7-8.

140. The Revolution was not just fought to eliminate Britain's control over America, it was also fought "over differing interpretations of who in America were the proper social

idea that in a conflict of interests between rulers and ruled the subject should passively acquiesce in the determinations of the magistrate."¹⁴¹ The American dream granted authority not just to the few, but to each person.¹⁴² According to some historians, this shift caused a radical transformation: society was now based on the actions of the common people.¹⁴³ Aristocratic, paternalistic rule was replaced by notions of equality¹⁴⁴ and the creation of a democracy.¹⁴⁵ Democratic impulses flooded the societal landscape.¹⁴⁶

leaders who ought naturally to accede to positions of public authority." *Id.* at 87. *See also* DANIEL E. WILLIAMS, *PILLARS OF SALT: AN ANTHOLOGY OF EARLY AMERICAN CRIMINAL NARRATIVES* 21-22 (1993):

The American Revolution altered the relationships between people and authority on a variety of levels. . . . During the Revolution and its aftermath, a cultural climate evolved that generally distrusted any expression of absolute or unmediated authority. . . . The republican rhetoric and egalitarian ideology of the Revolution had a far greater impact on the American populace than many of the social elite intended. Empowered by their belief in the ideals of democratic representation and individual rights, people from a variety of levels entered into a national debate over the organization and application of authority.

141. Richard Buel, Jr., *Democracy and the American Revolution: A Frame of Reference*, 21 WM. & MARY Q. 165, 169 (1964).

142. RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860* 34 (1973) ("In Europe all men were under authority; in America all men dreamed they had the power to become authority.").

143. Although "bas[ing] a society on the commonplace behavior of ordinary people may be obvious and understandable to us today, . . . it was momentarily radical in the long sweep of world history up to that time." WOOD, *supra* note 125, at ix.

144. The Founding Fathers made "a discovery that would turn the course of history in a new direction, a discovery that is still reverberating among us and liberating us from our past as it was soon to liberate them, in spite themselves, from theirs. This discovery was . . . the principle of human equality." EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89* 67 (1956).

145. The United States was the first modern nation not only to permit the common man to vote, but also to allow him to hold positions of power. WOOD, *supra* note 125, at 243. "This participation of common people in government became the essence of American democracy, and the Revolution made it so." *Id.* *See also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994) ("In recent years, scholars have emphasized the elitism of the framers of the Constitution, yet the framers established the most democratic nation-state in the world.").

146. The Revolution led to such social changes as "[t]he extension of the suffrage, abolition of feudal holdovers such as quitrent, primogeniture, and entail, redistribution of loyalist estates to small holders, disestablishment of the Anglican church, abolition of slavery and the slave trade in many states, and changes in the relation of social classes to one another . . ." GREENE, *supra* note 138, at 13.

With these transformed views, Americans rejected the notion of government officials acting as impartial arbiters.¹⁴⁷ Instead, government and society were seen as collections of individuals and factions acting in their own self-interest.¹⁴⁸ The essence of good government, then, was neither to find the right paternalistic people to rule, nor to prevent people from acting in their own self-interest, but to ensure that no interest had too much power.¹⁴⁹

The transformation of the criminal trial system—brought about by defense advocates using cross-examination—provides an almost perfect model for these social and political trends. The adversary system no longer trusted the trial judge to be an impartial umpire. Instead, decisions were only reached after the common person, the accused, was allowed to act in his own self-interest by personally challenging the evidence against him and presenting his own defense. Just as the government could not generally be trusted to act paternalistically as an impartial umpire, a trial judge could not be trusted to be the impartial developer of an accused's defense. The defendant, represented by counsel and given the power of cross-examination, could act in his own self-interest and thereby be a check on both judge and jury.

IV. THE SIXTH AMENDMENT AND THE ADVERSARY SYSTEM

The suggestion here is that America had adopted an adversary system, with defense cross-examination at its core, by the time of the Bill of Rights. This contention is supported by the transformation defense counsel brought to English criminal procedure, America's early acceptance of a full right to counsel, and America's creation of a public prosecutor. An adversary system was also consistent with new American concepts about crime, a government of checks-and-balances, and how society should be ordered.

This evidence, however, not only supports an inference about an adversary system, it and other evidence also suggests that the Sixth Amendment sought to constitutionalize that adversary system.

147. Even "long before Madison's famous Tenth *Federalist*, Americans had questioned the likelihood, though not the ideal, of government as an impartial judge." Cecelia M. Kenyon, *Republicanism and Radicalism in the American Revolution: An Old-Fashioned Interpretation*, 29 WM. & MARY Q. 153, 169 (1962).

148. People were no longer content to allow their representatives to sacrifice local interests for the good of the whole society. Instead, "[e]lected officials were to bring the partial, local interests of the society, and sometimes even their own interests, right into the workings of government." WOOD, *supra* note 125, at 294.

149. Kenyon, *supra* note 147, at 174.

A. The Sixth Amendment as a Rejection of the Common Law

The Sixth Amendment did not merely adopt the English common law, as the right to counsel clause reveals. England, at the time of our Constitution, did not guarantee the assistance of counsel in all prosecutions, but instead forbade it in most cases.¹⁵⁰ Although that prohibition was eroding at the end of the eighteenth century, defense lawyers only appeared in exceptional circumstances facing severe restrictions.¹⁵¹ The Sixth Amendment, in contrast, listed no restrictions. It was not limited to certain types of crimes, nor was counsel confined to only parts of the trial. The Sixth Amendment, in granting a full right to counsel in all cases, was not constitutionalizing English law. It was rejecting, or at least going beyond, the existing common law.

The right to counsel guarantee¹⁵² does not stand alone here. Neither the Sixth Amendment notice provision¹⁵³ nor even the compulsory process clause¹⁵⁴ simply adopted the English common law used for ordinary felonies. The common law on notice

forbade the defendant from having a copy of the indictment specifying the charges against him, not only in advance of trial, but even at trial. Instead, the court clerk summarized the indictment to the defendant upon his arraignment. The Treason Act of 1696 abrogated the rule against allowing the accused access to the text of the indictment, but only for cases of treason. For ordinary felony cases, the rule endured throughout the eighteenth century, and it impaired the defendant's ability to prepare his defense with precision.¹⁵⁵

150. See *supra* notes 22-26 and accompanying text.

151. See *supra* notes 27-34 and accompanying text.

152. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

153. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ." *Id.*

154. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." *Id.* The English common law did not provide for the defendant's right to subpoena witnesses to testify on his behalf. Langbein, *supra* note 20, at 1055-56. Instead, the right to call witnesses was not established until legislation was passed very late in the seventeenth century and early in the eighteenth century, which was interpreted to provide for the right of compulsory process. *Id.*

155. Langbein, *supra* note 20, at 1058.

The Sixth Amendment's counsel, notice, and compulsory process provisions did not adopt the common law. Whether these provisions are seen as either a rejection of the common law¹⁵⁶ or an extension of English trends, they are not simply incorporations of English law. Indeed, it would be surprising if the Sixth Amendment merely constitutionalized English common law, for early Americans had a complicated relationship with that law.

The colonists did not simply import the common law as a set of authoritative precedents. No accepted reasoning automatically made the common law binding on the colonies,¹⁵⁷ and, of course, distinctive American conditions naturally caused transformations in English procedures.¹⁵⁸ Such changes were not all the same. There was not just one system of colonial laws, but many.¹⁵⁹ As a result, the colonists had varied visions of the common law. Consequently, any notion that the drafters constitutionalized the common law as they knew it is an oversimplification.¹⁶⁰

Furthermore, colonial views about the common law were not static.¹⁶¹ Over time, different colonies demonstrated antagonisms towards the

156. HELLER, *supra* note 4, at 109.

157. FRIEDMAN, *supra* note 94, at 38-39.

158. Instead of just "blindly reproduc[ing] English procedure," Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 935 (1926), colonial law was largely codified, a condition completely foreign to English practice. FRIEDMAN, *supra* note 94, at 90.

159. Just "[b]ecause the colonies each tapped in the same cellar is no reason to assume that each drew in the same amount and of the same vintage, or that the wine bottled in New York was identical with that in South Carolina." GOEBEL & NAUGHTON, *supra* note 84, at xxxv. Therefore, "'colonial law' is an abstraction; there was no 'colonial law' any more than there is an 'American law,' common to all fifty states. There were as many colonial systems as there were colonies." FRIEDMAN, *supra* note 94, at 20.

160. The Framers could not have adopted a uniform model of the common law since none existed in America at the time. DWIGHT F. HENDERSON, *CONGRESS, COURTS, AND CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829* 3 (1985). Because each colony's common law fit its own unique circumstances, it is difficult to generalize about the state of the common law, especially in the criminal arena. Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J.L. HIST. 293, 296 (1982).

161. "One hundred and sixty-nine years went by between Jamestown and the Declaration of Independence. The same length of time separates 1776 and the end of the Second World War. No one would consider this last span of time a single 'period.' . . . [C]olonial times were hardly a single, uniform period." FRIEDMAN, *supra* note 94, at 34.

common law.¹⁶² Most important for an understanding of the Constitution, many Americans were especially hostile towards the common law from the beginning of revolutionary ferment until the Constitution's adoption.¹⁶³ The Revolution, not surprisingly, brought a dislike of England and its institutions.¹⁶⁴ English precedents were viewed by many as tools of an oppressor,¹⁶⁵ and a number of the new states forbade the citation of English cases.¹⁶⁶ The American frontier spirit resented the aristocratic tendencies of many of the bench and bar.¹⁶⁷ These feelings were intensified by the fact that a large number of judges had been loyalists during the Revolution.¹⁶⁸ All this fueled a distrust of judicial discretion and the common law.¹⁶⁹

This is not to suggest that the common law did not have a profound effect on colonial law¹⁷⁰ or that everyone of the constitutional generation

162. The residents of several colonies, including Pennsylvania, Massachusetts, Connecticut and Rhode Island, were eager to do away with the common law. WARREN, *supra* note 93, at 10, 102.

163. In the early years of the Republic, "American jurists succeeded in dethroning the common law from the unchallenged place it had occupied in the jurisprudence of the revolutionary generation." HORWITZ, *supra* note 129, at 11. Many individuals advocated that America should develop its own set of laws. WARREN, *supra* note 93, at 228.

164. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 22 (1977).

165. Wartime radicals labeled English precedents as "rags of despotism" and regarded English judges as "tyrants, sycophants, oppressors of the people and enemies of liberty." Francis R. Aumann, *The Influence of English and Civil Law Principles Upon the American Legal System During the Critical Post-Revolutionary Period*, 12 U. CIN. L. REV. 289, 296 (quoting ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 116-17 (1921)).

166. Statutes were passed that prohibited lawyers from relying on English sources in legal proceedings. GILMORE, *supra* note 164, at 22. For discussions of such laws and rules, see Aumann, *supra* note 165, at 79-80; FRIEDMAN, *supra* note 94, at 111-12. See also WARREN, *supra* note 93, at 135 (discussing Samuel Livermore, Chief Justice of New Hampshire from 1782 to 1790 who "was intolerant of legal precedent . . . and when reminded of previous rulings of his own contrary to his present ruling, . . . would reply that 'every tub must stand on its own bottom'").

167. Aumann, *supra* note 165, at 300.

168. *Id.* at 296.

169. Although the colonists had long been afraid of judicial discretion, the link between discretion and the common law was not made until the 1790's. After the Revolution came the realization "that the common law was both uncertain and unpredictable. . . . [B]ehind . . . warnings against the danger of judicial discretion was a growing perception that judges no longer merely discovered law; they also made it." HORWITZ, *supra* note 129, at 14-15.

170. "Between 1776 and 1784, eleven of the thirteen original states adopted, directly or indirectly, some provisions for the reception of the common law as well as of limited classes of British statutes." *Id.* at 4. However, although

disfavored the common law,¹⁷¹ but American criminal procedure in the constitutional era, for many reasons, was not simply defined by the common law. Americans might have started out with the English common law on criminal procedure. But then, they, perhaps not fully appreciating what was happening, developed a criminal procedure distinctive from England's.¹⁷² That distinctiveness was clearly shown, as we have seen, in the creation of a public prosecutor and the guarantee of a full right to counsel, things not known in England.

B. The Sixth Amendment as Constitutionalizing State Adversary Procedure

To understand the Confrontation Clause and related provisions, it is not sufficient just to recognize that the Sixth Amendment did not simply constitutionalize the common law and that America had developed a distinctive criminal procedure. These factors must be coupled with the reality that the driving force behind the Bill of Rights was not to protect against British depredations. The war against England had been won, and England could not deny the citizenry rights. The goal was instead to protect against federal encroachments.

While both English mistakes and rights might have given rise to notions of what needed protecting, Americans sought to protect rights viewed as

[s]ome States had expressly adopted, in their Constitutions, such parts of the Common Law as formed the law of the Colonies prior to 1775 or 1776 or to the date of the State Constitution . . . [a]ll parties, of course, agreed that English law since the Revolution, had no binding force whatever; but many of the Anti-Federalists claimed that the English law prior to the Revolution had no force in the United States except and by virtue of these express Constitutions and statutes.

WARREN, *supra* note 93, at 225.

171. There is a scholarly debate on how much impact the common law had on colonial law. See BEANEY, *supra* note 24, at 14 (comparing Roscoe Pound's view that the common law had limited practical effect or impact with Julius Goebel's view that the common law was firmly received).

172. We may never know how distinctive colonial practice was. For example: Originally, the proceedings of [the highest court in colonial Virginia] were based on English judicial customs, but throughout the years legal practices underwent a number of alterations to meet the exigencies of the local environment. So gradual were these changes that they were scarcely noted at the time, and people grew so accustomed to the proceedings of the court they could see no reasons for preserving on paper the manner in which these courts were conducted.

RANKIN, *supra* note 90, at 66. This failure to document the changes in the procedures result in modern scholars "know[ing] even less about seventeenth- and eighteenth-century practice in the colonies than we know about in England." SHAPIRO, *supra* note 66, at 174.

fundamental regardless of their origin.¹⁷³ If Americans had developed a criminal procedure thought to preserve fundamental rights better than the common law did, then Americans would have wished to preserve these rights. An American adversary procedure with defense cross-examination at its core furthered such rights by acting as a check on the government and by granting the citizenry control over their lives. Thus, the Framers' concerns about federal encroachments and desire to provide a check on federal judges¹⁷⁴ led to an attempt to constitutionalize the criminal procedure that had been developed in the colonies and the states. If we want to know what confrontation was originally about, we should not concentrate on English law, but on the criminal procedures in the states when the Bill of Rights was adopted. It was these procedures, devised by Americans and familiar to them through daily practice in state courts, which were preserved in the Sixth Amendment.¹⁷⁵

173. Prior to the Revolution the colonists did not consider their rights to be creatures of the common law and instead regarded them as natural rights. RUTLAND, *supra* note 19, at 42. From that perspective, the Bill of Rights "was not simply an enactment of We the People as the Sovereign Legislature bringing new rights into existence, but a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed." Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1206 (1992).

174. People remained suspicious of judges even after the judiciary won some institutional independence after the Revolution. Akhil Reed Amar, *Fourth Amendment Principles*, 107 HARV. L. REV. 757, 773 (1994). Considering that "[e]ven an Article III judge, after all, had been appointed by the President, looked to the President for possible promotion to a higher court, and drew his salary from the government payroll[.]" people wondered "[w]ould the handful of elite federal judges truly be able to empathize with the concerns of ordinary folk?" *Id.*

175. In 1851, the Taney Court also concluded that the immediate source of Sixth Amendment provisions was state, not English, law. An accused had claimed that his compulsory process right was violated because an evidentiary restriction prevented him from calling a co-defendant as a witness. Americans, Taney began his analysis, had partially adopted and partially rejected the common-law form of criminal trials. Trial by jury had been protected in all the colonies, but the common law undercut this right by denying the accused compulsory process. Although English statutes had modified some of these

oppressive mode[s] of proceeding[.] . . . the thirteen Colonies who united in the [D]eclaration of [I]ndependence, as soon as they became states, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen states which formed the Constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression.

This view of the Sixth Amendment is supported by seminal congressional actions. Early Congresses frequently gave concurrent jurisdiction over federal criminal laws to state and federal courts.¹⁷⁶ Such authorization, of course, indicates that state trial procedures were thought to satisfy the Sixth Amendment.

In this light, the Sixth Amendment constitutionalized the trial procedure used in the states. The rights underlying that procedure may not have had a universally-accepted, specific meaning. As we have seen, there was not just one law throughout the states, but many, and the new American criminal trial system had only recently emerged and was no doubt still evolving.

Nevertheless, some basic principles were so clear that they hardly needed discussion. The balance in the common-law trial system should change.¹⁷⁷ Judges' paternalistic power should be checked and the accused given rights to ensure that his version of the events and the law could be put forward. The accused had to be guaranteed the tools necessary to make an adversarial presentation to the jury. To do this, the accused needed the possibility of assistance of a trained advocate, notice of what he was charged with, the ability to present evidence that favored him, and the tools to challenge the evidence against him.¹⁷⁸ Confrontation was the guarantee to

United States v. Reid, 53 U.S. (12 How.) 361, 363-64 (1851).

Taney concluded that the old common law criminal proceeding was oppressive and had been abolished by the Sixth Amendment. The Amendment abrogated the common law on compulsory process and counsel and also the common law rule on notice. The source for the procedure used at trial "could not be the common law as it existed at the time of the emigration of the colonists, for the constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer. . . ." *Id.* at 365. Instead, Taney continued, the true source of the Sixth Amendment is found in state law.

[T]he only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts.

Id. In Taney's opinion, the state procedures of the constitutional era, not the English common law, defined the Sixth Amendment's content.

176. Congress granted concurrent jurisdiction to the states over some federal offenses since they feared "that exclusive reliance upon federal law enforcement machinery would not suffice to enforce the penal laws of the nation . . ." Krent, *supra* note 107, at 303.

177. "[T]hese criticisms, part and parcel of the wider and wider clamor for a Bill of Rights, indicated that the public continued to demand the maintenance of a fair balance in criminal trials, and to that end the protection of the rights of the accused." HELLER, *supra* note 4, at 27.

178. Since our adversary system results from the interrelationship of the defense rights of counsel, notice, compulsory process and cross-examination, if the adversary

allow an accused to challenge the information against him, and defense cross-examination had become the chief procedure for challenging such evidence. Indeed, defense cross-examination was at the heart of the new trial system. This analysis indicates, then, that the right to confrontation was guaranteeing an accused the right to cross-examine witnesses as part of the adversary system that had emerged.

This view of the Confrontation Clause and related provisions depends on the conclusion that Americans had truly institutionalized a trial system with

system was truly being institutionalized in eighteenth century America in ordinary trials, we should expect to see the near simultaneous evolution of all these rights. And indeed, as they were erecting a right to counsel, early Americans began permitting compulsory process and the swearing of defense witnesses. For example, in colonial Virginia, "[a] defendant could require the sheriff to summon persons to testify in his behalf. A witness, before he could take the stand, first had to be sworn." RANKIN, *supra* note 90, at 99. As early as 1708, defense witnesses were sworn in New York, but the incompleteness of court records make it hard to determine whether that practice was consistently followed. GOEBEL & NAUGHTON, *supra* note 84, at 627-28.

Similarly, a right to notice for all cases emerged so strongly that it, too, like the other rights, became protected under the Sixth Amendment. That these rights, which in conjunction gave the accused the tools to defend himself personally, emerged and were constitutionalized together indicates that an adversary system had emerged by 1790 and was being protected by the Sixth Amendment. "In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Faretta v. California*, 422 U.S. 806, 818 (1975).

America's constitutionalization of a right against self-incrimination also indicates that America already had an adversary system by the time of the Bill of Rights. Professor Langbein, in a persuasive examination of the origins of the privilege, contends that the self-incrimination right could not meaningfully exist without lawyers since then the accused had to speak to save his life:

Without defense counsel, a criminal defendant's right to remain silent was the right to forfeit any defense; indeed, in a system that emphasized capital punishment, the right to remain silent was literally the right to commit suicide. Only when defense counsel succeeded in restructuring the criminal trial to make it possible to silence the accused did it also become possible to fashion the true privilege against self-incrimination at common law. The privilege against self-incrimination became functional only as a consequence of the revolutionary reconstruction of the criminal trial worked by the advent of defense counsel and adversary criminal procedure. . . . In our legal history, that right was the achievement of the later eighteenth and early nineteenth centuries.

Langbein, *supra* note 20, at 1084-85. Langbein reached this conclusion by examining developments in England. Of course, before the end of the eighteenth century in America, the right against self-incrimination had been constitutionalized. If Professor Langbein is correct about the prerequisites for the privilege, then an adversary system must have already been functioning by the adoption of the Bill of Rights.

defense cross-examination at its core by the time of the Sixth Amendment. That premise is supported by deductions made and inferences drawn from the facts that Americans had adopted a full right to counsel; that an emerging right to counsel transformed the English trial system into an adversarial one with defense cross-examination at its core; and that an adversarial system comported with distinctive American notions about crime, checks-and-balances, and changed societal relationships. Such proof, while suggestive, is at best circumstantial and hardly conclusive. More proof, including colonial records, comments in the constitutional debates, and early judicial decisions, while admittedly being too fragmentary to be definitive, also supports the conclusion that cross-examination was at the heart of the new trial process and confrontation.

V. COLONIAL RECORDS

The scanty, surviving colonial records give tantalizing glimpses of an America moving towards an adversary system with defense cross-examination at its core. New Yorkers' concern about preliminary examinations provides an illustration.

In the first half of the eighteenth century sworn affidavits and examinations from preliminary proceedings were routinely admitted in New York.¹⁷⁹ While judges were supposedly under a duty to elicit favorable information for a defendant at preliminary hearings,¹⁸⁰ defense cross-examination was not allowed.¹⁸¹ Consistent with the notion that adversarial ideas were spreading, this prohibition on cross-examination increasingly came under attack.¹⁸² The criticisms did not produce a change at the preliminary examinations itself, but after 1750 such examinations were no longer admitted at trial unless explicit permission for the examination had been given by the court.¹⁸³ Such authorizations at first simply required notice to the accused, but by the time of the Revolution they required that the witness "be examined as well on the part of the defendant as on the part

179. See GOEBEL & NAUGHTON, *supra* note 84, at 633-37.

180. The judge's manuals often contained instructions that they should admit evidence regardless of whether it supported the defendant or the Crown. *Id.* at 633.

181. *Id.* at 635.

182. The accused was generally present during a preliminary examination, "chiefly because it was a convenient way to wrest a confession from a prisoner. . . . Confrontation at a preliminary hearing[, however,] inevitably raised the question of a right to cross-examine." *Id.* at 633-34. There were complaints in 1766 that defendants were not allowed to cross-examine at preliminary hearings. *Id.* at 634.

183. *Id.* at 637.

of the crown and that his testimony shall be admitted as evidence in the trial provided he be examined in the presence of the prosecutor and the defendant."¹⁸⁴ Furthermore, not only were the courts in effect requiring defense cross-examination as a condition for admissibility, they now were also willing to grant such orders to preserve the testimony of defense witnesses.¹⁸⁵ In other words, by the 1770's the New York courts were increasingly mandating essential components of an adversary system and recognizing that a fair trial required that evidence must be both presented and challenged from the defendant's perspective.

While New York was making these tentative motions, Virginia took firmer steps towards a criminal trial system with defense cross-examination at its core.¹⁸⁶ Colonial Virginia seems to have operated under a generalized best evidence rule. That evidentiary doctrine forbade trial use of depositions from available witnesses since the witness' testimony was better evidence than the deposition.¹⁸⁷ Furthermore, less formal hearsay, except for dying declarations, was not admitted.¹⁸⁸ Such precepts, of course, forced the production of witnesses.¹⁸⁹ At trial, these witnesses were subject to cross-

184. *Id.* at 638.

185. *Id.*

186. Firmer conclusions can be reached about developments in Virginia than in the other colonies because "[m]ore details are available to the general reader with regard to the administration of justice in colonial Virginia than any other of the New World settlements." HELLER, *supra* note 4, at 19. For extensive studies of criminal justice in colonial Virginia, see SCOTT, *supra* note 38, and RANKIN, *supra* note 90.

187. Witnesses were required to "appear in person to present oral testimony. . . . Only in those instances where the witness had died, or had some lawful reason for his absence, were the depositions, without corroborating oral testimony, admitted as evidence." RANKIN, *supra* note 90, at 95-96.

188. *Id.* at 100. Furthermore, "[i]f a criminal confessed on his preliminary examination, this might be used as evidence against him, but not against others." SCOTT, *supra* note 38, at 96.

189. Spindel, *supra* note 105, at 153. Because witnesses had to attend, many prosecutions terminated without a judgment because of the absence of witnesses. This pattern was not restricted to Virginia, but occurred in many, if not all, the colonies. For example, "[a] survey of 363 prosecutions between 1720 and 1740 [in North Carolina], shows that 207 (57.0 percent) resulted in no judgment at all because of lack of information or persons to give evidence." *Id.* at 148. In colonial New York, 37% of the prosecutions were never resolved, DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 71 (1974), with that rate being over fifty percent in some parts of the colony. *Id.* at 190.

Even though the rules requiring witnesses had a detrimental effect on law enforcement, the colonies did not make it easier to proceed without oral testimony. They did not create new ways to make hearsay admissible, and at the time of the Revolution, prosecutions did

examination by an accused's lawyer.¹⁹⁰ Indeed, well before the Constitution, lawyers were using cross-examination not to elicit information neutrally, but instead as a tool of advocacy for the accused.¹⁹¹

In addition, not only did the accused in colonial Virginia have the right to counsel and the opportunity to have that counsel cross-examine the prosecution's witnesses, the accused had the right to subpoena his own witnesses.¹⁹² In other words, by the time of the Revolution, the accused in Virginia had the rights necessary to develop the facts from his perspective. While it is not possible to tell how routinely this occurred, a vigorous and effective defense advocacy seems to have increasingly occurred by the Revolution.¹⁹³

not go forward, even for what many thought were serious crimes with guilt clear, without the witnesses. A letter from James Madison to his father in 1777 provides an illustration.

Madison wrote that two travelers had come across a man who had abused the local authorities and expressed his adherence to the King. Even though the culprit was identified and even though "[e]very one seemed to be agreed that his conduct was a direct violation of Law . . . , the Witnesses being travelers and therefore unable to attend on a Trial, it was thought best not to undertake a Prosecution which promised nothing but impunity and matter of triumph to the offender." 1 PAPERS OF JAMES MADISON 191 (William T. Hutchinson & William M.P. Rachel, eds., 1962). Later on, one of the travelers came across the loyalist with a score of others present. The loyalist was apparently baited and repeated his statements that were thought to be unlawful. Now with a cohort of local witnesses, he was arrested and prosecuted. *Id.*

190. RANKIN, *supra* note 90, at 99-100:

A witness for the prosecution, or king's witness, was not allowed to be cross-examined until he had first given his testimony for the crown, but he had to be examined in the presence of the accused. . . . In addition to the questions put to the witness by the prosecution and the judges, the court could "indulge" the prisoner, or his counsel, to interrogate the testifier.

191. Defense counsel had already learned how to carefully phrase their questions:

[Defense] questions could be so phrased as to either discredit the testimony of the witness or place a more favorable construction upon it. Testimony could be invalidated if the defense could prove that the witness was lying, and such proof was often followed by a motion by the defense counsel calling for an indictment of the witness for perjury. One method of discrediting a witness was to demonstrate variations between his original deposition and his testimony at the trial, and among the rights of the prisoner during the trial was to request a reading of the original deposition.

Id. at 100-01.

192. *Id.* at 99.

193. The October 21, 1773 edition of the Virginia Gazette described a counterfeiting trial which illustrates this rigorous defense advocacy:

Despite the mass of evidence against the accused, they were acquitted by the jury. In a clever maneuver, the defense counsel, by bringing in sundry witnesses, proved

Virginia, where procedures and rights came together so an accused could meaningfully present and challenge information even before Independence, is especially important as a source for the confrontation right. If the Virginia trial process seemed more just than earlier methods, Virginia would have wished to preserve it after Independence. Section 8 of the Virginia Declaration of Rights, adopted on June 12, 1776, apparently did just that.¹⁹⁴

Virginians had seen these procedures in operation and decided that they should be guaranteed.¹⁹⁵ Since defense cross-examination was crucial in some Virginia cases, Virginians presumably would have wished to preserve that right, too. Although it was not specifically mentioned in Section 8, Virginians' wish to guarantee defense cross-examination was apparently encapsulated in their confrontation guarantee.

Virginia's confrontation right is especially important, for it strongly influenced other colonies. Within the next ten years, seven states adopted constitutions which featured bills (or declarations) of rights.¹⁹⁶ "The language used by the colonies naturally differed, but *all included a confrontation guarantee. . .*"¹⁹⁷ The path started by Section 8 of the Virginia Declaration of Rights, indeed, led to the Sixth Amendment.¹⁹⁸

that John Short, the chief witness for the prosecution, was 'a most atrocious Villain,' and went so far as to make a motion that Terry be indicted for perjury. Short fled, leaving behind 'a wife and six helpless children, in most pitiable circumstances.'

Id. at 195 (citation omitted).

194. The Virginia Constitution guaranteed:

That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of the accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

VA. CONST. of 1776, Bill of Rights, § 8.

195. *But see* Moglen, *supra* note 130, at 1130 (arguing that although these rights were constitutionalized, "counsel, not the constitutions, were remaking criminal procedure").

196. Those states were Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire. Larkin, *supra* note 3, at 75.

197. *Id.* For the wording of the various confrontation guarantees, see *id.* at 75-76.

198. See HELLER, *supra* note 4, at 33-34:

Any attempt to trace the exact development of the finished product [the Sixth Amendment], to ascribe with definitive certainty the authorship of specific words, or to place the responsibility for its ultimate form and arrangement, continues to the present to be frustrated and hampered by the complete lack of information on the proceedings in the Senate. . . .

VI. CROSS-EXAMINATION AND THE CONSTITUTIONAL DEBATES

While there were only a few comments in the constitutional debates about the lack of a confrontation guarantee, at least one critic explicitly made a connection between confrontation and cross-examination.¹⁹⁹ More generally, however, others, without directly referring to confrontation, preached the power and importance of cross-examination. For example, "Brutus," in discussing how evidence should be taken in the proposed courts concluded, "[i]t is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross examining them in order to bring out the whole truth. . . ."²⁰⁰

Meanwhile, Federal Farmer's comments were even more striking. In extolling the importance of cross-examination, he saw its interdependence with other rights.²⁰¹

The available information thus permits only the following limited conclusion as to the immediate genesis of the Sixth Amendment: in its basic structure, compactness of arrangement, and enumeration of rights the amendment follows the recommendation of the ratifying convention of Virginia, which in turn was but an amplification of the corresponding section of the Bill of Rights drawn up by George Mason. . . .

199. In the Massachusetts ratifying convention, a delegate complained: "The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told." 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 690 (1971).

200. Essay of Brutus XIV, *in* 1 *id.* at 435.

201. Federal Farmer explained that:

When I speak of the jury trial of the vicinage, or the trial of the fact in the neighborhood, I do not lay so much stress upon the circumstance of our being tried by our neighbours: in this enlightened country men may be probably impartially tried by those who do not live very near them: but the trial of facts in the neighbourhood is of great importance in other respects. Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence: when trials of facts are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken ex p[ar]te, and but very seldom leads to the proper discovery of the truth.

Letter from Federal Farmer (Oct. 12, 1787), *in* 1 SCHWARTZ, *supra* note 199, at 473.

The comments were few, but revealing—Americans were seeing the importance of cross-examination to just trials.

VII. THE RIGHT TO CONFRONTATION IN EARLY JUDICIAL DECISIONS

Early judicial decisions might seem a source for understanding the original purposes of the Confrontation Clause. Unfortunately, they shed little light because only a few judicial opinions on confrontation from the constitutional generation exist. Those few, however, support the idea that cross-examination was at the heart of the right.

The Supreme Court did not interpret the Sixth Amendment provision in the years immediately after the Constitution's adoption. Its confrontation jurisprudence did not truly begin until the end of the nineteenth century,²⁰² and justices, then, like interpreters now, had to rely on historical investigation, not personal memories or experiences, to find the original purposes.

Chief Justice Marshall, however, did give his views about confrontation while presiding at the 1807 trial of Aaron Burr. Marshall saw confrontation as a crucial right that generally restricted the admission of hearsay against criminal defendants.

The Burr prosecution sought to introduce out-of-court statements made by the absent Herman Blennerhassett arguing that they were admissible as the declarations of a coconspirator.²⁰³ Marshall, however, relying on the right of confrontation, prohibited the evidence.

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declaration of any other individual than of him against whom the proceedings are instituted, has been generally deemed as essential to the correct administration of justice. I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to incriminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know

202. See *Mattox v. United States*, 146 U.S. 140 (1892).

203. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694). The prosecution argued either there was "a conspiracy between the two [Blennerhassett and Burr] and others; and that the declaration of one conspirator were evidence against the others; or, 2d, that they were accomplices." *Id.* at 193.

none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.²⁰⁴

At least to Marshall, confrontation was a general limitation on hearsay. In reaching this conclusion, however, Marshall did not explain why hearsay should be restricted. Some constitutional-era opinions interpreting state provisions, however, indicate that confrontation's purpose was to guarantee the accused the opportunity to cross-examine.

The earliest reported confrontation case, in fact, found cross-examination at the core of the right. It barred the introduction of a deposition because the accused was denied the opportunity to cross-examine. In that North Carolina case, *State v. Webb*,²⁰⁵ the accused was charged with horse stealing. The prosecution sought to introduce a South Carolinian's deposition that the absent accused had sold him the horse shortly after it was stolen. The court, writing in 1794, rejected the evidence since "[i]t is a rule of common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not had the liberty to cross examine"²⁰⁶

204. *Id.* Marshall continued, "This rule as a general rule is permitted to stand, but some exceptions to it have been introduced, concerning the extent of which a difference of opinion prevails, and that difference produces the present question." *Id.* Marshall stated that declarations of coconspirators could be admitted when conspiracy was charged to prove the fact of the crime: "Evidence of conspiracy in such a case goes directly to support the issue. It has therefore been determined that the nature of the conspiracy may be proved by the transactions of any of the conspirators in furtherance of the common design" *Id.* Marshall concluded, however, that co-conspirator statements could not be admitted to prove the criminal conduct of an accused when conspiracy was not charged:

I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons, made in the absence of the person on trial, under the idea of a conspiracy, where no conspiracy is alleged in the indictment.

Id. at 194. *Cf.* *State v. Poll*, 8 N.C. (1 Hawks) 237, 240 (1821) (stating that "when a common design is proven, the act of one in furtherance of that design is evidence against his associates; it is in some measure the act of all; but the *declarations* of one of the parties can be received only against himself").

Marshall, in this earliest interpretation of confrontation by a Supreme Court Justice, prohibited the hearsay even though it was not an *ex parte* affidavit, deposition, or other kind of statement that the government had elicited. *But see White v. Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring) (arguing that confrontation was only designed to stop abusive uses of depositions and *ex parte* affidavits or other government-generated materials).

205. 2 N.C. (1 Hayw.) 77 (1794).

206. *Id.* at 77.

In 1807, a Tennessee court also found a confrontation violation. After a trial for petty larceny in county court, an appeal on the law and facts was taken. This authorized a trial *de novo* in the higher court. The second prosecution, citing English authority, offered to prove what a then-dead witness had sworn at the lower court trial. The defendant objected, relying “upon the constitution, which provided, that the witnesses should be confronted with the accused.”²⁰⁷ The court rejected the evidence, reasoning that

frequent deaths may take place between the trial there and here, and it seems to us, that it would be dangerous to liberty to admit such evidence. It would go a great length in overthrowing this wise provision of the constitution. An inconvenience which could not exist in England, where there is no appeal as to matter of fact, as here. The evidence cannot be received.²⁰⁸

While that case suggested that former testimony could never be constitutionally admitted,²⁰⁹ fourteen years later another Tennessee court held that a use of former testimony did not violate the accused’s confrontation right.²¹⁰ That opinion, while not mentioning the earlier Tennessee decision, distinguished *Webb*, the North Carolina case that had excluded a deposition.

Although North Carolina’s confrontation guarantee was worded differently from Tennessee’s, each, according to the Tennessee court, signified the same. “The expression in our constitution . . . is, ‘the accused has a right to meet the witnesses face to face.’ In the constitution of North Carolina, it is . . . ‘every man hath a right to confront the accusers and witnesses with other testimony.’ The expression in both means the same thing. . . .”²¹¹

A different outcome from that in *Webb* was dictated not because the states had different wordings for the confrontation guarantee, but because there had been no cross-examination in the North Carolina case. The evidence was rejected, the Tennessee court concluded, because “it was not

207. *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807).

208. *Id.*

209. The question of “[w]hether prior testimony was ever admissible in a criminal case (in the late eighteenth century) even when the declarant was dead was more in doubt than one might imagine.” Mosteller, *supra* note 18, at 738 n.232 (citation omitted).

210. 10 Tenn. (2 Yer.) 58 (1821).

211. *Id.* at 59-60.

taken in [the defendant's] presence, when he could have had the liberty to cross-examine. This case necessarily admits the principle, that depositions, under proper circumstances, may be read on trial against a prisoner. . . ."²¹² Proper circumstances required that the accused have the chance to cross-examine the witness, and absent that opportunity, the former testimony could not be admitted without infringing the right to confrontation. As this and other early opinions indicated, cross-examination was at the core of confrontation.²¹³

My proposition is the Confrontation Clause, and other Sixth Amendment provisions, constitutionalized procedures already used in the states. These procedures allowed effective advocacy on behalf of the accused. Defense cross-examination was central to this. In trying to make sure that federal trials would use the procedures already developed by Americans, the Sixth Amendment sought to guarantee defense cross-examination in the Confrontation Clause.

The information presented for this position, I admit, is hardly conclusive. The deductions and inferences from English and American developments, supported by snippets from colonial studies, records, and debates, is at best suggestive. Instead, if America truly had abandoned an earlier trial system dominated by the judges and, by the time of the Constitution, had adopted one dependent on defense advocacy with cross-examination at its core, then the best evidence of that transformation would come from tracing the changed procedures in ordinary trials. We should expect, after defense attorneys started appearing, to see more and better use of cross-examination. We should find objections when defense opportunities for cross-examination were denied. We should find an increasingly passive

212. *Id.* at 59.

213. A case a little more removed from the constitutional era made even more explicit the connection between confrontation and cross-examination. The prosecution offered at trial the testimony of a witness, dead at the time of trial, who had testified at a coroner's inquest in the absence of the accused. The court rejected the evidence because the defendant had not had the chance to cross-examine the witness. "[O]ne of the indispensable conditions of such due course of law is, that prosecutions be carried on to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." *State v. Campbell*, 30 S.C.L. (1 Rich 124, 125) 51, 51 (1844). While an oath is necessary for lawful testimony, it is not sufficient. Although "[a]ny one may . . . take the judicial oath[.] . . . it is only in the examination and cross-examination, that the knave can be detected, errors of fact exposed, or false imaginations expunged" *Id.* at 52. The opinion concluded by contending that reliance should not be placed on English cases "when a supposed felon had no counsel, no process to enforce the attendance of his witnesses, and no right to have them sworn in court. Who would look to Sir W. Raleigh's or Lord Russell's case for a fair trial or just judgment?" *Id.* at 53.

judiciary. We should find the disappearance of the accused as the prime evidentiary source. By the time of Constitution, we should find a considerable body of trials featuring defense advocates using forensic skills, including cross-examination, to persuade the fact-finder that the prosecution's version of the facts was not correct.

While such an analysis is desirable, it cannot be done. It would require something akin to modern trial transcripts from many ordinary eighteenth century cases. Such material does not exist, or at least has not been found. These trials did not have court reporters, and no one else attempted to record all that happened at routine trials.²¹⁴

There does exist, however, transcript-like records from four trials of the relevant period. Interestingly, they form two pairs, each of which provides an illustration of the thesis that American trials were transformed by the time of the Constitution. In each pair, one trial occurred before the right to counsel was accepted in that colony; the second afterwards. The first trials were dominated by the judges. Defense advocacy and cross-examination were limited at best. On the other hand, the later trials with defense counsel reveal a modern "testing the prosecution" form with defense advocacy and cross-examination at their core.

These trials should be examined, as they lend support to the position that, by the time of the Constitution, a new trial system was in place. This examination will take us from witches to Redcoats, and from New York slaves to Mr. Weeks.

214. See GOEBEL & NAUGHTON, *supra* note 84, at 641 ("At the precise juncture in a prosecution when a witness's words acquired immediate significance in settling the issue of a defendant's guilt, they were no longer worth committing to paper because no useful procedural end would be served by so doing. . . . [T]he clerks were equally indifferent to rulings which the courts might make in the course of hearing evidence. . . .").

American lawyers were more doers than recorders. They learned by experience without pausing to record what they had mastered. "In attempting to describe the procedure in criminal trials in Virginia, one is troubled by the scarcity of the material on which to base conclusions. Procedure was something which judges and lawyers learned by actual experience in the courts and seldom took the trouble to record in detail." SCOTT, *supra* note 38, at 50. The absence of written proscriptions and prescriptions led to an adaptive process that could transform itself quickly, but it presents a problem to the modern-day student since "[w]hat was once so obvious and elementary that it did not seem worth writing down and explaining is now elusive and abstruse to a conventionally trained historian." MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816* 8 (1978).

VIII. THE SALEM WITCH TRIALS

The basic story of the Salem witch trials is well known.²¹⁵ In early 1692, the daughter and niece of a Salem minister had convulsions. Witchcraft was diagnosed. The girls accused several women as their tormentors. Other girls soon claimed similar afflictions, and more people were named as witches.

Magistrates examined the afflicted and the accused. Trials ensued, and guilty verdicts announced. By the end of the year, one person had died in jail, nineteen had been executed, and another had been pressed to death.²¹⁶

But the cauldron had boiled dry. In January 1693, fifty-two more accused witches were tried. All but three were acquitted, with those three, later reprieved by the governor, having confessed. And the trials ended.²¹⁷

For a number of reasons, this story, familiar as it is, bears examination here. First, unlike most colonial criminal proceedings,²¹⁸ extensive records of what occurred in court were made and preserved.²¹⁹ These reports are

215. For a brief summary of the trials and surrounding events, see STATE TRIALS: THE PUBLIC CONSCIENCE 6-8 (Donald Thomas ed., 1972) [hereinafter THOMAS].

216. One of the suspects was killed merely for attempting to exercise a right to remain silent:

[W]hen Giles Corey was indicted he did something nobody else had dared to do. He stood mute, refusing to answer his indictment. And under both English and New English law a man who refused to answer could not be tried. He could, however, be tortured—be subjected to “peine forte et dure”—until he either answered or died. Accordingly Giles Corey was pressed: placed upon the ground with gradually increased weight upon him. It took him two days to die.

CHADWICK HANSEN, WITCHCRAFT AT SALEM 153-54 (1969). Corey's motivation is not known. A scholar has theorized this was a form of political protest and he “was pressed to death because he would not agree to be tried by the Special Court of Oyer and Terminer. His death was a protest—the most dramatic protest of all—against the methods of the court.” *Id.* at 154.

217. The three found guilty were convicted on the basis of their confessions. MARION L. STARKEY, THE DEVIL IN MASSACHUSETTS: A MODERN INQUIRY INTO THE SALEM WITCH TRIALS 235 (1950).

218. Even though

it is true there are still stored reams of depositions and examinations, there are pages upon pages of counsel's summaries of testimony prepared in advance of trial, but the *postea*s and judgment rolls are nearly always silent on what was said or proffered at trial, and the judicial minutes at best ordinarily furnish only a list of documents or the names of those who testified.

GOEBEL & NAUGHTON, *supra* note 84, at 628-29.

219. Samuel Parris, at the request of various authorities, recorded the preliminary examinations. He apparently also recorded the trial proceedings. THOMAS HUTCHINSON, THE

supplemented by many contemporaneous commentaries about the proceedings.²²⁰ Consequently, what happened at these trials is known. We know not only what evidence was presented, but how it was adduced. In other words, we can see what the trial procedures were for at least one, admittedly unusual, set of criminal proceedings as the eighteenth century dawned.²²¹

The Salem witch trials, however, have importance beyond the fact that their records survive.²²² These were not obscure proceedings. Their notoriety spread beyond Salem and endured beyond the seventeenth century. They were well known and analyzed when revolutionary ferment was stalking the colonies.²²³ The witch trials were quickly, widely, and consistently perceived as unjust.²²⁴ In print, correspondence, and no doubt

HISTORY OF THE COLONY AND PROVINCE OF THE MASSACHUSETTS BAY 23 (Lawrence Shaw Mayo, ed. 1936). The various court records were compiled in typescript, but not published, by the Works Progress Administration. See STARKEY, *supra* note 217, at v.

220. Many of these accounts are collected in GEORGE L. BURR, NARRATIVES OF THE WITCHCRAFT CASES (1914). In addition, many other documents concerning the Salem community have survived. Two historians have concluded, "[W]e realized that here was probably as large a body of first-hand documentation as existed for any seventeenth-century community in British America." PAUL BOYER & STEPHEN NISSENBAUM, SALEM POSSESSED: THE SOCIAL ORIGINS OF WITCHCRAFT x (1974).

221. See RUTLAND, *supra* note 19, at ix ("It is worth noting that the Salem witchcraft trials and the adoption of the Federal Bill of Rights virtually opened and closed the 18th century; and these historical incidents indicate the tremendous American intellectual advancement during that stirring span of time.").

222. Witch trials "may have had a far greater role in the development of English criminal law than we have hitherto suspected, not because so many individuals were caught in its net, but because the doctrinal writings on witchcraft provide the most extensive early public discussion of circumstantial evidence." SHAPIRO, *supra* note 66, at 209.

223. Hutchinson's history of Massachusetts, first published in 1760, gave a thorough recounting of the Salem witch trials, using, apparently, some sources that no longer survive. HUTCHINSON, *supra* note 219, at 19-47.

224. Afterwards, people realized that an injustice had been served:

In 1697 one of the magistrates . . . and twelve jurors confessed themselves guilty of shedding innocent blood in the trials. In 1706 Ann Putnam confessed that she had been misled by Satan. A day of fasting throughout Massachusetts had been appointed in 1697 and in 1710 a committee was set up to award compensation to those survivors who had suffered in 1692.

THOMAS, *supra* note 215, at 7. Meanwhile, a minister who at the time of the trials thought the accused were guilty and wrote a narrative defending the prosecutions shortly thereafter remarked "that many were of opinion that innocent blood had been shed." HUTCHINSON, *supra* note 219, at 47.

Doubts about the outcomes were, of course, also held by many while the trials proceeded. One person writing to a correspondent in October, 1692, stated, "As to the late

in public and private discourse, colonial Americans pondered the mistakes. No colonial trials were examined more. The consensus concluded that injustices were committed, even though existing law and procedures had been followed.²²⁵ Something, then, had to be wrong with the law and procedures, and consequently pressures for change and reform emerged out of these trials.²²⁶ Even though the trials were extraordinary and may not have been representative of the procedure used in all cases, the colonial criticism of them can help us understand how some early Americans thought criminal procedure should be reformed.

The flaws at Salem did not come from the lack of a jury trial or a face-to-face confrontation between the accused and accuser. The trials were to juries.²²⁷ Face-to-face confrontation was not only granted, it was crucial to many of the proceedings.²²⁸ The secret generation of evidence by the state

executions, I shall only tell you, that in the opinion of many unprejudiced, considerate and considerable spectators, some of the condemned went out of the world not only with as great protestations, but also with as good shews of innocence, as men could do." Letter from Thomas Brattle (October 8, 1692), in BURR, *supra* note 220, at 177 [hereinafter Brattle].

225. Surviving records show that the magistrates attempted to seek evidence "that would conform to the established rules of courtroom evidence—that is to say, evidence that was empirically verifiable and logically relevant." BOYER & NISSENBAUM, *supra* note 220, at 11.

226. The Reverend John Higginson, a minister in Salem, wrote in 1698 that the judges and juries following the law, as it existed at the time, but he wondered "[w]hether some of the laws, Customs and principles used by the Judges and Juries in the Trials of Witches in England (which were followed as Patterns here) were not insufficient and unsafe." John Higginson, *Introduction to John Hale, Hale's A Modest Inquiry* (1702), reprinted in BURR, *supra* note 220, at 401. Therefore, he advocated that the proceedings be studied so "[t]hat whatever Errors or Mistakes we fell into, in the dark hour of Temptation that was upon us, may be (upon more light) so discovered, acknowledged and disowned by us, as that if may be a matter of Warning and Caution to those that come after us, that they may not fall into the like." *Id.* at 401-02. Another Salem minister, the Reverend John Hale, who had started out as a defender of the trials, noted that men of integrity had followed the existing law but he agreed that the procedures were in need of reform. John Hale, *Hale's A Modest Inquiry* (1702), reprinted in BURR, *supra* note 220, at 415.

227. However, although there was a jury, "[i]t should not be overlooked that in these trials of 1692 the jurors were chosen from among church-members only, not, as later, from all who had the property to make them voters under the new charter." BURR, *supra* note 220, at 362 n.2.

228. The evidence against the accused included the reactions of the complainants when they came into the room:

In their effort to establish a probable connection between instances of misfortune and the malefic will of particular persons, the authorities introduced the practice of stationing the afflicted girls together in the examination room and observing them

did not occur. The proceedings, including the preliminary examinations, were very public.²²⁹ *Ex parte* depositions were not used. The trials relied heavily on evidence adduced at preliminary examinations, but both the accused and the accuser were present at them.²³⁰ If those examinations can be labeled depositions, they were not *ex parte*.²³¹

The perceived defects, instead, fell into two groups: first, wrong sorts of evidence were relied upon as proof of witchcraft; second, the methods for taking and presenting evidence were flawed. The evidence itself was largely of three kinds—confessions from the witches naming themselves and others, evidence about supernatural attributes of the accused, and “spectral evidence: testimony about supernatural visitations from some demonic creatures—perhaps Satan himself?—who appeared in the specter (that is, shape) of an accused witch.”²³²

All these forms of evidence received contemporary criticism. Thus, although confessions were widely relied upon,²³³ at least some thought that

closely for signs of pain when an accused witch was brought in. (In an extension of this process, the accused witch would then be required to touch the sufferers, and their response—usually instant recovery—would again be noted and entered as part of the record.)

BOYER & NISSENBAUM, *supra* note 220, at 15.

229. The trial attracted “a throng of Spectators . . . to see the Novelty.” Robert Calef, *More Wonders of the Invisible World* (1700), reprinted in BURR, *supra* note 220, at 343.

230. During the preliminary examinations, most of the accusers had fits supposedly caused by the presence of the accused witch.

[T]hese courtroom fits were so convincing that most of the indictments were for witchcraft committed during the preliminary examination rather than for the offense named in the original complaint. The typical order of events in the Salem witchcraft cases was: (1) the swearing out of a complaint for acts of witchcraft; (2) a preliminary examination during which the afflicted persons had convulsive fits; (3) an indictment for acts of witchcraft performed during the preliminary examinations; and (4) the trial.

HANSEN, *supra* note 216, at 89-90.

231. Massachusetts’ practice of permitting the accused to be present during the examination of the witness was a deviation from English practice. SHAPIRO, *supra* note 66, at 174.

232. BOYER & NISSENBAUM, *supra* note 220, at 16. For a summary of the categories of evidence, see *id.* at 13-16.

233. Increase Mather, while criticizing various aspects of the proof, maintained that “a free and Voluntary Confession of the Crime made by the Person Suspected and Accused after Examination is a sufficient ground of Conviction.” INCREASE MATHER, *CASES OF CONSCIENCE CONCERNING EVIL SPIRITS* 59 (1693).

this reliance was misplaced,²³⁴ especially those parts of the confessions that named others as witches.²³⁵ Others condemned the court's use of various tests and examinations to ferret out supernatural powers and manifestations as mere superstitions.²³⁶

The spectral evidence, however, attracted the most debate.²³⁷ This proof depended upon the beliefs that specters existed, that the afflicted "saw" real specters, even if they were invisible to others, and that the devil would not be able to take the form of an innocent person.²³⁸ Consequently, when the afflicted reported specters in the shape of an accused, proof was presented that the accused was a witch. Few ever challenged the assertion that the afflicted perceived specters. After much theological discussion, however, influential ministers concluded that, in spite of the original assumption of the courts, specters could take the shape of innocent people. If that were true, then a report by the afflicted of specters in an accused's form was not meaningful evidence of witchcraft.²³⁹ After this conclusion was reached,

234. One critic of the confessions strongly believed that the confessors were "deluded, imposed upon, and under the influence of some evil spirit; and therefore unfit to be evidences either against themselves, or any one else." Brattle, *supra* note 224, at 173.

235. Although Increase Mather believed that the confessions were valid, *see supra* note 233, that belief did not extend to parts of confessions that implicated others. He "could mention dismal Instances of Innocent Blood which has been shed by means of the Lies of some confessing Witches." MATHER, *supra* note 233, at 61-63.

236. For a discussion and condemnation of some of these tests, *see id.* at 52-57.

237. The judges were divided on how spectral evidence should be interpreted. STARKEY, *supra* note 217, at 154.

238. The lieutenant-governor believed "that although the devil might appear in the shape of a guilty person, yet he would never be permitted to assume the shape of an innocent person." HUTCHINSON, *supra* note 219, at 18.

239. A letter from twelve ministers, probably drafted by Cotton Mather, *see* STARKEY, *supra* note 217, at 155, had stated that

convictions whereupon persons may be condemned, as guilty of witchcrafts, ought certainly to be more considerable than barely the accused person's being represented by a spectre unto the afflicted; inasmuch as it is an undoubted and a notorious thing, that a demon may, by God's permission, appear, even to ill purposes, in the shape of an innocent, yea, and a virtuous man.

HUTCHINSON, *supra* note 219, at 38. The letter had little immediate effect since the judges were more interested in "the speedy and vigorous prosecutions . . . for the detection of witchcrafts" than they were in proceeding with caution. *Id.* at 39.

In October, 1692, however, Increase Mather published *Cases of Conscience Concerning Evil Spirits*, *supra* note 233, which stated that the devil may take the shape of an innocent person and concluded, "This then I Declare and Testify, that to take away the life of any one, merely because a *Spectre* or Devil, in a Bewitched or Possessed person does accuse them, will bring the Guilt of Innocent Blood on the Land, where such a thing shall

juries were instructed to disregard spectral evidence, and the convictions ended.²⁴⁰

More than dubious evidence however, caused the injustices. So, too, did the judges. These were not judges as we now think of them. They were not modern, passive arbiters. Instead, like the English judges before the rise of defense counsel, the Salem magistrates developed the facts through both pretrial examinations and the trial itself. They did this unimpeded since neither the state nor the accused had attorneys.

These judges were hardly neutral truth-seekers. The magistrates were certain of the accused's guilt. Their job was to produce the evidence supporting that guilt and then have a jury return a verdict consistent with what already was known. The trials were held to confirm guilt, not to find whether it existed.²⁴¹

Since the best evidence of guilt was a confession, the magistrates went to great lengths to get one. The judges directly questioned the accused, who, without an attorney or a right against self-incrimination, had no protections against judicial bias.²⁴² "Over and over again, the record shows the examiners almost frantically trying to draw a confession from the lips of a

be done." *Id.* at 34. Although these sentiments were not new, they now began to make an impact. See STARKEY, *supra* note 217, at 221.

240. Several theories explain why the convictions ended. One contemporary observer believed the convictions ended as soon as the jury was told they should consider spectre evidence worthless. Calef, *supra* note 229, at 382. Others believed the ministers had a tremendous impact and were responsible for changing the level of acceptable proof. According to this theory, the convictions stopped after the ministers "emphasized that every conviction must be based on water-tight proof of guilt." BOYER & NISSENBAUM, *supra* note 220, at 11. Still others have cited the fact that the ranks of the accused began to extend beyond the lower classes. Those scholars believe that once people from "superior rank" started to be accused, the community realized they had gone too far. HUTCHINSON, *supra* note 219, at 45.

241. STARKEY, *supra* note 217, at 150. Certainly most of those accused held no illusions that they would be exonerated. For example, John Proctor wrote while awaiting trial, "[O]ur Judges, and Jury, whom nothing but our Innocent Blood will serve their turn, [have] condemned us already before our Tryals. . . ." Calef, *supra* note 229, at 362. The records contain numerous demonstrations of judicial bias. For example, an accused was made to stand with her arms stretched out, and when she and her husband implored the court for a respite, "Justice Hathorn replied, she had strength enough to torment those persons, and she should have strength enough to stand." *Id.* at 351.

242. WARREN, *supra* note 93, at 71-72 (quoting H.L. OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* (1904-07)).

person whose guilt they clearly do not doubt but against whom they recognize they do not yet have a legal case."²⁴³

While some condemned the coercion,²⁴⁴ torture,²⁴⁵ and inducements²⁴⁶ used to obtain confessions and others saw the possibilities of lying, deception, delusion, and fraud in the charges,²⁴⁷ more and more began to see an overarching flaw—those with total control over the evidence simply accepted the allegations as true. As a result, while the accused were in effect

243. BOYER & NISSENBAUM, *supra* note 220, at 11-12. See also HANSEN, *supra* note 216, at 33 ("Rather than adopting the stance of impartial investigator, . . . [the examining magistrate] acted more like a prosecuting attorney than a magistrate, assuming the guilt of the person under examination and trying to force a confession with bullying questions.").

244. Increase Mather, in stating what proof would be sufficient for a conviction of witchcraft, first listed "a free and Voluntary Confession of the Crime . . ." but then went on to caution that "if Confession be extorted, the Evidence is not so clear and Convictive." MATHER, *supra* note 233, at 59-60.

245. One of the accused left a graphic record of the torture:

Here are five Persons who have lately confessed themselves to be Witches, and do accuse some of us. . . . Two of the 5 are . . . Young-men, who would not confess any thing till they tyed them Neck and Heels till the Blood was ready to come out of Noses. . . . These actions are very much like the Popish Cruelties. They have already undone us in our Estates, and that will not serve their turns, without our Innocent Bloods.

Calef, *supra* note 229, at 362-63.

246. The accused quickly came to believe that the only way to save their lives was to proclaim themselves, and others, witches. See *id.* at 364-66, 375-76. Thomas Hutchinson harshly condemned the efforts to induce confessions and accusations:

No body was safe. The most effectual way to prevent an accusation, was to become an accuser; and accordingly the number of the afflicted increased every day, and the number of the accused in proportion, who in general persisted in their innocency; but, being strongly urged to give glory to God by the confession, and intimation being given that this was the only way to save their lives, and their friends urging them to it, some were brought to their own guilt.

HUTCHINSON, *supra* note 219, at 23-24.

247. Brattle, *supra* note 224, at 188. Seventy years later, Hutchinson rejected the notion that the

accusers [were] under bodily disorders which affected their imaginations. This is kind and charitable, but seems to be winking the truth out of sight. A little attention must force conviction that the whole was a scene of fraud and imposture, begun by young girls, who at first perhaps thought of nothing more than being pitied and indulged, and continued by adult persons, who were afraid of being accused themselves. The one and the other, rather than confess their fraud, suffered the lives of so many innocents to be taken away, through the credulity of judges and juries.

HUTCHINSON, *supra* note 219, at 47.

cross-examined by the court,²⁴⁸ the accusers were not challenged. The judges, instead, often used leading questions to get the accusers to give the inculpatory evidence desired by the court. For example:

Q. Mary Lacey! was there not a man also among you at your meeting? A. None but the devil. Q. What shape was the devil in then? A. He was a black man, and had a high crowned hat. Q. Your mother and your grandmother say, there was a minister there. How many men did you see there? A. I saw none but Richard Carrier. Q. Did you see none else? A. There was a minister there, and I think he is now in prison. Q. Were there not two ministers there? A. Cannot tell. Q. Was there not one Mr. Burroughs there? A. Yes.²⁴⁹

Such use of leading questions was recognized by some as a dangerous tactic,²⁵⁰ but soon it was seen by increasing numbers to be part of a more

248. See, e.g., Calef, *supra* note 229, at 344:

Mr. Hathorn, a Magistrate of Salem, asked her, why she Afflicted those Children? she said, she did not Afflict them; he asked her, who did then? she said, "I do not know, how should I know?" she said, they were Poor Distracted Creatures, and no heed to be given to what they said; Mr. Hathorn and Mr. Noyes replied that it was the Judgment of all that were there present, that they were bewitched, and only she (the Accused) said they were Distracted.

249. HUTCHINSON, *supra* note 219, at 29. A review of the records showed that some of the confessions resulted from the court's questioning. *Id.*

250. This at least is the implication of a telling exchange between Robert Calef and Cotton Mather. Calef's book was especially critical of Mather. In it, he reproduced Mather's account of his September, 1693, pastoral examination of Margaret Rule, who seemed afflicted by witches. Calef then added an unnamed person's version of that examination. Calef continued that Mather had heard of the other account and was offended by what he heard. Calef, consequently, sent Mather the other's narration. Mather, clearly outraged, claimed that portions of the examination were taken out of context and that some of the descriptions of the physical manifestations were inaccurate. He, however, especially railed against any report that he used leading questions in the examination.

In that several of the Questions in the Paper are so Worded, as to carry in them a presupposal of the things inquired after, to say the best of it is very unfair. . . . 'Tis no less untrue, that either my Father or self put the Question, how many Witches sit upon you? We always cautiously avoided that expression; It being contrary to our inward belief: All the standers by will (I believe) Swear they did not hear us use it (your Witnesses excepted) and I tremble to think how hardy those woeful Creatures must be, to call the Almighty by an Oath, to so false a thing.

Calef, *supra* note 229, at 334-35. This exchange indicates that while leading questions were used regularly in 1692 to elicit complaints of witchcraft, their reported use a few years later

general problem—the acceptance of incriminatory proof without challenge.²⁵¹

The judges neither used, as they were urged by prominent ministers, “a very critical and exquisite caution” in accepting signs of witchcraft nor conducted the trials “with an exceeding tenderness towards those that may be complained of. . . .”²⁵² Even when it was clear that the accusers were lying²⁵³ or being prompted by others,²⁵⁴ the judges just simply accepted the accusations without testing, challenge, or skepticism.

Since judges had helped cause the injustices, the colonists naturally considered whether better judges would prevent future injustices. The judges, however, were not bad or incompetent. They were, instead, men of good judgment. All humans, the New Englanders believed, are fallible, and that fallibility often prevents a person from seeing his own errors.²⁵⁵ Better judges, as long as they were human, was not the solution.

Since a change in personalities would not prevent future disgraces, systemic reform could be the only answer. And since the judges had nearly total control of the proceedings, almost any desirable change had to circumscribe judicial powers. Granting juries more autonomy and power

was considered slanderous. By 1697, apparently, the Salem community had become convinced of the dangers of leading questions.

251. Thomas Brattle, a contemporary observer, noted that one of the judges had previously told an accused that he always considered him to be a good man but changed his opinion just because a child came out of her fit at the same time that the accused touched her. Brattle questioned why the judge “never made the experiment, whether there was not as much virtue in his own hand, as there was in Mr. Alden’s, to cure by a touch.” Brattle, *supra* note 224, at 170-71.

252. From paragraphs three and four of the pastoral letter, June 15, 1692, apparently drafted by Cotton Mather. Reproduced in HUTCHINSON, *supra* note 219, at 38.

In October, Increase Mather stressed that before convicting anyone of witchcraft, the evidence should be as clear as for any other capital crime. In his conclusion Mather stressed, “It were better that Ten Suspected Witches should escape, than that one Innocent Person should be condemned.” Mather, *supra* note 233, at 66.

253. Even though judges do not normally condone lying by witnesses, these judges did not mind and merely blamed deception on the Devil. Brattle, *supra* note 224, at 173. The accusers often complained the accused had bitten them. However, there were instances in which others had seen the accusers bite themselves and there was even an example of an accused who was charged with biting even though he did not have any teeth. Calef, *supra* note 229, at 353.

254. Some accusers had named John Alden as a witch. When Alden was brought into court, the girls fell into fits. When they ceased, however, they pointed out someone other than Alden as the agent of their convulsions. A man standing behind an accuser then whispered in her ear, after which she identified Alden as the bewitcher. *Id.*

255. See, e.g., Brattle, *supra* note 224, at 169.

would do that, and the Salem trials led to pressures for more jury independence.²⁵⁶ But even if judges were not riding roughshod over juries, the problem of accusatory evidence being accepted without challenge or testing remained.²⁵⁷

An answer to this problem, apparently increasingly accepted by those examining the Salem trials, was to increase the opportunity for advocacy for the accused. The trials would have been better with true cross-examination and true notice. Thus, Thomas Hutchinson, writing at the dawn of the Revolution, summarized the Salem trials: "Instead of suspecting and sifting the witnesses, and suffering them to be cross examined, the authority, to say no more, were imprudent in making use of leading questions, and thereby putting words into their mouths or suffering others to do it."²⁵⁸

Furthermore, the notice was deficient because the judges had not limited the proof of witchcraft to what was charged in the indictments, but permitted evidence about almost any period of the accused's life. While contemporaries sensed an injustice in this situation,²⁵⁹ later generations more fully recognized the problem—without notice, there cannot be an adequate defense.²⁶⁰

Salem showed the dangers in a system where the accused could do little to affect the factual developments at criminal trials. Seventy years later

256. Finally, contemporary critics noted the extraordinary influence the judges had over the jury. This was illustrated when, during one of the early trials, the jury acquitted. The court was displeased. "[O]ne of the Judges exprest himself not satisfied, another of them as he was going off the Bench, said they would have Indicted anew." Calef, *supra* note 229, at 358. The chief judge suggested that the jury had not fully considered some of the evidence. All of this induced the jury to go out again and reverse their verdict, proclaiming the defendant guilty.

257. The Salem trials may have also lead to more respect for the law and legal training in Massachusetts. While the judges were respected figures, they were not trained in the law. See BURR, *supra* note 220, at 155 n.2, 355 n.2.

258. HUTCHINSON, *supra* note 219, at 21.

259. Thomas Brattle complained that the accused were often charged with one offense and then had to defend against evidence that was not related to the indictment. Brattle, *supra* note 224, at 175.

260. Thomas Hutchinson summed up the problem:

[S]ome of the other evidence was of facts ten or twenty years before, which had no relation to those with which they were charged; and some of them no relation to the crime of witchcraft. Evidence is not admitted, even against the general character of person upon trial, unless to encounter other evidence brought in favour of it; much less ought their whole lives to be arraigned, without giving time sufficient for defence.

HUTCHINSON, *supra* note 219, at 44.

critics assumed that fair trials required evidence to be challenged with an opportunity for a true defense. That required defense advocacy with meaningful cross-examination which would ensure that the evidence against the accused could truly be tested. The criticisms of Salem indicate that Massachusetts was moving towards such a system. The Boston Massacre trials demonstrate that a true adversary system—allowing the accused to be represented by an attorney, to present a defense by challenging accusers through cross-examination, and to present witnesses—was in place, for at least some trials, by Independence.

IX. THE BOSTON MASSACRE TRIALS

On the eve of the Revolution, as illustrated by the Boston Massacre trials, Massachusetts granted a much different form of criminal trial from that used at the Salem witch trials. On March 5, 1770, while British soldiers were occupying Boston, a dispute erupted at the Custom House. The soldiers, led by Captain Thomas Preston, opened fire. Three Bostonians were killed instantly, and two others died soon afterwards.

The soldiers were tried for murder in two separate trials. Captain Preston was prosecuted first with the rest of the soldiers jointly tried later. With John Adams as the lead defense counsel in both trials, Preston and five of the soldiers were acquitted by juries, while two others were convicted only of manslaughter.²⁶¹

A verbatim transcript of the seven soldiers' trial, *Rex v. Wemms*, was published. No transcript of Preston's trial survives, but the proceedings have been pieced together from a number of sources. Although the accuracy of every particular facet of the trials cannot be assured, we can get a good picture of what happened.²⁶²

261. Probably the fullest discussion of the events leading up to the shootings and the subsequent trials, is HILLER B. ZOBEL, *THE BOSTON MASSACRE* (1970).

262. For a bibliography of the Boston Massacre trials, see H. Butterfield, *Descriptive List of Sources and Documents*, in 3 *LEGAL PAPERS OF JOHN ADAMS* 34-45 (L. Kinvin Wroth & Hiller B. Zobel ed., 1965) [hereinafter *ADAMS PAPERS*]. Butterfield states, "Documenting the two principal trials growing out of the Boston Massacre has required an elaborate piecing together of scattered and often defective sources. . . . Taken all together, however, the materials for telling the story of the legal aftermath of the events of 5 March 1770 are impressive in quantity and form a fairly continuous record of a dramatic episode in legal history." *Id.* at 34. The documents themselves are reproduced in *id.* at 46-314.

Although there were no transcripts from Preston's trial, the records appear to be accurate. Immediately following the trial, summaries of all of the witnesses' testimony

Unlike the Salem proceedings, these were not trials where biased judges dominated the presentation of evidence. The Boston Massacre trials were truly adversarial. Lawyers, not judges, were in charge of the factual presentations. Each side was represented by trained advocates.²⁶³ "Advocate" is the key word here.

Defense counsel was not under the same restraints as those existing under the English system. Unlike England, where defense lawyers only argued legal points or perhaps were allowed to urge the judges on how they should present and develop the evidence or were granted an opportunity for some cross-examination by judicial largess, in 1770 Boston, both prosecution and defense counsel were full advocates for their respective sides.²⁶⁴

John Adams and his colleagues cross-examined prosecution witnesses;²⁶⁵ they called and examined defense witnesses; and they addressed the jury, making both opening and closing arguments. They did not undertake these functions in a neutral or objective manner, but instead

were compiled and the prosecuting attorney's personal records still survive. ZOBEL, *supra* note 261, at 247-49. These two sources "tend to corroborate each other," and one of the top scholars of the trials "decided to rely on them fully." *Id.*

263. Samuel Quincy and Robert Treat Paine represented the Crown. John Adams and Josiah Quincy represented all the defendants, and, in addition, Robert Auchmuty also represented Preston. 3 ADAMS PAPERS, *supra* note 262, at 6-8.

264. In one crucial way the defense had a tool that the prosecution did not. Apparently the prosecution was not permitted to challenge prospective jurors peremptorily. "The figures on Preston's challenges . . . coupled with a clear indication that the prosecution would have challenged certain jurors if it could, suggest that only the defense was permitted to challenge." ZOBEL, *supra* note 261, at 244. In Preston's case, this resulted in the seating of jurors biased in favor of the defense. Zobel concluded:

[R]ecalling that Massachusetts practice required a unanimous jury for conviction, we can probably be fairly sure that before a single witness had been sworn, the outcome of the trial was certain. . . . [T]he trial, as lawyers and judges must have known, was nothing but a propaganda battle. Yet everyone acted as though a life were really at stake.

Id. at 246. However, he concluded the defense "testimony generally was so strong that even an honest jury would probably have acquitted [Preston]." *Id.*

265. The transcripts that exist do not indicate who asked the question and do not clearly delineate cross from direct examination. See 3 ADAMS PAPERS, *supra* note 262, at 25. Nevertheless, Zobel was able to differentiate between direct and cross-examination "purely from (a) the context and (b) an informed surmise, reinforced occasionally by an acquired feeling that the matter in question is something no sane trial lawyer would willingly bring out on direct examination." ZOBEL, *supra* note 261, at 249.

As an example of the cross-examination, see the testimony of James Bailey from the Wemms trial. 3 ADAMS PAPERS, *supra* note 262, at 117.

did so as advocates. They had a theory, self-defense or justification, and the defense lawyers used their tools to further that theory, just as a modern advocate would. Prosecution witnesses were not just accepted or simply asked to clarify ambiguous points. Their stories were probed by challenging and skeptical questions.²⁶⁶ Contradictions with other witnesses were highlighted.²⁶⁷ Attempts were made to enhance the defense witnesses' credibility.²⁶⁸ Statements to the jury were not impartial recitals of evidence, but clever arguments for why the defense theory ought to be accepted.²⁶⁹ These were lawyers acting as we expect modern defense attorneys to act, as

266. The cross-examination of Josiah Simpson, a prosecution witness, provides an example:

I then saw a white club thrown at some distance from me towards the soldiers. . . .

Q. Did that club hit any body?

A. I believe it hit one of the solders guns, I heard it strike.

Q. Was that before the firing, or after?

A. Before the firing.

Q. How near to the soldiers was the person that threw the club?

A. About ten yards off. . . .

Q. Upon the oath you have taken, did that man throw the stick with considerable violence, or not?

A. He threw it considerable hard, he threw it over hand.

3 ADAMS PAPERS, *supra* note 262, at 128 n.4.

267. Witnesses were permitted to be immediately recalled in order to expose contradictions. For example, after a prosecution witness testified that a soldier had fired and had not fallen or been knocked down beforehand, the defense was permitted to immediately recall their witness to counter that testimony. *Id.* at 119.

268. One of the crucial defense witnesses was Andrew, whose last name, if it existed, was not given. Andrew was a slave owned by Justice Oliver Wendell Holmes' great-grandfather. ZOBEL, *supra* note 261, at 257. After Andrew gave exculpatory testimony in Preston's trial, the defense called Oliver Wendell who testified that Andrew's "character for truth, integrity, and understanding is good." *Id.* at 258.

269. For example, Adams, as part of his closing argument in the Wemms case, stated:

Langford "heard the rattling against the guns, but saw nothing thrown."—This rattling must have been very remarkable, as so many witnesses heard it, who were not in a situation to see what caused it. These things which hit the guns made a noise, those which hit the soldiers persons, did not—But when so many things were thrown and so many hit their guns, to suppose that none struck their persons is incredible.

3 ADAMS PAPERS, *supra* note 262, at 267.

advocates for their clients in all parts of the trial. Not surprisingly, the records of the testimony read much like a modern trial transcript.²⁷⁰

The system that sealed the fate of the Salem “witches” was not present. Now advocates, not judges, presented and probed the evidence and fashioned arguments for the jury on its significance. The focus of a trial was not the extraction of the accused’s confession. The person charged was no longer the evidentiary center of the trial as she had been at Salem. In the Boston trials, neither judge, prosecutor, nor defense counsel asked any questions of those on trial.²⁷¹ Guilt, if it were to be proved, was to be established from the testimony of others.

Adams and the other lawyers were not breaking new ground in defending Preston and the others. These changes from the Salem trials, as well as the deviations from the prevailing English criminal procedure, were clearly well established.²⁷² The key in the changed procedures seems to have been the full representation by defense counsel, which was accepted without debate or comment in the Boston Massacre trials.

270. Perhaps the major difference from a modern transcript besides the fact that cross and direct are not demarcated is that the Boston Massacre transcripts do not contain any objections by the attorneys. *See id.* at 25. It is not clear whether that really means there were no objections or whether they simply were not recorded.

271. Under then existing procedures, the defendants could not have testified even if they had wished to.

By eighteenth-century rules of evidence, the accused in a criminal case, like the parties in a civil one, could not legally take the stand, even on his own behalf. In both instances, the law reasoned that the certainty of perjury by the interested litigant overcame whatever truth-finding value his evidence might afford. Preston was therefore a legally incompetent witness.

ZOBEL, *supra* note 261, at 254-55. On the other hand, at least some of the time, a defendant, even though represented by counsel, was permitted to ask questions of witnesses and sometimes, in effect, testify by doing so. For example, in a 1769 murder trial, *Rex v. Corbet*, the existing documents indicate defendants asking a few questions. *See, e.g.*, 2 ADAMS PAPERS, *supra* note 262, at 307. One defendant in the guise of asking a question of a prosecution witness, in effect, testified:

Q. by Prisoner Corbet. How could you see when there was no light, the scuttles being down.—There was no Light among ‘em, but we had Lights and the Planks were all clear where we were. The Light shone full upon them.

Id. at 305.

272. Although the adversarial system was in place for these trials, procedure naturally continued to evolve. One notable difference from modern trials is that a group of judges presided over the trial, and each judge charged the jury separately. ZOBEL, *supra* note 261, at 264.

Although it is unclear how Massachusetts blazed its own path,²⁷³ that colony had set a course different from the English common law on the right to counsel.²⁷⁴ Indeed, that right was so firmly ensconced before the Revolution that in at least one case, the colonial Massachusetts court appointed counsel when the defendant was unable to secure a lawyer on his own.²⁷⁵

The right had been established long enough for counsel to see themselves as advocates and present a sophisticated defense. Lawyers uncertain of their advocacy role or its limits were unlikely to perform as brilliantly as these lawyers did.²⁷⁶ Counsel's job was to make sure that a criminal charge was not simply equated with guilt.²⁷⁷ Their goal was to

273. The right to counsel in Massachusetts may have come from legislation. An act passed towards the end of the Salem witch trials, after giving general jurisdiction, "provid[ed] that 'the plaintiffe or defendant in any suit may plead or defend his cause by himselfe in his proper person, or with the assistance of such other person as he shall procure.' . . . Arguably, despite its language, this act applied to criminal as well as civil matters." 2 ADAMS PAPERS, *supra* note 262 at 402 n.40 (citation omitted).

274. Massachusetts also set its own path on allowing defendants to summon witnesses. Although there was no express statutory provision providing for compulsory process in criminal cases, the soldiers were provided with that right. *Id.* at 401-02.

275. Shortly before the Boston Massacre trials, Ebenezer Richardson was tried for homicide. On the day set for trial, Richardson told the court that he had been unable to find counsel willing to represent him. The court then appointed Samuel Fitch to undertake the representation. After several postponements, Fitch reported himself ill, and the court then appointed Josiah Quincy to represent Richardson. ZOBEL, *supra* note 261, at 222-23; 2 ADAMS PAPERS, *supra* note 262, at 402. This was apparently not a singular occurrence. "It is worth noting that whereas in provincial Massachusetts, the court would apparently appoint counsel for a man accused of murder who had none, in contemporary England (and, for that matter, in New York), defendants in felony trials could not be represented by counsel at all." 2 ADAMS PAPERS, *supra* note 262, at 402-03 n.40.

276. Cf. ZOBEL, *supra* note 261, at 260 ("Adams's [closing] argument, as taken down by his opponent and professional rival, [Robert Treat] Paine, brilliantly capped the case.").

277. Josiah Quincy Jr.'s defense of his actions in representing Preston and the others is as "modern" as any present attorney could give. Quincy's father had written him a letter stating that he could not believe the stories that his son was going to defend those charged. Quincy replied:

I have little leisure, and less inclination, either to know or to take notice of those ignorant slanderers who have dared to utter their "bitter reproaches" in your hearing against me, for having become an advocate for criminals charged with murder. . . .

Let such be told, Sir that these criminals, charged with murder, are *not yet legally proved guilty*, and therefore, however criminal, are entitled, by the laws of God and man, to all legal counsel and aid; that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation. . . . I dare affirm

persuade a jury²⁷⁸ through cross-examination, the presentation of defense witnesses, and arguments to that jury that the charge had not been proved.²⁷⁹

The Boston Massacre trials reveal an adversary system fueled by zealous defense advocacy operating before Independence. It was in place for a trial that, although politically charged, was not for a state crime, but for an ordinary criminal offense. Predictably, this rise of adversariness and defense

that you and this whole people will one day REJOICE that I became an advocate for the aforesaid "criminals" charged with the murder of our fellow-citizens.

Letter from Josiah Quincy, Jr. to Josiah Quincy, Sr. (March 26, 1770), *reprinted in 3 ADAMS PAPERS*, *supra* note 262, at 7. The right to counsel had so far advanced in Massachusetts that Quincy could simply assert as self-evident that those charged were entitled "by the laws of God and man, to all legal counsel," when English law would not then have allowed the Adams and Quincy's representation. Adams later wrote about his defense of Preston:

I had no hesitation answering that Council ought to be the very last thing that an accused Person should want in a free Country. That the Bar ought in my opinion to be independent and impartial at all Times And in every Circumstance. And that Persons whose Lives were at Stake ought to have the Council they preferred.

DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 293 (Lyman H. Butterfield ed., 1961).

278. While the Salem trials cast doubt upon whether the principle was then accepted, by 1770 a jury's verdict of not guilty was apparently inviolable no matter what the presiding justices thought of it. In *Rex v. Richardson*, the judges instructed the jury that the killing done by Richardson was done in self-defense and he should be convicted of nothing more than manslaughter. 2 ADAMS PAPERS, *supra* note 262, at 404. Probably influenced by a mob, the jury, while acquitting a co-defendant, convicted Richardson of murder.

A hearing was later held at which the jurors testified. The tipping point in the deliberations, according to the jury, was the jurors' impression "that the judges' unanimously expressed belief that Richardson was innocent meant that the court would take the proper steps to save his life." ZOBEL, *supra* note 261, at 239; 2 ADAMS PAPERS *supra* note 262, at 406.

Even though the jurors were mistaken, it was clear the judges could neither acquit Richardson nor order a new trial. "The inviolability of a jury verdict had become so sacred a principle that the court felt itself helpless." ZOBEL, *supra* note 261, at 239. "It is apparent from the notes that counsel was very much aware of the doctrine . . . that the jury was the proper finder not only of fact, but of law as well." 2 ADAMS PAPERS, *supra* note 262, at 407.

The judges dealt with this situation by not sentencing Richardson and instead seeking a pardon for him in advance of the sentence. Richardson remained in jail for two years until the pardon was granted and arrived in Boston. *Id.* at 407-10.

279. The Massacre trials apparently were conducted under the principle that guilt had to be proved by the prosecution, not that innocence had to be established by the defense. Judge Oliver, in the *Wemms* trial, instructed the jury that if they were convinced that justification had been established they must acquit "or if upon the whole, ye are in any reasonable doubt of their guilt, ye must then, agreeable to the rule of law, declare them innocent." 3 ADAMS PAPERS, *supra* note 262, at 309.

advocacy brought with it a concern about hearsay.²⁸⁰ Testimony may have been excluded from the Boston Massacre trials because it was hearsay.²⁸¹ Certainly hearsay concerns shaped the testimony of a crucial defense witness.

Dr. John Jeffries was the surgeon for Patrick Carr, who died from wounds suffered in the shooting. The patient, according to Jeffries, said that the mob greatly abused the soldiers and hurt them with thrown objects. Jeffries then testified that Carr said that "he thought [the soldiers] did fire to defend themselves; that he did not blame the man whoever he was, that shot him. . . . [H]e always called himself a fool, that he might have known better, that he had seen soldiers often fire on the people in *Ireland*, but had never seen them bear half so much before they fired in his life."²⁸²

This testimony today, of course, would be classified as hearsay. It, however, was also recognized as such then, for it was qualified as a dying declaration:

Q. Was he apprehensive of his danger?

A. He was told of it. . . .

Q. How long did he live after he received the wounds?

A. Ten days.

Q. When had you the last conversation with him?

A. About four o'clock in the afternoon, preceding the night on which he died, and he then particularly said, he forgave the man whoever he was that shot him, he was satisfied he had no malice, but fired to defend himself.²⁸³

The Boston Massacre trials were adversarial proceedings with a developing concern about hearsay. The defendants had been granted tools—

280. The Salem witch trials, in contrast, seemed to indicate no concern about hearsay. The trial of Margarit Matson for witchcraft held in Philadelphia in 1684, however, was different. For example, one witness stated that twenty years ago he was told that the defendant was a witch and had bewitched several cows. BURR, *supra* note 220, at 86. The defendant denied the charges, but added "that the Witnesses speaks only hear say." *Id.* at 87. The jury found her guilty of having the common fame of a witch, but found her "not guilty in manner and forme as She stands Indicted." *Id.*

281. John Adams notes of the *Wemms* trial refer to one witness' testimony as hearsay. The editors of his legal papers state, "It is not clear whether JA is here merely characterizing the testimony or noting its exclusion." 3 ADAMS PAPERS, *supra* note 262, at 179 n.86.

282. *Id.* at 214.

283. *Id.*

a full right to counsel, compulsory process, and the opportunity to cross-examine the witnesses against them—so that they could meaningfully test the prosecution's case.

That an adversary system was used in two 1770 trials does not, of course, show that it was being used in all criminal trials of the day. The circumstances certainly indicate, however, that adversarial proceedings were not limited to these two cases. The full right to counsel was not confined to the Boston Massacre trials, but seems by then to have been generally granted. This suggests that cases besides these saw such defense advocacy. Furthermore, the skill with which these attorneys performed, their ready acceptance of the advocacy role, and the absence of anything indicating that this advocacy was remarkable all suggest that the adversarial nature of the trial was not unusual.

Perhaps equally important, even if the adversarial system was not absolutely ensconced in Massachusetts in 1770, when Americans twenty years later were deciding what kind of trial system should be constitutionalized in the Sixth Amendment, famous trials such as those concerning the Boston Massacre must have formed the model. Certainly John Adams had to have had high regard for the trial system used in the Boston Massacre trials. He wrote in his diary three years later that a "Judgment of Death against those Solders would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently."²⁸⁴ A system that allowed his defense advocacy had helped prevent that blot. Adams and other Americans would have wished to make sure that such a system would be used in federal court.

And it was not Massachusetts alone that was developing an adversary system in eighteenth century America. Virginia was taking steps in that direction,²⁸⁵ and New York, on a later schedule, also produced the same transformation. This, too, is illustrated by a pair of trial proceedings.

X. THE NEW YORK SLAVE REVOLT TRIALS OF 1741

A burglary began the events that led to the slave revolt trials of 1741.²⁸⁶ A rash of fires followed, and arson was suspected. John Hughson's

284. 2 *id.* at 79.

285. See *supra* note 90 and accompanying text.

286. Black slaves constituted a sizable portion of the colonial New York population. "By contemporary estimate, there were more black slaves in New York than in any colony north of Maryland." GREENBERG, *supra* note 189, at 29. "Blacks were never less than 11.5% of the colony's population, and for much of the period were as high as 15%." *Id.* at 43. "By

indentured servant, sixteen year old Mary Burton, told the grand jury that blacks set the blazes at Hughson's instigation. The goal, Burton stated, was a slave revolt that would install Hughson, a white tavern keeper, as king and divide the white women among the slaves.

Two supposed leaders of the slaves, Quack and Cuffee, were placed on trial first. They were found guilty and condemned to burn. Even though offered clemency for their confessions, the two maintained their innocence until the flames had begun when their confessions implicating Hughson came too late to save them.

In short order, Hughson, his wife, and Peggy Kerry, a suspected prostitute who lived with them, were tried, convicted, and executed. These deaths only seemed to further fuel a panic about a slave revolt. Mary Burton and others accused more and more. Those accused were promised clemency for confessing. Not surprisingly, confessions flowed naming the confessor and others as having criminal designs.²⁸⁷ More people were charged. Then, finally as the panic may have been collapsing, events took a new turn.

England was at war with Spain, and reports circulated that the Spaniards were going to send Catholic priests to New York to organize the city's destruction. This assertion "released long-standing religious animosities. Catholics were detested in the English colonies, not only on religious

1741, one of every seven persons throughout the province was black. In New York City the proportion stood higher, near one in every five." THOMAS J. DAVIS, *A RUMOR OF REVOLT: THE "GREAT NEGRO PLOT" IN COLONIAL NEW YORK* 32 (1985). Laws promulgated at all levels of the colony restricted the activities of the slaves:

[W]hites throughout the colony engaged in a comprehensive attempt to control what they believed was a restive slave population. Blacks were prevented by law from buying liquor, holding funerals after dark, going out at night without a candle or lantern, assembling in groups of more than three, belonging to a militia, or carrying a gun or other weapon of any kind, leaving their masters' houses on the sabbath, or even training a dog. In addition, several laws were passed by the Assembly under the general rubric of preventing conspiracies and insurrections by slaves. Further, in the city proper the House of Correction was made available to masters with "unruly and ungovernable" slaves.

GREENBERG, *supra* note 189, at 44. See also Ferenc M. Szasz, *The New York Slave Revolt of 1741: A Re-Examination*, 48 Q.J. N.Y. HIST. SOC. 215, 217 (1967) ("The slave code of colonial New York was harsh. . . . New York had regulations barely less strict than those of South Carolina. . . . The severity of these laws [were] unique in the North. . .").

287. See Henry Ingersoll, *The New York Negro Plot of 1741*, 20 THE GREEN BAG 130, 132 (1908) (stating that "74 negroes' and two whites are reported as having confessed connection with the conspiracy"); Annette K. Dorf, *The Slave Conspiracy of 1741* 13 (1958) (unpublished M.A. thesis, Columbia University) ("In the entire course of the trial[s], seventy nine people confessed. Of that number, seventy three escaped death.").

grounds but especially for their known adherence to the Stuart pretenders. It was a capital offense in New York for a Catholic priest even to enter the province."²⁸⁸

At this point, Mary Burton accused John Ury, a schoolmaster recently arrived in New York, of being a priest and the leader of the slave conspiracy.²⁸⁹ Ury was tried. Fifteen minutes after the case was submitted to them, the jury pronounced him guilty. Ury was executed protesting his innocence.

This execution, however, was the last. Although some further accusations were floated, no more trials were held. By the time the proceedings concluded, "which dragged out for over a year, the magistrates imprisoned 150 slaves and 25 whites; hanged 18 slaves and 4 whites; burned 13 slaves, and transported over 70 to the West Indies."²⁹⁰

The proceedings, however, drew criticisms, or at least that is the implication to be drawn from Daniel Horsmanden's apologia. Horsmanden,²⁹¹ one of the magistrates who presided at the trials, expressed outrage in his book that citizens could doubt that the conspiracy existed.²⁹²

288. EDGAR J. MCMANUS, *A HISTORY OF NEGRO SLAVERY IN NEW YORK* 132 (1966).

289. Many suspected Ury to be a priest because of his proficiency in Latin "and his penchant for theological disputation. Most New Yorkers had highly stylized ideas of how to detect Catholic priests. Unfortunately for Ury, Latin and religious casuistry were important elements of the stereotype." *Id.* at 133.

Ury had maintained, however, that he was a nonjuror minister ordained by an English bishop.

Nonjurors stood as splinters from the Church of England and received their label from following those who refused in 1689 to take the oath of allegiance to William and Mary. . . . The issue with them was more political loyalty than religious fidelity, although the union of church and crown often allowed no distinction.

DAVIS, *supra* note 286, at 198.

290. Szasz, *supra* note 286, at 215.

291. Horsmanden was born in England and studied at the Inns of Court. He came to New York in 1731. He was a firm loyalist with influence in London and advanced quickly in the provincial government.

Within two years of his arrival, he won appointment to the governor's council.

Within five years he was the city's recorder and, thus, an *ex officio* member of the city council; a judge on the Court of Admiralty which had jurisdiction over New York, New Jersey, and Connecticut; and third justice on New York's Supreme Court of Judicature, the province's highest tribunal.

DAVIS, *supra* note 286, at 38.

292. In the preface to his account of the trials, Horsmanden stated:

There had been some wanton, wrong-headed persons amongst us, who took the liberty to arraign the justice of the proceedings, and set up their private opinions in

In 1744, to vindicate the outcomes, he published the records of the proceedings along with his comments.²⁹³

While later historians have not been kind to Horsmanden,²⁹⁴ the records he published and his descriptions of the proceedings are accepted as accurate.²⁹⁵ His lengthy book provides a detailed account of the criminal

superiority to the court and grand jury; . . . they declared with no small assurance (notwithstanding what we *saw* with our eyes, and *heard* with our ears, and every one might have judged of by his intellects, that had any) *that there was no plot at all!*

DANIEL HORSMANDEN, HISTORY OF THE NEGRO PLOT 11 (Negro University Press ed., 1969).

Horsmanden's contempt for those who doubted the existence of the conspiracy leads modern observers to conclude "there must have been a good deal of doubt about the existence of a plot." Dorf, *supra* note 287, at 10. Although Horsmanden's defensiveness indicates considerable opposition to the proceedings, one historian searched contemporaneous newspapers, diaries, and letters and noted, "The disbelievers must have been very numerous. Yet I could not find a single critical newspaper article or a single opinion by any New Yorker living at that time who opposed the trials." *Id.* at 41. A letter from Horsmanden to Cadwallader Colden, however, written on August 7, 1741, indicates contemporary skepticism. The judge remarked that, although the townspeople were pleased with the outcome, skeptics went to "great pains . . . to bring a discredit upon Mary Burton the Original Witness . . ." Letter from Daniel Horsmanden to Cadwallader Colden (Aug. 7, 1741), in 2 LETTERS AND PAPERS OF CADWALLADER COLDEN, 1730-1742 224, 226 (1973).

New Yorkers in short order became embarrassed by the proceedings and were silent about them:

Even William Smith, the zealous prosecutor, avoided any significant reference to the conspiracy in his writings. His son, William Smith, Jr., gave the events of 1741 two harsh pages in his classic *History of the Late Province of New York, from its Discovery to 1762*, mentioning his father once but in no way suggesting his prominence in the proceedings. The public silence suggested that the episode became an embarrassment to the city and its citizens who thought the less said the better.

DAVIS, *supra* note 286, at 252.

293. Szasz, *supra* note 286, at 216. The book was "commissioned by New York's city council and published originally in 1744 as an official report on what occurred." DAVIS, *supra* note 286, at xii.

294. Horsmanden has been labeled "a very inferior lawyer." WARREN, *supra* note 93, at 93. Modern historians have also concluded "no one other than Horsmanden would dare suggest that the conspiracy involved every slave in the city . . ." Szasz, *supra* note 286, at 216.

295. See DAVIS, *supra* note 286, at 250-51:

Intending his work to display the reality of the conspiracy and the justness of the proceedings, the judge expected to refute critics and silence skeptics for all time. The prejudice of his own self-righteousness, which convinced him that right-minded readers would see the facts as he saw them, and the presence of opponents sure to quibble at any false hint kept him honest in his accounting. . . .

investigatory and trial procedures used.²⁹⁶ In a most significant way, the material shows, these proceedings were like those for the Salem witch trials²⁹⁷—they were non-adversarial. That is not to say that the slave conspiracy procedures precisely mirrored the earlier ones. Instead, the slave revolt defendants had some rights the alleged witches did not enjoy. Defendants in the 1741 trials were granted peremptory jury challenges, were allowed to cross-examine witnesses, and were able to call their own

Even those who disagreed with Horsmanden's conclusions seemed to agree that he correctly rendered the facts. . . .

296. GOEBEL & NAUGHTON, *supra* note 84, at 121.

297. Many similarities between the New York slave revolt trials and the Salem witch trials have been noted. *See, e.g.*, DAVIS, *supra* note 286, at 74 (observing that Mary Burton's "resemblance to the girls who lied so murderously in the Salem witchcraft episode in Massachusetts during 1692 seemed to have eluded the officials"). At least some contemporaries were aware of the similarities to Salem. An unsigned letter to Cadwallader Colden stated that the writer had read about the some of the executions in a Boston paper and continued that:

this occasion puts me in mind of our New England Witchcraft in the year 1692 which if I don't mistake New York justly reproached us for, and mockt at our credulity about. . . .

What ground you proceed upon I must acknowledge myself not sufficiently informed of; but finding that these 5 who were put to Death in July denied any Guilt, It makes me suspect that your present case, and ours heretofore are much the same and the Negro and Spectre evidence will turn out alike. We had near 50 confessors, who accused multitudes of others, all alledging Time and Place, and various other circumstances to render their Confessions credible, that they had their meetings, form'd confederacies, sign'd the Devil's book etc. But I am humbly of Opinion that such Confessions unless some certain Overt act appear to confirm the same are not worth a Straw; . . .

And if nothing will put an end thereto till some of higher degree and better circumstances and character are accused (which finished our Salem Witchcraft) the sooner the better, lest all the poor People of the Government perish in the merciless flames of an Imaginary Plot.

Szasz, *supra* note 286, at 228. Interestingly, as the letter writer predicted, the prosecutions stopped when the accusations started naming the higher strata of society.

Intoxicated with self-importance, Mary Burton denounced several prominent whites to the grand jury. . . . Not only was [the Attorney General's] star witness lying, but she was lying so crudely that even the dullest dolt could see through her perjury. . . .

With Burton completely out of control, the authorities had no choice but to drop the affair if they were to save their own reputations.

MCMANUS, *supra* note 288, at 136-37. Although there may be many parallels between the slave and witch trials, the New York proceeding have received only a fraction of the attention that Salem has garnered. DAVIS, *supra* note 286, at 254; Szasz, *supra* note 286, at 215.

witnesses. These rights, however, did not make the trials adversarial; without counsel, and none of the defendants had an attorney, the rights meant little.

For example, at the joint trial of Hughson, his wife Sarah, and Margaret Kerry, the Court informed the defendants that they could challenge an unlimited number of potential jurors for cause and twenty peremptorily.²⁹⁸ The defendants agreed that Hughson would exercise the challenges for all of them. He challenged sixteen men, but at least one of the co-defendants was unhappy. Horsmanden notes that after one person was excused by Hughson, Margaret Kerry "seemed out of humour, and intimated that he had challenged one of the best of them all; which occasioned some mirth to those within the hearing of it."²⁹⁹ On the other hand, without an attorney, John Ury challenged no one.³⁰⁰

Those charged, both black and white,³⁰¹ were allowed to call witnesses. This is a right many used, although, without the advice of a trained advocate,

298. HORSMANDEN, *supra* note 292, at 109-10.

299. *Id.* at 110.

300. *Id.* at 287. It is not clear whether slaves were allowed to excuse potential jurors. For example, in the first trial of two slaves, Quack and Cuffee, Horsmanden's account, merely states about the jury selection, "The prisoner's brought to the bar. Jury called and sworn," *id.* at 79, and the judge never recorded any instances in which a slave challenged either a witness or juror. Dorf, *supra* note 287, at 47.

301. The law provided a special trial system for slaves accused of serious crimes. GOEBEL & NAUGHTON, *supra* note 84, at 472-73. A justice of the peace who received a complaint of such a crime was to have the slave apprehended. If the justice believed that the slave was guilty, after an examination, the slave was to be held for trial. The trial was to be held before the committing justice, two other justices of the peace and five freeholders. No grand jury indictment was needed to proceed to trial. On the other hand, for a typical non-serious crime "the usual practice was to try [slaves] summarily." *Id.* at 418.

Whatever the usual practice, "the slaves accused in the conspiracy of 1741 were formally indicted by a grand jury, and received a full jury trial." Dorf, *supra* note 287, at 47. Professor Davis suggests that these rights were granted not to protect the accused, but to serve the judges' interests.

The outcome would not rest then solely on Horsmanden and his fellows' shoulders. Citizens would share the burden of judgment. . . . The decision of the king's men to have jury trials then was self-serving. It promised to strengthen their hand, protect them from public criticism, and also put the supreme court center stage with a spotlight on the officials' working in defense of society.

DAVIS, *supra* note 286, at 56. The case was considered important enough to send it to the state's highest court. "The reason for this decision was that both whites and Negroes were involved and it was felt that the colony's highest tribunal should handle any plot that seemed to extend deeper than just a mere slave uprising." Szasz, *supra* note 286, at 220.

Before sentencing the first two convicted slaves, the court pointed out to them

sometimes defense witnesses did more harm than good.³⁰² Similarly, all the defendants were given the chance to cross-examine those who testified against them, but significantly, most of the defendants did not employ this tool.³⁰³ Ury attempted cross-examination, and although a prepared and trained advocate would have seen effective lines to pursue, his efforts were inconsequential.³⁰⁴ As a result, in none of these cases was the inculpatory evidence subjected to adversarial testing.

that you have been proceeded against in the same manner as any white man, guilty of your crimes, would have been. You had not only the liberty of sending for your witnesses; asking them such question as you thought proper; but likewise making the best defence you could; and as you have been convicted by twelve honest men upon their oaths, so the just judgment of God has at length overtaken you.

HORSMANDEN, *supra* note 292, at 52.

302. See, e.g., HORSMANDEN, *supra* note 292, at 80-90 (discussing witnesses testifying on behalf of the slaves Quack and Cuffee); *id.* at 301-05 (discussing witnesses called by Ury). Hughson had already called witnesses to try to establish that Hughson's tavern was not frequented by blacks as prosecution witnesses maintained. Hughson then called Adam King who stated "that of late he took Hughson's house to be disorderly; for he saw whole companies of negroes playing at dice there, and that Wyncoop's negro once carried a silver spoon there that was hammered down. . . ." *Id.* Apparently mocking Hughson, the Attorney General then said, "Have you any more such witnesses as this?" DAVIS, *supra* note 286, at 111.

303. The account of the prosecution's testimony against Quack and Cuffee indicate no cross-examination. HORSMANDEN, *supra* note 292, at 82-89. In the Hughson trial, after each of the prosecution witnesses the Court asked, "Have you any questions to ask these witnesses?" The record indicates that each time, except when Mary Burton testified, they had nothing then to say or ask. See, e.g., *id.* at 114-16. After Burton's testimony, "[t]he prisoners asked the witnesses no material questions, such only as seemed rather to imply their guilt; but some of them threw up their hands, and cast up their eyes, as if astonished, and said, she was a very wicked creature, and protested all she said was false." *Id.* at 116. One historian commented:

[Hughson] neglected the chance for cross-examination. He was no match for the king's men in court. He was literate enough to sign his name, but he never read law nor proved himself able to handle rough questioning. . . . The defense proceeded then on hope alone and simply called five character witnesses.

DAVIS, *supra* note 286, at 110.

304. Mary Burton's accusations against Ury could not be reconciled with her earlier testimony against Hughson. In all her testimony she had named Hughson as the chief conspirator; she made no charges at all against Ury, nor did she say anything to indicate that the alleged plot had religious or political implications. . . . [H]er story was now so riddled with inconsistencies that some observers began to doubt her credibility. . . .

Burton's testimony of course was damaging, but it also gave the defense a priceless opportunity to exploit its contradictions. A skillful cross-examination would have impeached the witness and thereby demolished the prosecution's case.

Without counsel, as in Salem, the defendants had to depend upon the judges for protection and guidance,³⁰⁵ but once again, as in Salem, the judges were not passive officers arbitrating between adversaries nor neutral, detached magistrates who sought the fullest presentation of evidence and skeptically probed that which was presented.³⁰⁶ The judges were active partisans in the investigation and trials.³⁰⁷ These judges knew the "truth,"³⁰⁸ and their job was to make sure that those they already knew to be guilty were convicted.³⁰⁹ The judges were prosecutors.³¹⁰ As a result, since the

But Ury was not skillful. He asked Burton a few inconsequential questions which did not even touch the issue of inconsistency. . . . Perhaps he was simply unfamiliar with the testimony given at the Hughson trial and therefore unaware that contradictions existed. In any event, he failed to attack where Burton was clearly vulnerable and thereby missed his best chance of saving himself.

MCMANUS, *supra* note 288, at 133-35. Ury's cross-examination of Burton, as recorded by Horsmanden, consisted of only five questions and answers and takes up less than half a printed page. HORSMANDEN, *supra* note 292, at 292-93.

305. See Ingersoll, *supra* note 287, at 134.

306. See DAVIS, *supra* note 286, at 91:

They had no legal counsel to rebut the prosecutors and no hope of support from the bench. . . . The bench was, after all, the king's bench, and the judges and prosecutors alike served the same master, shared the same interests, and pursued the same end. That meant defendants tried in the king's name needed to battle both the bench and the opposing bar.

See also Dorf, *supra* note 287, at 30 ("Since judicial objectivity was not then a practice in the courts, a slave's hope for acquittal depended completely on obtaining a judge biased in his favor. Certainly all of the conspiracy cases of 1741 were enveloped in bias.").

307. For example, the judges visited Margaret Kerry in prison to try to get her to confess and tell what she knew about the plot in exchange for a recommendation of a pardon from the governor. HORSMANDEN, *supra* note 292, at 41.

308. The judges were more interested in ensuring that their preconceived notions were verified than they were in determining what really happened. "Confession contradicted confession. Lists given by different witnesses showed only random correlation. Denial after denial went unheeded. Yet little notice was taken of these contradictions. Whatever the magistrates wanted to believe was believed, and they had set their minds beforehand." Szasz, *supra* note 286, at 222.

309. The judges allowed their views of the accused to be negatively colored by the popular prejudices of the day.

[The accused slave] Patrick's visage betrayed his guilt: those who are used to negroes may have experienced, that some of them, when charged with any piece of villainy they have been detected in, have an odd knack or (it is hard to know what to call or how to describe it) way of turning their eyes inwards, as it were, as if shocked at the consciousness of their own perfidy; their looks, at the same time, discovering all the symptoms of the most inveterate malice and resentment: this was Patrick's appearance. . . .

HORSMANDEN, *supra* note 292, at 58.

defendants were not capable of doing so, nor did the judges do it, the inculpatory evidence was not probed, challenged, or skeptically examined.³¹¹

This made the slave revolt trials like the witch prosecutions, but the defendants' situation was actually worse in 1741 since the public prosecutor had already been institutionalized in New York. The accused not only had to face a hostile and partisan judiciary, they also had to face lawyers whose job was to prosecute. Indeed, while the defendants were not permitted to have counsel, the entire bar of New York helped the prosecution.³¹² These prosecutors did not just neutrally present evidence to the jury. They were advocates using the tools of advocacy—arguments to the jury, presentation of witnesses, and cross-examination—to convince the jury of the defendants' guilt. The public prosecutor's active role made these trials even more one-sided than the trials in Salem.³¹³

The Salem proceedings however, helped advance reform because they were quickly recognized as injustices. The connection between the slave revolt trials and change is not so clear. Contemporary views about the slave trials are not well preserved, but that Horsmanden went to the trouble of producing his book and its defensive stance indicates that the proceedings had important contemporary critics. These skeptics might have been critical

310. Cf. DAVIS, *supra* note 286, at 111 (observing that Horsmanden's "questioning sounded more like that of a prosecutor than a judge").

311. For example, nobody questioned the accuser, Mary Burton's, credibility. *Id.* at 52. The magistrates were unlikely to challenge evidence they had in fact induced. For example, Sarah Hughson, who had been convicted along with her parents, had her execution postponed several times in hopes that she would confess and inculpate others. By the time of the trial of Ury, efforts by the magistrates were made time and again to get her to swear against Ury. Finally, "Sarah, after hours of questioning, was told by the magistrates that she would be hanged immediately if she remained silent any longer. Only then did she confess." Szasz, *supra* note 286, at 224.

312. The defendants were literally up against "the whole bar of New York, consisting of eight members . . ." WARREN, *supra* note 93, at 95. This widespread cooperation by the bar was rare. Professor Goebel noted this occurred only twice: this case and "the so-called Dutchess Assizes, 1766, a special commission of oyer and terminer issued to try nearly one hundred indictments of those involved in land riots, including one for treason and several for murder." 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 687 n.9 (Julius Goebel, Jr. ed., 1964). [hereinafter HAMILTON PAPERS].

313. At the testimony's end, Quack and Cuffee were "asked what they had to offer in their defence and why they should not receive sentence of death? and they offer[ed] nothing but repetitions of innocency." HORSMANDEN, *supra* note 292, at 93. This was followed by a lengthy and passionate argument by the prosecutor that adroitly summarized the evidence against the defendants and played on the racial fears of the jury. *Id.* at 93-96.

of those in charge of the cases, but they must also have realized that the slave revolt trials followed legal forms. Consequently, those troubled by the proceedings must have started to consider whether the forms needed changing.

In contemplating systemic reform, comparisons to colonial New York's most famous trial, that of John Peter Zenger in 1735, would have been natural. The parallel, however, was not perfect.³¹⁴ No evidence was presented in *Zenger*, a trial for criminal libel. Zenger's chief attorney, Andrew Hamilton, admitted in open court that his client had published the allegedly libelous matter.³¹⁵ Hamilton instead contended that the printed material was not false and, therefore, not libelous.³¹⁶ The court, however, prohibited the introduction of evidence on this point,³¹⁷ and consequently, the highlight of the defense, indeed the only defense, was Hamilton's address to the jury.

Even though the proceedings were different in this regard, some New Yorkers must have been troubled by the fundamental difference between *Zenger* and the slave revolt trials—Zenger was brilliantly represented by Hamilton while the later defendants were lawyerless.³¹⁸ New York followed the English common law on counsel. Zenger was entitled to representation because he was charged with criminal libel, a misdemeanor,³¹⁹ while the slave revolt defendants, charged with felonies, were forbidden attorneys.

While today *Zenger* may primarily be seen as concerned with a free press, the considerable intellectual ferment caused by it³²⁰ had a number of

314. Extensive records of this case have survived. The year after the trial, James Alexander edited a report of the trial. JAMES ALEXANDER, A BRIEF NARRATIVE HISTORY OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., 1963). See also THE TRIAL OF PETER ZENGER (Vincent Buranelli ed., 1957) [hereinafter BURANELLI].

315. See ALEXANDER, *supra* note 314, at 62; BURANELLI, *supra* note 314, at 98.

316. ALEXANDER, *supra* note 314, at 68-69; BURANELLI, *supra* note 314, at 99.

317. ALEXANDER, *supra* note 314, at 69-74.

318. Zenger's original lawyers were disbarred. *Id.* at 21, 55; GOEBEL & NAUGHTON, *supra* note 84, at 49-50. The court then appointed a lawyer for Zenger. This lawyer did not have the Zenger faction's confidence and Andrew Hamilton of Philadelphia, probably the leading American lawyer of the day, was engaged. ALEXANDER, *supra* note 314, at 22; BURANELLI, *supra* note 314, at 48.

319. See GOEBEL & NAUGHTON, *supra* note 84, at 632.

320. The trial's report went through many printings, and its fame endured through the Revolutionary Era. Even before Alexander produced his report of the trial, "[n]ewspapers and correspondence carried word of the trial throughout the Atlantic community. . . ." ALEXANDER, *supra* note 314, at 26. His *Brief Narrative* "was reprinted fifteen times before the end of the century, and is surely serving of its reputation as 'the

themes that resonate in the Sixth Amendment. It, of course, indicated the defense counsel's importance in preventing oppression.³²¹ The case furthermore shows that Americans did not always cling to the common law, and thus the law of criminal libel changed.³²² *Zenger* demonstrated that Americans could make the common law better suited for American conditions.³²³

Zenger also showed the necessity for limiting judicial authority. An independent jury of the vicinage helped do that.³²⁴ Such a jury alone, however—as the slave trials' critics must have come to realize—was not

most famous publication issued in America before the *Farmer's Letters*.” *Id.* at 37 (quoting CHARLES R. HILDEBURN, *SKETCHES OF PRINTERS AND PRINTING IN COLONIAL NEW YORK* 25-26 (1895)). See also BURANELLI, *supra* note 314, at 71 (stating that Alexander's “account had an enormous success in his own time”).

321. Professor Moglen concluded that a lesson of the *Zenger* case was that a professionalized Bar was not so pliable in the hands of Administration. . . . [T]here were lines a self-consciously coherent Bar would not cross, and ‘Liberty and Law’ was a slogan that meant something even to lawyers not marching under the banner. . . . The willingness of lawyers to defend the subject's liberty under law, if necessary at the hazard of their lives, their fortunes, and their sacred honor, was now an important force in North America. Eben Moglen, *Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495, 1520-21 (1994).

322. Hamilton argued “what is good law in England is not necessarily good law in America,” and he convinced the jury the English precedents cited by the prosecution had no place under American conditions. ALEXANDER, *supra* note 314 at 24.

323. Hamilton's arguments to the jury were based on the ideas that the common law “could not always apply to America, because conditions in the New World were in many respects unique, that in such cases our law would have to develop its own rules and regulations.” BURANELLI, *supra* note 314, at 62.

324. After the court ruled that Hamilton could not produce witnesses to prove the publication's truth he turned to the jury and said:

Then, gentlemen of the jury, it is to you we must now appeal for witnesses to the truth of the facts we have offered and are denied the liberty to prove; and let it not seem strange that I apply myself to you in this manner, I am warranted so to do both by law and reason. The law supposes you to be summoned *out of the neighborhood where the fact is alleged to be committed*; and the reason of your being taken out of the neighborhood is *because you are supposed to have the best knowledge of the fact that is to be tried*.

ALEXANDER, *supra* note 314, at 75. “That juries provided a constitutional check on executive power was not a lesson any English-speaking person needed the *Zenger* case to teach—that was why English people loved juries so deeply. . . .” Moglen, *supra* note 321, at 1520. “*Zenger*'s trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies.” Alschuler & Deiss, *supra* note 145, at 874.

sufficient protection, especially when community passions run high against the accused. In *Zenger*, of course, the jury check did not operate by itself. A vigorous defense advocacy also limited the judges' powers. If critics looked back after the slave revolt verdicts, they had to see that a primary difference between the trials was the presence of defense advocacy in only one of them.

In any event, whether or not the slave trials helped spur a transformation in the fact-development procedures for criminal trials, they give an idea of how criminal trials proceeded in colonial New York without defense attorneys. The trials were dominated by the judges, heavily dependent on confessions, and without challenge to the inculpatory evidence.³²⁵

This system, of course, did not endure, and New York provides laboratory-like conditions for analyzing what produced the change in trial procedures. Although we do not know when or how Massachusetts began to allow the full participation of defense counsel, the practice had a definite starting point in New York. Until 1777, colonial New York followed English common law on the right to counsel, and as a result, little, if any, of the adversarial system developed.³²⁶ The English restrictions, however, were decisively rejected the year after Independence when the right to counsel was guaranteed.

So far as the New York bar was concerned, the Constitution of 1777 ushered in a new era in law enforcement. Article 34 ordained that "in every

325. With such one-sided procedures, with both the prosecutors and judges acting like prosecutors and no one acting as a defense advocate, it is hard to tell what the rules of evidence were. It is possible that otherwise inadmissible evidence was considered simply because it was not objected to, but nothing indicates that that was the situation. Instead, the trials support the theory that hearsay became a concern only when defense advocacy became a dominant part of criminal trials, for hearsay of significant importance was used with nary a comment against the advocate-less defendants in the slave revolt trials. *See, e.g.*, HORSMANDEN, *supra* note 292, at 125 (observing confessions of Quack and Cuffee introduced in the trial of the Hughsons); *id.* at 363-64 (citing a letter of James Oglethorpe of Georgia containing hearsay that Spanish individuals planned to burn American towns after disguised priests gained confidence of families).

326. Professor Goebel noted:

[T]he common law manner of criminal trial had been the model for lawyers, judges, and legislators in the Province of New York. . . . The acceptance of the restrictive rules about representation by counsel had the result, of course, that only the Attorney General and his deputies were experienced in all the categories of criminal law. The bar derived its experience from the defense of misdemeanors, but here the records indicate that practice was small beer indeed. In the country it was not usual for defendants to have the services of counsel and few . . . in New York City could afford the luxury of representation.

HAMILTON PAPERS, *supra* note 312, at 686-87.

trial on impeachment or indictment for crimes or misdemeanors, the party impeached or indicted, shall be allowed counsel, as in civil actions.”³²⁷ This right became so important in New York that by the time of the ratification of the United States Constitution, the state was petitioning for a Bill of Rights that included a right to counsel as well as a right to confrontation.³²⁸ In a few years, then, New York had moved from a system without defense counsel to one where they were essential.³²⁹ If it is correct that the presence of defense counsel forced fundamental changes, then New York’s trial procedure after Independence should have rapidly moved towards adversariness where defense advocacy compelled the prosecution to prove its case. And the trial of Levi Weeks indicates that that is exactly what happened.

XI. THE TRIAL OF LEVI WEEKS

Gulielma Elma Sands³³⁰ lived in a New York City boarding house run by her cousin and her cousin’s husband, Catherine and Elias Ring. On December 22, 1799, Sands left that house never to return. On January 2, 1800, her body was fished out of the Manhattan Well. This “death created a sensation in the city of New York A pretty young girl from a respectable home had been cruelly murdered, and rumors abounded that the young carpenter who lived in the Ring’s boardinghouse had proposed marriage to her in order to enjoy her favors, and had then killed her to avoid keeping his promise.”³³¹

327. *Id.* at 687. This constitutional provision must have been expected to change existing practices.

While New York constitutionalized a right to counsel that had not existed before, the legislature did nothing to ensure representation. “It would appear that it was the court which took the initiative in appointing counsel for prisoners, for after the state courts began functioning in New York City, there are numerous entries to this effect.” *Id.*

328. New York proposed that among the rights “which cannot be abridged or violated” were that “the accused ought to be informed of the cause and nature of his accusation, to be confronted with his accusers and the witnesses against him, to have the means of producing his witnesses, and the assistance of counsel for his defense; and should be not be compelled to give evidence against himself.” HELLER, *supra* note 4, at 28-29.

329. *Cf.* Moglen, *supra* note 130, at 1126 (noting that “it was the lawyers in postrevolutionary America . . . who began the slow process of refashioning the criminal trial”).

330. Throughout the proceedings, the victim’s first two names were spelled in a variety of ways.

331. ESTELLE FOX KLEIGER, *THE TRIAL OF LEVI WEEKS OR THE MANHATTAN WELL MYSTERY* 6 (1989).

That young carpenter, Levi Weeks, was charged with her murder. Public titillation ran high. Only a fraction of those seeking to attend the trial got into the courtroom.³³² Consequently, three entrepreneurs produced reports of the trial. Two of them, rushed into print after the verdict, are now of limited use. The first was little more than a newspaper account, and the second was only a summary of some testimony.³³³ The third, however, is close to a real transcript. It was produced by William Coleman, a clerk of the circuit, who stated that he recorded the trial in shorthand.³³⁴

Even so, this Coleman version, "the one nearest to being stenographic . . .,"³³⁵ still has its shortcomings. It was produced for public consumption, not as an official court record.³³⁶ Not every word uttered at trial was printed. Although the transcript states that 75 witnesses testified, the testimony of some is absent or appears only in summary form.³³⁷ On the other hand, every important witness' testimony is presented, apparently in verbatim form. Furthermore, while the report does not always clearly indicate which of the three defense counsel was speaking, it does indicate whether the speaker was a witness, the prosecuting attorney, the court, or a defense attorney.

While the trial itself is not intrinsically of great legal or historical moment,³³⁸ Coleman's report is important as "the first attempt following the Revolution to make a verbatim report of a criminal trial."³³⁹ Furthermore, while this may have been "the first trial for a widely publicized murder in the new Republic,"³⁴⁰ this was not a state or political trial. It was an ordinary criminal case. Consequently, Levi Weeks' trial illustrates procedure for an ordinary felony at a time when the constitutional generation was trying criminal cases.³⁴¹

And important figures of the constitutional generation did try this case. John Lansing was the presiding magistrate of the three judge court. Lansing had been a delegate to the Constitutional Convention of 1787, but left

332. *See id.* at 22-23; HAMILTON PAPERS, *supra* note 312, at 694.

333. HAMILTON PAPERS, *supra* note 312, at 694.

334. KLEIGER, *supra* note 331, at 22.

335. HAMILTON PAPERS, *supra* note 312, at 693.

336. *Id.* at 693.

337. *Id.* at 699.

338. Liva Baker, *The Defense of Levi Weeks*, 63 A.B.A. J. 818, 821 (1977) (opining that "[t]here were no lofty legal principles involved").

339. KLEIGER, *supra* note 331, at 172.

340. *Id.* at 21.

341. The Coleman transcript is reproduced in HAMILTON PAPERS, *supra* note 312, at 703-774, and provides the major foundation for KLEIGER, *supra* note 331.

because he thought the convention overstepped its authority.³⁴² Assistant Attorney General Cadwallader David Colden prosecuted. He was the grandson of Cadwallader Colden, a major figure in colonial New York who was Lieutenant Governor in the slave revolt era.

The defense counsel, however, were most intriguing. One was Brockholst Livingston, an Antifederalist whom Jefferson later appointed to the United States Supreme Court, where he served for seventeen years. The other two defense lawyers were Aaron Burr and Alexander Hamilton. While Burr and Hamilton were political enemies, “[f]rom 1784 to 1800 Burr and Hamilton were in the same courtroom during nearly every important case at the New York bar. They were part of a tight-knit and impressive legal community of about fifty lawyers who began practice immediately after the Revolution”³⁴³

These defense attorneys faced a circumstantial, but simple, prosecution case. Gulielma Sands and Levi Weeks had become intimate. Weeks promised to marry her. People in the boardinghouse had reasons to believe that Weeks and Sands left the boardinghouse together on December 22 to be married. Weeks returned later that evening, however, and claimed not to have been with her. A few days later, a boy found Sands’ muff in the Manhattan Well. The well was searched on January 2 and her body discovered. Doctors stated that she had been killed by strangulation before going into the well, and Weeks intimated that Sands’ body was in the Manhattan Well before that fact was publicly known.

By the time the trial was over, however, the evidence convincingly demonstrated that Weeks should not be convicted. Masterful defense advocacy had destroyed the prosecution’s case, and the jury returned a not guilty verdict in five minutes.

Weeks’ supposed motive was attacked by testimony that he had paid the victim no special attention. It was further suggested that, even if Sands had been sleeping with Weeks, she was also sleeping with her cousin’s husband while the cousin was in the country. A nearly airtight alibi was presented. The medical testimony was challenged, and contradictory proof was presented showing that drowning, not strangulation, was almost certainly the cause of death. Finally, the defense suggested that the victim was suicidal.

The defense lawyers made these points by sophisticated use of cross-examination, brilliant arguments to the jury, and dexterous presentation of

342. KLEIGER, *supra* note 331, at 23.

343. *Id.* at 26. During the period between the indictment and trial of Weeks, Burr and Hamilton together argued an important case in the Court of Errors and Impeachments. See HAMILTON PAPERS, *supra* note 312, at 699.

their case. The advocacy was so skilled and polished that much of this trial could be used today to illustrate effective trial techniques. The cross-examination did not merely attack the prosecution witnesses, but repeatedly, as modern attorneys might be exhorted to do, tried also to elicit favorable material from those witnesses.³⁴⁴ Similarly, the defense used cross-examination to enhance the credibility of witnesses it would later call.³⁴⁵ Cross-examination, was also used in the more straightforward ways of attacking the prosecution witnesses' credibility.³⁴⁶ These attempts, however,

344. For example, the initial cross-examination question and answer of Catherine Ring, the prosecution's first and foremost witness, was:

Q. What was the character of Levi Weeks, while he boarded in your house?

A. It was such as to gain the esteem of every one in the family.

HAMILTON PAPERS, *supra* note 312, at 723.

345. For example, Elias Ring was asked about the wall between his house and that of his neighbor, which tended to corroborate the neighbor's later testimony that he could hear through that wall. Defense counsel then asked Ring:

Q. Is Mr. Watkins a clever man and a good neighbor?

A. Yes he is.

Id. at 728; KLEIGER, *supra* note 331, at 73.

Joseph Watkins testified for the defense that through the common wall he had "heard a shaking of a bed and considerable noise" coming from the victim's bedroom accompanied by a man's and a woman's voice eight to fourteen times. He believed that Elias Ring was the man and further testified that these bedroom noises ceased when Ring's wife returned from the country. HAMILTON PAPERS, *supra* note 312, at 753-54.

346. Richard David Croucher had testified for the prosecution that there was a "warm courtship" between Sands and Weeks and Weeks spent at least "two nights in her bed room." The cross-examiner asked questions about where the witness was on the night of the murder and how well he knew the Manhattan Well, as if Croucher should be considered a suspect. A possible bias was probed, and the answers challenged. After Croucher stated, "I bear him [Weeks] no malice," he was asked

Q. But have you never had any words with him?

A. Once I had—the reason was this, if you wish me to tell it:—Going hastily up the stairs, I suddenly came upon Elma [the victim], who stood at the door—she cried out Ah! and fainted away. On hearing this the prisoner came down from his room, and said it was not the first time I had insulted her. I told him he was an impertinent puppy. Afterwards, being sensible of his error, he begged my pardon.

Q. And you say you bear him no ill will?

A. I bear him no malice, but I despise every man who does not behave in character.

The cross-examiner stopped after receiving the kind of response any present day cross-examiner would like to have as an ending point.

Q. Were you ever upon any other than friendly terms with Elma?

A. After I offended the prisoner at the bar, who she thought was an adonis, I never spoke to her again.

were not just blunderbuss shots at sincerity, but also offered the more subtle suggestion that seemingly sincere witnesses were still wrong.³⁴⁷

The defense's opening argument, given at the conclusion of the prosecution's case, was also skillful. Taking up a little more than three printed pages, it wove together the various strands of the defense. It referred to the pretrial publicity, which had condemned Weeks, in such a way as to help ensure that the jurors kept an open mind. It easily conceded what might have been damaging evidence—an intimacy between the accused and victim—by continuing that “she manifested equal partiality for other persons as for Mr. Weeks.”³⁴⁸ The defense attorney suggested others ought to be under suspicion and Sands may have committed suicide. The opening promised an alibi, alluded to the ever present possibility of convicting an innocent man, and concluded by explaining why the defendant thought the body was in the Manhattan Well.³⁴⁹

The defense delivered on the opening's promises:

[T]he alibi of Weeks for the night of Gulielma's disappearance was established as closely as possible in a city almost lightless and where few

HAMILTON PAPERS, *supra* note 312, at 730-32. See also KLEIGER, *supra* note 331, at 70 (discussing a defense effort to demean or rattle Elias Ring).

347. For example, Susanna Broad's memory was successfully challenged on cross-examination. This prosecution witness, described as an aged and infirm woman, lived across from the defendant's brother's lumberyard and claimed that on the night of the victim's disappearance (December 22), she had heard a carriage come out of the yard. On cross, her recollection was shown to be flawed.

Q. Was it after Christmas or before Christmas?

A. It was after I believe, it was in January.

Q. That you are sure of, it was in January you say?

A. Yes; I am sure it was in January.

HAMILTON PAPERS, *supra* note 312, at 733. Witnesses' perceptions were also challenged. For example, Buthrong Anderson testified that on the night in question a one horse sleigh going at full gallop went past him in the direction of the Manhattan Well and the horse appeared similar in color and size to the one owned by the defendant's brother.

Q. Do you pretend to distinguish the color of a horse in the night?

A. Not exactly—but I know that he was light colored.

Q. Can you determine the size of a horse when he is on a gallop, and as you say, on a full gallop?

A. I think he was such a sized horse as I have described him.

Id. at 736.

348. *Id.* at 748.

349. The defendant's explanation was “he had been previously informed that the muff had been found there, and it was therefore natural to enquire if [the body] was not found there also . . .” *Id.* at 750.

of the inhabitants carried timepieces. The prosecution's evidence about the use of the horse and sleigh belonging to Weeks's brother was rendered improbable. The testimony about intimacies between Gulielma and Weeks was blunted by the testimony tending to show that similar intimacies between the girl and Ring . . . might have occurred in the absence of the wife.³⁵⁰

In addition, the defense's medical testimony convincingly established the marks supposedly indicating strangulation were not on the body when found, but came from later examinations of it.

The defense did nothing tricky nor brilliant. The solid defense, however, came, as it almost always still does, from extensive pretrial preparation. The defense worked hard to find and prepare more than two dozen witnesses for all these different facets of the case.³⁵¹ These advocates already knew that preparation and investigation, as well as courtroom performance, were required to be effective, and such preparation could only come when they had meaningful notice of the charges.

Weeks is an indication that by the end of the eighteenth century the paternalistic trial dominated by judges, which prevailed in mid-century, was gone. The accused no longer had to depend upon the good graces of those above him, the judges, for his defense. Instead, acting through his representative, the accused made his own defense. A supposedly neutral judicial inquiry had been replaced by a clash of proof and contentions by representatives of the parties. The adversarial trial was in place.

That does not mean that all the procedures used at that trial are the same as in a modern proceeding.³⁵² For example, even though in the Boston Massacre trials almost all the evidence was obtained through a question and

350. *Id.* at 702.

351. *Id.* at 699.

352. One of the most striking differences from today was the length of the trial day. Most trials at that time were concluded within one day. This one was not.

Weeks' trial began at 10 a.m. on March 31 with the selection of the jury. HAMILTON PAPERS, *supra* note 312, at 704-05. After that, the prosecution's case continued until 1:30 a.m. the next morning when several counsel requested an adjournment. "The Court seemed disposed to sit, but some of the Jury informed them that it would not be possible to keep themselves sufficiently awake to attend, upon which the Court concluded to adjourn till 10 o'clock next day. . . ." *Id.* at 739. The proceedings on April 1 went on to about 2:30 the next morning. Defense counsel then asked to have the case submitted to the jury. The prosecutor asked for an adjournment saying that he had not slept since the trial began. The Court responded that it would be too hard on the jury to keep them together again for the night, and the case was submitted to the jury. *See id.* at 771-72; KLEIGER, *supra* note 331, at 164.

answer format similar to what is now used, the *Weeks'* testimonial pattern was different. Witnesses generally started their testimony not by responding to questions, but by delivering a narrative.³⁵³ This was sometimes interrupted by a judge or opposing counsel, but the interruptions seem to have been limited to clarifying ambiguities in the narrative.³⁵⁴ At the conclusion of the narrative, however, questions and answers took over like in the modern format.

The evidence-taking shows a concern about hearsay, but certainly not a complete or consistent one. The trial itself virtually started with a hearsay objection. The first witness' second sentence began: "About two days after her absence, Gulielma Sands 'asked me'"³⁵⁵ The defense interrupted with a hearsay objection, contending that while dying declarations could be admitted, this witness was about to testify to something different.³⁵⁶ The prosecution responded that it was trying to establish the deceased's state of mind to see "whether she was sound in her intellects"³⁵⁷ The objection and response were hardly impromptu, for both prosecutor and defense counsel were prepared with legal authorities. After a brief discussion, the

353. "[S]ome of the most important testimony was not elicited by questions, but by allowing the witnesses to give a consecutive and uninterrupted account." HAMILTON PAPERS, *supra* note 312, at 701. Sometimes the narrative was preceded by a general question that was clearly designed to elicit a narrative. For example, one narrative was preceded in the record by "HOPE SANDS, being asked if she had observed any intimacy between the prisoner and the deceased?" *Id.* at 724. A defense witness, after answering in the affirmative as to whether she lived next to the boardinghouse, was then told, "Pray tell what you know about this affair." *Id.* at 752.

354. *See, e.g., id.* at 713, (recounting that defense counsel interrupted Catherine Ring to ask, "Which room did Elma sleep in while you were in the country?"); *id.* at 740 (observing that the court interrupted a medical witness who stated that he saw bruises on the body by asking, "How long was this after she was taken out of the water?"). On occasion, members of the jury also asked questions. *See, e.g., id.* at 727.

355. *Id.* at 712.

356. *Id.* The defense

contended that this was a case of hear-say testimony, and did not come within any of the exceptions in the books.—They admitted that the declarations of a murdered person were sometimes received as evidence against a prisoner, but it was only when they were made after the fatal blow, in his last moments when he must be supposed to be under an equal solemnity of an oath.

Id.

Some depositions were entered at various points in the trial, but with consent from both sides. *See, e.g., id.* at 755, 764. One deposition was taken only after it was established that the witness was unavailable for trial because of illness. This was not an *ex parte* deposition; the presiding judge, prosecutor, and a defense attorney attended. *Id.* at 711-12.

357. *Id.* at 712.

court sustained the objection and instructed the witness "to suppress whatever Elmore *had said* to her."³⁵⁸

What is curious is how frequently hearsay was admitted thereafter without objection by the defense. That same witness, who was instructed not to divulge what the victim had said, several times later did precisely that without objection. Some of the prosecution's most damning proof was an out-of-court assertion related by that first witness: "On first day [Sunday] after 12 o'clock, she came down stairs after being with thee, and told me, that night at eight o'clock you were going to be married, that you did not go till 8 o'clock on account of its being froze."³⁵⁹ Nothing in the record indicates why that first hearsay objection was made, but others were not later raised,³⁶⁰ or if they were lodged, but not recorded, how the court distinguished what it admitted from what it excluded.

Even with some differences, however, *Weeks* was a modern trial.³⁶¹ It was modern because the attitudes and duties of the participants were like

358. *Id.* at 713. Towards the end of the defense case, the prosecution tried to get the court to reverse its ruling on the early hearsay objection contending that it had now been made a point of defence, that the mind of the deceased was melancholy and deranged—he [the prosecutor] thought the words as well as the look and behaviour of the deceased, should be given in evidence, it being equally an index of the mind and disposition and that in his opinion, this was the only way to arrive at truth.

Id. at 766. The court replied that this argument "was not such as to induce them to change their opinion." *Id.*

359. *Id.* at 720. According to Kleiger, "[t]he only damning circumstantial evidence against *Weeks* was Catherine Ring's statement that Elma had said she was to marry *Weeks* on the night she disappeared. But Elma's statements to Mrs. Ring were, and would be today, inadmissible as hearsay, as Goebel has pointed out." KLEIGER, *supra* note 331, at 192. Kleiger is apparently referring to Goebel's comments in HAMILTON PAPERS, *supra* note 312, at 701 ("[H]earsay evidence that today would be excluded was admitted, apparently without objection."). Although the victim's statement to Ring might today be classified as hearsay, it might also be admissible as statement of present state of mind regarding a future action. See FED. R. EVID. 803(3).

360. The defense also presented hearsay testimony without objection. For example, the defense elicited from one of its witnesses:

[Mrs. Ring] came into our house one morning, and said Elmore was so sick since she was at your house last night, that we have all been employed to take care of her; my wife said she was not here. Mrs. Ring said aye, she told me she had been.

HAMILTON PAPERS, *supra* note 312, at 754.

361. Some aspects of this trial seem amazingly modern. For example, the prosecutor gave the kind of opening that many prosecutors use today: defense counsel are just trying to win the case for their client, but I am here just to present truth, but of course, truth does mean you should convict. Colden said:

their present-day equivalents. They were not like the participants in the eighteenth century English common law trials or in the slave revolt or Salem witch trials. The judges' job was not to force out the truth. The magistrates, as today, were primarily passive arbiters monitoring the lawyers for each side. Counsel, however, did not just substitute for the judge. Their role was not to present the "truth," but to serve as advocates. If truth was to emerge, it was to be from the clash of proof and contentions presented to the jury. This system was adversarial.³⁶²

New York criminal procedure had been transformed. A system dependent on defense advocacy was in place within a few years after the Sixth Amendment's adoption, and was used with extraordinary and apparently practiced skill by people who were leaders during the founding of the nation. The facility with which the participants used this system indicates that it was already well-established when Levi Weeks was tried and must have been in place when the Bill of Rights was adopted.

While to my opponents it belongs as their duty to exert all their powerful talents in favour of the prisoner, as a public prosecutor, I think I ought to do no more than offer you in its proper order, all the testimony the case affords, draw from the witnesses which may be produced on either side all that they know, the truth, the whole truth, and nothing but the truth. If I had the power of enlisting the passions and biasing the judgment, which those opposed to me possess, I should think it unjustifiable to exert it on such an occasion.

Id. at 707. A few moments later, however, after he described the victim's death, the prosecutor "suddenly stopped a few seconds, as if overpowered with his emotions," *id.* at 708, and later added, "if you do believe that the prisoner, at this time went out with the deceased—I do not see how he can be acquitted." *Id.* at 710.

Other modern touches in this trial include the sequestering of witnesses, *id.* at 712, demonstrative evidence, *id.* at 717, an admonition against lay opinions, *id.* at 741, the overruling of a defense objection, *id.* at 743, and the use of an evidentiary stipulation, *id.* at 746. The prosecutor's difficulty in getting the expert to communicate with the jury also rings modern bells. His expert had stated, "There was many discolourations on the teguments of the skin. There was a dislocation of the clavercle from the sternum." In seeming irritation, the prosecutor responded, "Be so good, Sir, as to speak in less technical language, so that the Jury may understand you." *Id.* at 744.

362. In one way, the system then was more fully adversarial than now. "At this time, of course, prosecution and defense were on an even footing in the rounding up of evidence, for there was no vast law-enforcing machinery at the command of the state as there is today." *Id.* at 701-02.

In another way, however, the system may have been less adversarial. While the defense had the right to peremptory jury challenges and exercised them, the prosecution apparently only had the right to exercise challenges for cause. The defense used eleven preemptory challenges while, after their first attempt was overruled, the prosecution did not use this tool. *Id.* at 705.

If the Sixth Amendment was protecting the criminal procedure used in the states, the New Yorkers involved in drafting or adopting the Amendment were protecting an adversary system that dramatically and quickly changed the common law trial system. The right to counsel was crucial to this system. Without counsel, the process was judge-dominated. With counsel came an adversarial process where the prosecution case was thoroughly tested.

While counsel precipitated the transformation, more than a right to counsel was necessary. This adversary system depended not on rights or procedures in isolation, but on the interplay of advocacy's tools. Because the accused had notice of the charges, defense counsel could investigate and prepare the case. Because there was a full right to counsel, an advocate could address the jury. Because there was compulsory process, counsel could present witnesses. And because there was confrontation, counsel could cross-examine the witnesses presented against the accused.

If, at the time of the Bill of Rights, this mature adversary system was in place in New York, which adhered to the common law as rigidly as any colony before 1776, then a similar system would seem to have been in place throughout the states when the Sixth Amendment was adopted. It is this system that the Sixth Amendment sought to constitutionalize, and defense cross-examination was at its core.

XII. CONCLUSION

The Sixth Amendment did not just adopt the common law. The rights to counsel, notice, compulsory process, and along with them confrontation, all went beyond the common law. Together these rights constitutionalized the criminal procedure that Americans had developed and they constitutionalized a procedure where the accused could truly test and challenge the government's case.

In the eighteenth century, a new trial system emerged in America and replaced the judge-dominated form of trials. The accused obtained tools to challenge an accusation and present a defense. Judicial authority was checked,³⁶³ and ordinary individuals were empowered to act in their own self-interest in the determination of facts at trial.

This new structure was not dependent on any one right or procedure,³⁶⁴ but on a confluence of advocacy tools that permitted the accused to

363. Landsman, *supra* note 36, at 604.

364. Although a number of rights exercised interdependently produced the new system, the presence of defense counsel forced the changes.

challenge the prosecution's case. Defense cross-examination was crucial to that transformed system, and the right of confrontation preserved defense opportunities for cross-examination.

The evidence presented here supports, but does not conclusively establish, these propositions. The dust can be blown off, but confrontation's parchment remains faded.³⁶⁵ Still, this view of confrontation as a grant of an adversary power to the accused is the one most consistent with the historical record. It is consistent with the Sixth Amendment's adoption of a full right to counsel, a right not known in England until later generations.³⁶⁶ It acknowledges the complicated feelings Americans had towards the common law.³⁶⁷ It recognizes that eighteenth century American society was undergoing many rapid transformations, part of which produced changed views of criminal law and punishment.³⁶⁸ It recognizes that historical causes are more likely to come from recent and local developments than past and distant ones.³⁶⁹ It sees the Sixth Amendment right as part of the broader

365. Cf. Mosteller, *supra* note 18, at 736-77 (stating that "a definitive history [of the Confrontation Clause] has not yet been written, and one probably cannot be fashioned").

366. See *supra* note 79 and accompanying text.

367. See *supra* notes 161-71 and accompanying text.

368. The rapid emergence of the adversary system in America should not be surprising. The entire American society was undergoing many sudden, astonishing changes. WOOD, *supra* note 125, at 169. America, without the drag of history and inertia, could change more easily than Europe could.

[T]he American Revolution provided an opportunity for the colonies—soon to be states—to make a quantum leap, to overtake and surpass the European culture which had spawned them by fundamentally reordering attitudes, institutions, and colonial organization without having to overcome the inertia of history—that force, that heavy weight of the past which at once had allowed and encouraged extraordinary changes in Europe, but which, in the nature of things, also mandated that such change be undertaken slowly if society were to continue and survive.

GREENBERG, *supra* note 189, at 229-30. With this much rapid change in general society and in criminal law in particular, it is not surprising that the trial system, too, was changing. Many aspects of American criminal law and enforcement were undergoing rapid reform during the constitutional era. "[T]he new republic, unburdened by the weight of its own history, seized the opportunity to reform its mechanisms for the prevention of crime and the enforcement of law." *Id.* at 232. The development of the new American system "was very much the product of the Revolution and of the idea which gave the rebellion form and substance." *Id.* at 230.

369. Those who see the right to confrontation as simply constitutionalizing the common law often rely on sixteenth and seventeenth century English events, especially the trial of Sir Walter Raleigh in 1603. See *supra* notes 13-18 and accompanying text.

Human beings, however, including those who shape the law, are seldom primarily motivated by century-old events. Graham C. Lilly, *Notes on the Confrontation Clause and*

constitutional trend of a government by checks-and-balances.³⁷⁰ It does not treat the right to confrontation in isolation, as if it developed in quarantine apart from other rights.³⁷¹ It even helps explain why the Confrontation Clause generated so little debate in the clamor for a Bill of Rights.³⁷²

The fact that this alternative history is better supported than the traditional histories is important if history is to be the guide for interpreting the Confrontation Clause, for the different histories suggest different approaches for answering present-day problems. That does not mean that the alternative history gives explicit answers to modern disputes. The Sixth Amendment constitutionalized the new adversary system of criminal trials, but nothing indicates that those drafting, adopting or proselytizing for a confrontation right had specific definitions in mind. Since the adversary

Ohio v. Roberts, 36 U. FLA. L. REV. 207, 209 (1984) ("The recognition and maturation of [the hearsay] rule, even if accurately attributable to the 1603 trial of Raleigh, nonetheless fails to explain why the Americans adopted a constitutional right of confrontation in 1791. One would at least expect a more immediate cause or, perhaps, some indication that over the long term the hearsay rule had failed to provide the accused adequate protection."); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 118 (1972) ("[It has not been explained] why the understanding of the hearsay rule and confrontation claim in Raleigh's time in England is relevant to the meaning of the Sixth Amendment, which was adopted 150 years later.").

As Lawrence Friedman states,

[T]he strongest ingredient in American law, at any given time, is the present. . . .

The history of law has meaning only if we assume that at any given time the vital portion is new and changing, form following function, not function following form.

History of law is not—or should not be—a search for fossils, but a study of social development, unfolding through time.

FRIEDMAN, *supra* note 94, at 19. A constitutional history that relies on events that were relics at the time of the Constitution and does not consider developments that more immediately affected the framers is incomplete at best. The local, in time and geography, is often at least as much a motivating factor as the global.

370. See *supra* notes 110-11 and accompanying text.

371. See *supra* notes 150-98 and accompanying text.

372. That the Confrontation Clause constitutionalized an American right, not an English one, helps explain why the normal sources for ascertaining original purposes contain so little about confrontation. See *supra* notes 3-4. If the Clause had been constitutionalizing English rights, there should have been more comments about it. See REID, *supra* note 110, at 25. On the other hand, distinctively American rights were little discussed. "American rights were not generally questioned by the London government during the revolutionary controversy, and therefore were not at issue." *Id.* at 10. The lack of an extensive historical record about the meaning of confrontation is consistent with the Confrontation Clause primarily protecting a distinctively American right, not an English one, against possible federal encroachment.

system had so recently emerged and was still evolving, there hardly could have been agreement, if people had truly thought about it, as to what the right in detail meant.³⁷³

While a precise meaning cannot be assigned, the alternative history suggests the values and goals that should guide interpretation. Americans moved away from the judge-dominated trial system. Power, including the power of the government in criminal trials, needed to be checked. Americans adopted a system where the accused could defend himself. Confrontation, and the related rights, as part of the developing government of checks-and-balances, affirmatively gave the accused the power to truly test the prosecution's case. A number of rights and procedures had to act in conjunction for this to occur. Defense cross-examination was one of those rights crucial to that developing adversarial system, a system protected by the Sixth Amendment from federal encroachment.³⁷⁴

Confrontation, then, does not merely restrain the government from certain narrow practices—such as the introduction into criminal trials of formal, *ex parte* affidavits or depositions or hearsay generated by the government for trial—as standard histories would have it.³⁷⁵

The new trial system may have checked governmental power, but it did not simply restrain it. It balanced that power by giving the accused rights. The concern was not merely about some specific abuses that happened within a trial. Instead, the basic trial system itself was changed by granting the accused the authority and tools to challenge all the evidence. The prosecution's case was tested not only when the accused could prevent *ex parte* affidavits, but when the accused could challenge everything against him.

The Supreme Court today does not decide cases based on the premises derived from the standard histories. The Court, however, has stated that “the Confrontation Clause’s very mission [is] to advance ‘the accuracy of the

373. Cf. Mosteller, *supra* note 18, at 737 (“Enough of the historical materials surrounding the drafting and the ratification debates survives that we can be relatively confident that no precise meaning was ascribed to the Confrontation Clause in either process.”).

374. Cf. *id.* at 77 (“It is likely, however, that since they were acting in the midst of a century in which the adversary system was expanding on many fronts, the framers were looking forward toward a doctrine with the right of cross-examination preeminent rather than backward to a time when personal presence and best evidence concepts dominated.”).

375. See *supra* notes 7-18 and accompanying text. Cf. Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 618 (1992) (“Confrontation, correctly interpreted, is a much broader and more powerful guarantee than the restraint model would have it.”).

truth-determining process in criminal trials.’”³⁷⁶ As I have discussed elsewhere, since the primary purpose of evidence law is to advance the truth in trials, the Court’s premise has subordinated the right of confrontation to evidence law.³⁷⁷ The alternative history indicates, however, that the Court’s starting assumption is not historically sound. Accurate trials was not the driving force behind the Confrontation Clause and related provisions. The driving force was to have trials in which the government’s power was more constrained and the accused had more opportunity to act in his own self-interest. Adversarial trials, not necessarily the most accurate ones, were being constitutionalized.³⁷⁸

Courts trying to be true to the original purposes of the Confrontation Clause should not ask whether the admission of evidence will further “truth.” Instead, they should recognize that the Sixth Amendment guaranteed an adversarial trial by constitutionalizing a number of interdependent rights so the accused could present a defense and challenge the government’s case. Defense cross-examination is crucial in this scheme, and confrontation sought to preserve defense opportunities for exercising that right. Courts, then, will best serve the original purposes of the Confrontation Clause by asking a different question: whether the admission of disputed evidence furthers the constitutionally protected adversary system by guaranteeing the accused the right to challenge that evidence.³⁷⁹

376. *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

377. See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 574-81 (1988) (discussing confrontation’s “mission”).

378. Cf. Mosteller, *supra* note 18, at 754:

[T]he right[s] articulated in the Sixth Amendment generally, and the confrontation right specifically, are not meant to make trustworthiness the defining principle. Rather, the central principle is that the Framers chose an adversarial system. . . . [T]he decision also involved a more fundamental decision about the relationship of the individual to the state, and a desire to restrain the power of the state. Specifically, there is no reason to believe that an inquisitorial procedure would have been regarded as satisfactory under this constitutional scheme even if that particular procedure promised to produce a more accurate result.

379. In Jonakait, *supra* note 375, I have given my views at more length on how the Confrontation Clause should be interpreted today.