

## THE RISE OF THE AMERICAN ADVERSARY SYSTEM: AMERICA BEFORE ENGLAND

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The standard version of the historical development of the adversary system concentrates on changes in criminal procedure in eighteenth-century England. In previous work,<sup>1</sup> I suggested that the standard views were incomplete or misleading in largely ignoring American developments that indicate America moved to a full adversary system before England. This article expands on my earlier research and conclusions by exploring information either not available or not examined in that previous piece. This newly considered information confirms that America did not simply adopt England's adversary system, but moved to an adversary system independently and in advance of England. It shows that the American adversary system was operating widely in America at the end of the eighteenth century.

Part I summarizes the standard history of the adversary system, which starts with the fact that English common law prohibited an accused from being represented by counsel in ordinary felony trials. In the eighteenth century, some courts allowed that prohibition to be lifted by permitting defense counsel to cross-examine some witnesses. The standard history concludes that this presence of defense counsel formed the foundation of the adversary system. The English adversary system, however, took a long time to emerge fully. Well into the nineteenth century, few criminal defendants were represented by counsel, and the role of those attorneys who did appear remained restricted. The common law still required the accused to represent himself, and defense counsel could not address the jury. An English accused could not be fully represented by counsel until 1836.

Part II points out that early Americans rejected the English common law restrictions on defense lawyers and instead widely guaranteed the right to counsel. Early America did not simply adopt all English procedures, but also fashioned procedures of its own. Moreover, if, as the standard history contends, the limited presence of defense counsel in England formed the foundation of the adversary system, then America's guarantee of a full right of counsel suggests that America accepted an adversary system before England. Part II continues by noting that eighteenth-century American procedure diverged in another significant way from English practices by instituting prosecution through a public prosecutor. This is yet another signal that America accepted an adversary system before it existed in England.

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1. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 81 (1995).

Part III discusses the results of recent research about criminal cases in mid-eighteenth-century colonial New Jersey. At that time in London, attorneys almost never appeared for either the prosecution or the defense. In contrast, in colonial New Jersey, the prosecution was almost always represented by counsel, usually a public prosecutor, and in the majority of cases, the accused had counsel as well. This research shows that practices in colonial New Jersey had already diverged in a significant way from English practices and indicates that the seeds for an adversary system had already been sowed in that colony.

Part IV considers a study of court records from early nineteenth-century New York City. It shows that attorneys regularly appeared for both prosecution and accused during a period when such representation occurred infrequently in England. The study finds that an adversary system was routinely operating in criminal cases in New York City at this time when the full right of counsel had not yet been granted in England and the English adversary system was still not fully formed.

Part V reviews a portion of the standard history of the adversary system's development. It examines the concept that hearsay should be prohibited because of the lack of cross-examination, and maintains that this idea emerged in England when a sizeable number of defense attorneys started appearing in criminal cases at the end of the eighteenth century. American cases are reviewed that indicate that that rationale for the hearsay rule was emerging in the United States at least as early as it did in England. This again indicates that America was not simply following and adopting English procedures that led to an adversary system.

Part VI describes American cases from the late eighteenth century that demonstrate a full adversary system in operation throughout the new country at a time when that system had not yet fully emerged in England.

Part VII discusses the significance of the history of the rise of the American adversary system. Key components of the system were constitutionalized in the Sixth Amendment. If those constitutional provisions are to be interpreted according to the Framers' original intentions, and if America moved to an adversary system before England, then American history must be analyzed to understand those Sixth Amendment rights.

#### I. THE ORIGINS OF THE ADVERSARY SYSTEM IN ENGLAND

Eighteenth-century English common law prohibited the criminal defendant charged with an ordinary felony from having an attorney assist in the development of facts at trial. A defense attorney could argue legal points, but the attorney could not present evidence, examine or cross-examine witnesses,

or address the jury in opening or closing statements.<sup>2</sup> Instead, an accused had to represent herself.

In contrast, the prosecutor could be fully represented by a lawyer in all stages of the proceeding, but this was not the prosecutor as we now know it in America. A public official whose job it was to prosecute did not exist. Instead, the victim of a crime or a friend or relative of the victim could hire an attorney to prosecute the case. When this happened, the attorney was not restricted as defense counsel was, but in practice few prosecuting attorneys were hired.<sup>3</sup> Instead, neither the prosecution nor the defense was represented by an attorney in the early 1700s, and the trial judge dominated the proceedings.<sup>4</sup> “The judge . . . was the chief interrogator of witnesses . . . [,] but [f]ew trials featured sustained questioning . . . . By modern standards, little information was generally elicited from the witnesses and even less was challenged.”<sup>5</sup>

English criminal procedure started to change in the 1730s, when for reasons unknown,<sup>6</sup> defense counsel, while still prohibited from addressing the jury or arguing about facts, were allowed to undertake some cross-examination.<sup>7</sup> These defense counsel brought a new mentality into the courtroom. Before defense counsel participated, guilt was rarely challenged, and trials were largely de facto sentencing proceedings.<sup>8</sup> Defense counsel,

2. *See id.* at 82-83. (“[U]nder the common law, a person charged with an ordinary felony could not have an attorney assist in the development of the facts. A defense attorney could help present legal arguments, but could not present evidence, examine or cross-examine witnesses, or address the jury in opening or closing statements.” (footnotes omitted)).

3. At the beginning of the eighteenth century, 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.” J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 *LAW & HIST. REV.* 221, 221 (1991); *see also* JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 12 (2003) (“[E]ven though the prosecutor was permitted to engage counsel, in cases of felony he virtually never did . . .”).

4. *See* Jonakait, *supra* note 1, at 86 (“Judges . . . controlled English common law trials through their dominance over the development of facts at trial.”); *see also* LANGBEIN, *supra* note 3, at 15 (“Without counsel to order the proofs and to examine and cross-examine witnesses and accused, the responsibility for directing felony trials fell to the judge.”).

5. Jonakait, *supra* note 1, at 85-86.

6. The system had earlier changed in treason trials. The Treason Act of 1696, 7 & 8 Will. 3, c. 3, § 1 (Eng.), granted the right to counsel to those charged with treason, but this reform did not extend beyond treason.

7. *See* Jonakait, *supra* note 1, at 87-88. “The changes began around 1730 when . . . the prohibition on counsel was breached, but only partially. Defense counsel still could not address the jury or argue about facts. Attorneys were, however, increasingly allowed to question witnesses. Limited to this tool, defense attorneys soon became skilled cross-examiners . . .” *Id.* (footnotes omitted).

8. *See id.* at 88-89. (“Without defense counsel, the issue of guilt or innocence was rarely contested. Instead, guilt was widely assumed by the presiding judge, and determining the appropriate sanction was the real purpose of most trials.” (footnotes omitted)); *see also* LANGBEIN, *supra* note 3, at 59 (“Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. . . . To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction.”).

however, increasingly contested the accused's guilt.<sup>9</sup> Without lawyers at the trials, judges conducted trials with few evidentiary restraints. With defense counsel, evidence rules increasingly came to be defined,<sup>10</sup> and trials saw more hearsay and other evidentiary objections.<sup>11</sup>

These changes transformed the trial system into an adversarial proceeding, and the transformation was wrought because defense counsel were increasingly allowed to cross-examine.<sup>12</sup> Indeed, J. F. Stephens called the expanded role of defense counsel "the most remarkable change" that occurred in English criminal procedure.<sup>13</sup>

The true pace of the English developments, however, has to be noted. While defense counsel started to appear in their cross-examination role in some trials during the 1730s, it was not until the 1780s that counsel appeared in any significant number, and even then they participated in only a fraction of criminal trials.<sup>14</sup> Furthermore, their role continued to be severely restricted because the English common law still prohibited an accused from having full representation. Counsel could address issues of law and might be allowed to cross-examine, but he could not address the jury and could not present the defense. This continued until 1836, when criminal defendants were allowed the right to counsel in ordinary felony trials for the first time. Legal historian J. M. Beattie summarizes these developments by noting that while defense counsel might have been allowed to participate in felony trials,

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9. See Jonakait, *supra* note 1, at 89-90. ("Instead of trials being used merely to decide sentences, defense counsel increasingly challenged whether the accused had in fact committed the offense. 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." (footnote omitted)).

10. "Defense counsel . . . forced a clearer definition of the rules of evidence." *Id.* at 90.

11. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 546 (1999) ("Lawyers representing criminal defendants . . . were forced to focus their energies on vigorous cross-examination and the use of evidentiary objections.").

12. See Jonakait, *supra* note 1, at 92.

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 . . . . [I]his 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.

*Id.* (footnotes omitted).

13. 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 424 (London, MacMillan 1883).

14. See LANGBEIN, *supra* note 3, at 169-70 (as late as 1770s, defense counsel only appeared in one or two percent of cases, but by 1800 about 30% of trials had defense counsel).

[t]hey did so under judicial sufferance, and from the beginning what they might do for their clients was limited by the bench. . . . The right to full defense by counsel was not granted until the passage of the Prisoner's Counsel Act of 1836. Until that legislation was enacted, lawyers acting for accused felons were allowed 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 they wished to leave their defense to counsel were told that that was not possible and that they must speak for themselves.<sup>15</sup>

In other words, even in the few cases where defense lawyers appeared in England, they were legally prohibited from providing the full assistance of counsel until well into the nineteenth century.

## II. DEFENSE COUNSEL, PUBLIC PROSECUTION, AND THE AMERICAN ADVERSARY SYSTEM

The standard account describes the emergence of the adversary system in England, but America did not simply inherit or adopt that system. The standard history concludes that an expanded role for defense counsel moved England towards an adversary system. America, however, did not follow England, but rather preceded it in allowing the full assistance of defense counsel.

England did not permit full representation by defense attorneys until the middle decades of the nineteenth century. In contrast, early America not only did not restrict the role of defense attorneys, it guaranteed the right of counsel. It did this not only in the Sixth Amendment to the federal constitution, but also earlier in the state constitutions after Independence<sup>16</sup>—and even before the Revolution, in a number of the colonies.<sup>17</sup> If an expanded role for defense counsel precipitated the adversary system, then America, with a guaranteed right to counsel, was moving to the adversary system at faster pace than England, where the lawyers acted only by judicial sufferance in a restricted role.<sup>18</sup> Indeed, the fact that the states and the federal government

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15. Beattie, *supra* note 3, at 230-31; *see also* Gallanis, *supra* note 11, at 545 (“[E]ven as the use of lawyers in criminal cases was rising rapidly, the prisoner’s counsel was allowed to do little more than cross-examine the victim and the other witnesses supporting the charge. Significantly, he was not allowed to address the jury.” (footnotes omitted)).

16. Jonakait, *supra* note 1, at 94 (“Shortly after Independence, twelve of the then thirteen states guaranteed that the accused could be represented by counsel.”).

17. *Id.* at 95 (“[A] number of colonies even before the Revolution permitted defense counsel in ordinary criminal cases.”).

18. *Id.* at 96 (“[I]f 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.”).

constitutionalized the right to counsel implies that America had already accepted an adversary system by the 1780s, when England was just taking its first significant steps in that direction.<sup>19</sup>

Another American innovation—public prosecution—also indicates America’s early institution of the adversary system. In England, a public official did not prosecute in ordinary criminal trials. Instead, the victim or his relatives or friends prosecuted the case.<sup>20</sup> In eighteenth-century America, however, public officials began to assume the duty of prosecuting criminal cases, and by Independence public prosecution existed in all parts of the land.<sup>21</sup> Public prosecution, of course, demonstrates that early American criminal procedure was not simply an English import, but it also indicates America’s early adoption of an adversary system. In England, even into the nineteenth century, the prosecutor seldom had an advocate and the judge dominated the proceedings. In America, a public official was increasingly an advocate for the prosecution. This diminished the judge’s role and made an adversarial counsel on the other side increasingly necessary for fair trials.<sup>22</sup> With a guaranteed right to counsel who could fully represent the accused on one side and public prosecution on the other, the foundations of the adversary system were in place in early America.<sup>23</sup>

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19. In the most extensive discussion of the rise of the adversary system, John Langbein says merely this about the important divergence of America on the right to counsel: “[An] anomaly, not much understood, is that in parts of British North America the rule against defense counsel was not followed. (This departure from English practice was constitutionalized in the American Bill of Rights in 1789.)” LANGBEIN, *supra* note 3, at 40 (footnotes omitted).

20. *Id.* at 11-12 (noting that “the French observer Cottu, who visited England to study the criminal procedure in 1820, was astonished to find this ancient system [of private prosecution] still in place. He marveled that ‘the business of prosecution, instead of being performed on the behalf of the public by an officer appointed expressly for the purpose, is committed entirely to the hands of the injured party, who, by this means, becomes the arbiter of the culprit’s fate. . . .’” (quoting M. COTTU, ON THE ADMINISTRATION OF THE CRIMINAL CODE IN ENGLAND (1820))).

21. Abraham S. Goldstein, *History of the Public Prosecutor*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE, 1286, 1286 (Sanford H. Kadish ed., 1983) (localized public prosecution existed in every colony by the time of the Revolution).

22. Jonakait, *supra* note 1, at 99-100.

Public prosecution pushed Americans toward a right to counsel and the resulting adversary system. . . . In America, . . . where advocates increasingly presented the prosecution’s case, the unjustness of the [English] defense counsel prohibition must have been apparent. . . . Permitting the assistance of defense counsel and making the procedures more adversary were a natural response.

*Id.*

23. *Id.* at 108.

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

The conclusion that America had moved to an adversary system in advance of England is not merely a deduction from the facts that America guaranteed a right to counsel before England did, and that America had early instituted public prosecution. If the right to counsel and public prosecution were merely abstract ideas that were seldom instituted in practice, then perhaps America's pace to the adversary system in reality was no quicker than it was in England. If, however, America had earlier adopted that system, then we should expect to see more participation in criminal trials by lawyers than was occurring at the same time in England. Recent studies of criminal proceedings in colonial New Jersey and early nineteenth-century New York City demonstrate precisely that.

### III. LAWYERS IN COLONIAL NEW JERSEY CRIMINAL TRIALS

George Thomas has recently uncovered records of the New Jersey Court of Oyer and Terminer, that colony's court of general jurisdiction for serious criminal cases.<sup>24</sup> His data from November 1749 to May 1757 show that criminal proceedings were, in important ways, very different from those conducted during the same period in England. Unlike in England, lawyers in New Jersey appeared regularly for both the prosecution and the defense. This indicates that the roots, if not more, of the adversary system were already firmly in place at that time in this part of North America.

In mid-eighteenth-century England, the prosecution was almost never represented by an attorney in ordinary felony cases. A study of London's Old Bailey indicates that counsel represented the prosecution there in less than 3% of the cases from the period of the New Jersey sample.<sup>25</sup> Colonial New Jersey from around 1750 was strikingly different. Thomas reports that in his sample counsel represented the prosecution in 88% of the cases,<sup>26</sup> and most often that representation was provided by an early form of an institutionalized public prosecutor—that being the Attorney General, who was the prosecution's counsel in 73% of the cases.<sup>27</sup> A public prosecutor had not taken over all prosecutions, but the data indicates that even as early as 1750 prosecution by a public official had firm roots in New Jersey.

The New Jersey pattern for defense counsel also diverged widely from English practices. Defense lawyers appeared at the Old Bailey in the mid-

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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.

*Id.*

24. George C. Thomas, III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749-57*, 1 N.Y.U. J. L. & LIBERTY 671, 672 (2005).

25. Beattie, *supra* note 3, at 227.

26. Thomas, *supra* note 24, at 688.

27. *Id.* (“[T]he Attorney General represented the king in 35 of the 48 cases . . .”).

eighteenth century in only about 5% of the cases,<sup>28</sup> but in 54% of the New Jersey prosecutions the accused had a defense lawyer,<sup>29</sup> with the court appointing a defense lawyer in three of the 48 examples.<sup>30</sup>

Thomas does suggest that the role of defense counsel was limited. Only minutes of the proceedings he sampled are available, and he notes that in one case the record mentions the appointment of counsel only after it lists the witnesses. He speculates that if those minutes are an accurate temporal sequence of events, then “[t]he function of the lawyer seemed to be summing up the case. One imagines, then, that [defense counsel] was simply a spectator at the trial and the judge appointed him to sum up [the defendant’s] case when the time came for that part of the trial.”<sup>31</sup> Thomas goes on to conclude that New Jersey was following the common law form of trials, restricting defense lawyers to issues of law and prohibiting them from the examination of witnesses.<sup>32</sup> If, however, by “summing up” Thomas means that the lawyers talked to the jury, then the colony was deviating significantly from that common law, for English defense attorneys could not address those fact finders.<sup>33</sup>

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28. Beattie, *supra* note 3, at 227.

29. Thomas, *supra* note 24, at 689 (“In my sample, counsel appeared for defendants in 26 of the 48 cases.”). These lawyers were not necessarily formally trained. Thomas states, “[T]he colonial distrust of English-trained lawyers, with their ‘special privileges and principles,’ coupled with a total lack of schools in the colonies that could train lawyers, led to an amateur and semiprofessional practice of law in New Jersey at least through the middle of the eighteenth century[.]” *Id.* at 687 (footnotes omitted).

30. *Id.* I have suggested that part of the reason America came to guarantee the accused a right to counsel before England did was because of the institution of public prosecutors in America. Jonakait, *supra* note 1, at 97-100. Thomas suggests a similar conclusion. He states, “Perhaps the much greater frequency of appearances by defense counsel can be explained by the frequency of the king having counsel.” Thomas, *supra* note 24, at 689.

31. Thomas, *supra* note 24, at 687-88.

32. *Id.* at 688. Thomas also states:

The defense evidence was presented by the defendant, obviously, in cases where he represented himself. In Orsland’s case, “the Attorney Gen’l having summed up, the prisoner was called upon to make his defense . . . .” Defendants likely presented a defense by calling witnesses who took the witness stand, swore or affirmed to tell the truth, and then narrated a story. In his defense against a murder charge, Benjamin Springer presented a single witness, and the reporter remarks, “The prisoner at the bar having made his defense, the charge was given to the jury . . . .” Cross-examination was known at the time, but it was apparently the defendant’s job to do that.

*Id.* (footnotes omitted).

33. See LANGBEIN, *supra* note 3, at 288.

Until the 1836 legislation prosecution counsel was allowed to make an opening statement to preview its case for the jury, but the defense was not. Likewise, prosecution counsel was permitted to address the jury at the close of the case,

Thomas, while suggesting the role of defense counsel was restricted, also reports findings indicating that the participation of defense lawyers had a “stunning” impact on the determination of the facts at trial. He reports that the acquittal rate when defendants were represented by counsel was 77%, compared to only 18% when defendants were unrepresented. He concludes that,

In colonial New Jersey in the middle of the eighteenth century, a defendant was roughly four times more likely to be acquitted if he had counsel. Small sample or not, I think that a pretty robust finding that counsel, whether trained in the law or not, were worth whatever fees they charged.<sup>34</sup>

If, however, those lawyers did not have a role in the presentation or dissection of the facts for the jury, it is hard to see how they could have had such an effect on the outcomes of trials. George Thomas, in a personal communication with this author, has suggested that at least some of the differences in the comparative acquittal rates might be because those who were so obviously guilty that a conviction was a certainty might not have sought representation. He continues in that personal communication to state, “Beyond that, though, I noticed (though I didn’t count) that the ‘evidences’ for the defense seemed fewer in pro se cases, sometimes amounting to zero. So I assume the best thing a lawyer could do then, as now, was to find witnesses to testify in a favorable way.”<sup>35</sup> Whatever the defense counsel role, the high acquittal rate for those represented and the fact that criminal defendants frequently sought out representation indicate that those defendants thought defense counsel could aid them significantly at trial.

In any event, without something like trial transcripts, we simply cannot know what role the lawyers really played. What is clear, however, is that the participation of lawyers in criminal cases in early New Jersey was not the rare circumstance that it was then in England, but a frequent occurrence. Furthermore, Thomas’s data suggests that an experienced defense bar was already emerging. Thomas reports that approximately three-quarters of his sampled cases with defense lawyers “featured ‘repeat’ defense counsel, individuals who had represented other defendants, often in different counties. Repeat counsel who traveled by horseback to a different county were unlikely to be a relative or friend of the defendant.”<sup>36</sup>

This invaluable research by George Thomas demonstrates that colonial New Jersey criminal practices had diverged from English proceedings by 1750.

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commenting on the evidence received and on the accused’s defenses, but defense counsel was forbidden to make closing remarks.

*Id.*

34. Thomas, *supra* note 24, at 691.

35. E-mail from George C. Thomas, III, Professor of Law, Rutgers School of Law, to Randolph N. Jonakait, Professor of Law, New York Law School (Mar. 6, 2007, 10:50 EST) (on file with author).

36. Thomas, *supra* note 24, at 689.

And, if the key to the development of the adversary system was truly the result of increased participation by criminal defense lawyers, then it indicates that the system was emerging much faster in colonial New Jersey than it was in England.

#### IV. THE ADVERSARY SYSTEM IN EARLY NINETEENTH-CENTURY NEW YORK CITY

Mike McConville and Chester Mirsky's study of New York City's court and other records from the beginning of the nineteenth century shows that during this time an adversary system was regularly in place in New York for criminal cases, while such a system had still not fully emerged in England.<sup>37</sup>

In England, "[a]s late as 1834 a leading Old Bailey counsel estimated that prosecution counsel appeared in only one case in twenty."<sup>38</sup> About a quarter of criminal defendants there appear to have been represented by counsel in the first three decades of the nineteenth century.<sup>39</sup> In contrast, McConville and Mirsky report "that lawyers were regularly present in General Sessions, at least from 1810 onward, on behalf of the prosecution and defence."<sup>40</sup>

Public prosecution in New York was in a transition state at this point. McConville and Mirsky summarize:

[I]n the first half of the nineteenth century . . . upon payment of fees any private citizen (who was referred to as either the prosecutor or complainant) was able to initiate the arrest process and to appear and testify before a magistrate, a grand jury, and a trial jury at General Session in pursuit of an indictment. The private citizen/prosecutor was supported by an administrative structure . . . : the constable, the magistrate, the District Attorney, and the Chief

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37. Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J.L. & SOC'Y 443, 444 (1995). The authors' data for the beginning of the nineteenth century

come from (i) the Court Minute Book, comprised of docket entries memorializing the type and number of indicted offences, the method of case disposition, and the number of defendants, lawyers, judges, and juries, (ii) District Attorneys' case files which contain the prosecution's records of cases including pleadings, statements, background of potential witnesses and defendants and transcripts of witness examinations; (iii) accounts of General Sessions trials in everyday cases, by named court reporters who were lawyers themselves . . . .

*Id.* at 444 (footnotes omitted).

38. LANGBEIN, *supra* note 3, at 285.

39. *See id.* at 170 n.303 (reporting data of defense and prosecution appearances).

40. McConville & Mirsky, *supra* note 37, at 446.

Judge of General Sessions were compensated according to a schedule of fees for acts undertaken on behalf of the private prosecutor . . . .<sup>41</sup>

A public official, the District Attorney, appointed by judges, assisted private attorneys who prosecuted and was ready to step in if no private attorney was offering prosecutorial representation.

[T]he District Attorney's principal function was to receive the case file assembled by the magistrate and to guide the case to conclusion often representing the private prosecutor at trial, when the prosecutor was not represented by privately retained lawyers. . . . Should a private lawyer represent the prosecutor at trial, as was common in the first half of the nineteenth century, the District Attorney might prepare briefing notes for private counsel . . . .<sup>42</sup>

The result was that attorneys regularly represented the prosecution in New York City, unlike in London. The same was true for defendants.

New York guaranteed the right to counsel in 1789 in its Constitution.<sup>43</sup> McConville and Mirsky found "that, at least from 1810 onwards, almost every defendant in General Sessions exercised the right to be represented by a lawyer at trial irrespective of his or her standing in society or ability to pay a fee."<sup>44</sup> While defense counsel in colonial New Jersey may have been at best semi-professionals,<sup>45</sup> those in early nineteenth-century New York City were trained:<sup>46</sup>

Lawyers were knowledgeable about issues of substantive and procedural law and experienced in criminal cases; they were not amateurs without qualification or expertise . . . . Prominent lawyers with considerable stature within the profession provided almost one-third of the representation . . . . Almost two-thirds of the remaining representation at trial was undertaken by a core group of repeat

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41. *Id.* at 448 (footnotes omitted).

42. *Id.* at 453.

43. *Id.* at 454.

44. *Id.* at 454. The authors report:

It was not uncommon for the judge to assign or offer to assign counsel even where the defendant was already represented, and it was common for more than one lawyer to be assigned to a single defendant. Private lawyers volunteered for court assignments and, when a fee was not forthcoming from the defendant or his family, acted *pro bono*.

*Id.* at 454-55.

45. *See supra* note 29.

46. "Lawyers apprenticed for at least three years in a law office and often had college educations." McConville & Mirsky, *supra* note 37, at 452.

players whose actions showed they were versed in substantive and procedural law and the rules of evidence.<sup>47</sup>

With lawyers regularly appearing for both the prosecution and defense, the result was an adversary process for indicted defendants. McConville and Mirsky state,

Suspects were examined by magistrates in line with legal forms and, thereafter, adversarial procedures and practices controlled by lawyers protected indicted defendants against over-reaching. Defendants . . . had the right to notice of the charges (through the complaint or the indictment), the right to counsel on the trial of an indictment . . . , the right to confront and cross-examine witnesses, and the right to a jury trial.<sup>48</sup>

This does not mean that the adversary system, as we now know it, was in operation in New York City at the beginning of the nineteenth century. As we have seen, the public prosecutor had not fully emerged,<sup>49</sup> and lawyers did not always act as adversarial as they might later, but an adversary process was in place. McConville and Mirsky conclude that the records

suggest that lawyers displayed forensic skill over the entire period of the study. Witnesses were called to testify and to give evidence through direct examination and cross-examination. However, the extent, detail, and length of witness examination with respect to issues of credibility was more limited than that associated with jury trials of today. The style was less confrontational and often cross-examination allowed the witness to provide additional details to the account already given on direct examination.<sup>50</sup>

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47. *Id.* at 455. The authors go on to state, “No defendant, so far as we were able to ascertain, was represented by an individual who was not admitted to legal practice.” *Id.*

48. *Id.* at 449.

49. It was only in the middle of the eighteenth century that public prosecution took full control in New York. *Id.* at 465 (“[W]hilst for most the first half of the [nineteenth] century, District Attorneys and private lawyers shared responsibility for the disposition of cases in General Sessions, by mid-century the District Attorney had become the sole representative of the state in prosecutions of indictable offences.”). Public prosecution developed at different paces in various places in America. Compare Bruce P. Smith, *The Emergence of Public Prosecution in London, 1790-1850*, 18 YALE J.L. & HUMAN. 29, 30 (2006) (“[I]n the United States, . . . states, counties, and cities routinely relied upon public prosecutors to investigate, manage, and argue a broad range of criminal cases by the early years of the nineteenth century.”), with Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325 (2002) (“The idea that public prosecution had become firmly established as the American system by 1789 does not bear scrutiny.” (footnote omitted)).

50. McConville & Mirsky, *supra* note 37, at 456-57. The authors also state:

An adversary system was entrenched in New York City at least by 1810. This system was not simply imported from England, for that country, even at that time, had not yet produced a regularly operating adversary system.<sup>51</sup> Of course, for New York's system to be so embedded by then, it had to be planted even earlier. This shows that America did not simply adopt an adversary system from across the sea.<sup>52</sup> Perhaps some of its seeds came from England, but in the new world soil, they produced distinctively American roots.

#### V. THE DEVELOPMENT OF THE RATIONALE FOR THE HEARSAY RULE

The development of the rationale that hearsay is prohibited because of the lack of cross-examination may also shed light on the emergence of the adversary system. T.P. Gallanis's study of the emergence of modern evidence rules found that hearsay in England developed a little before 1780, but "the 1780s were a period of considerable activity and . . . by 1800 much of the modern approach to hearsay was already in place."<sup>53</sup> He suggests that modern notions of hearsay developed because of increasingly aggressive lawyering in English criminal cases and concludes, "Only in the late eighteenth century, when a new spirit of adversarialism appeared in criminal and then civil trials, did those rules and their consistent application begin to mature."<sup>54</sup>

John Langbein, while studying English sources, notes that while some earlier comments can be found about how cross-examination was denied because of hearsay, the first judicial mention found of that rationale was in a

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The provision of legal representation did not mean that trials were examples of what Roscoe Pound described, in the early twentieth century, as the "sporting theory of justice", whereby defence lawyers utilize every conceivable device to secure an acquittal. Rather, lawyers in General Sessions offered some guarantee that legal procedures would be followed and that verdicts would be obtained in conformity with accepted procedure, evidence, and case precedent. Thus, when a defence lawyer believed that the defendant was guilty and that, given the prosecution's evidence, continued opposition would be of no avail, the defence lawyer would often engage in either little or no cross-examination, withdraw a defence, and not press for an acquittal . . .

*Id.* at 457.

51. Early America adopted a different notion of "lawyer" from the English concept. England separated and kept distinct the functions "between a pleader, one who offers specialized legal assistance, and an attorney, one who is the client's alter ego." George C. Thomas III, *History's Lessons for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 562. "[B]y the time of the ratification of the Sixth Amendment, a single person typically functioned as the client's alter ego and legal specialist in the United States. This distinguished American law from English law at the time and continues to distinguish it today." *Id.* at 572.

52. Certainly, this country did not import the concept of public prosecution from England. See Ramsey, *supra* note 49, at 1325 ("English influence on public prosecution in America was very slight.").

53. Gallanis, *supra* note 11, at 503.

54. *Id.* at 551-52.

1789 case.<sup>55</sup> He observes that “[o]nly in the middle of the nineteenth century did the consensus form that the doctrinal basis of the hearsay rule was to promote cross-examination.”<sup>56</sup>

Gallanis’s survey of English treatises reaches a similar result.<sup>57</sup> He notes that early writers stated “hearsay lacked credibility because the original statement was not made under oath,”<sup>58</sup> and the lack of cross-examination first appeared as a rationale in a treatise in 1791. He continues, “By 1801, however, Peake’s treatise presented the two rationales on equal terms, and for Evans in 1806 the lack of cross-examination was even the ‘stronger objection.’”<sup>59</sup> Gallanis found that while English judges often did not explain the reasons for the hearsay rule, cases from that period tended to mirror the progression of the hearsay rationales in the treatises. He states, “The surviving accounts of litigation are less helpful on this point than one would hope, largely because most case reports did not discuss the rule’s purpose; but where such discussions did appear, they generally centered on the need for an oath in the eighteenth century and on the desirability of cross-examination in the nineteenth.”<sup>60</sup>

If America only followed English criminal procedure, then we should find the modern hearsay rationale enunciated after it took root in England. If, however, a developing adversary system produced that rationale—as it apparently did in England—and America adopted an adversary system before England, then the modern hearsay rationale should have taken hold in America first.

Available information does not allow a conclusion as to when that rationale became rooted in America. However, that information does indicate that the concern that hearsay denied cross-examination appears to have been emerging in America at least at the same time, if not earlier, than it did in England.

Recent research by Thomas Davies indicates that the connection between hearsay and the lack of cross-examination was widely afoot in early America. He has examined justice of the peace manuals printed in America in the 1770s and 1780s, all which give the lack of opportunity for cross-examination as a reason for the hearsay rule. He summarizes, “[T]he linkage between the confrontation right and the ban against unsworn hearsay appeared in the justice of the peace manuals published for New England, New York and the mid-Atlantic states, Virginia, and South Carolina. . . . Given all of these

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55. LANGBEIN, *supra* note 3, at 245.

56. *Id.* at 180; *see also id.* at 233 (“The ultimate rationale for the hearsay rule (serving the process value of promoting cross-examination) was not settled until well into the early nineteenth century.”).

57. Gallanis, *supra* note 11, at 499.

58. *Id.* at 533.

59. *Id.* (citations omitted).

60. *Id.* at 537 (footnotes omitted).

sources, it seems highly likely that framing-era American lawyers and judges understood the bar against unsworn hearsay evidence to be a *component* of a criminal defendant's right to confront adverse witnesses."<sup>61</sup>

The contention that hearsay was prohibited because of the lack of cross-examination appears in American cases at least as early as it did in English cases. One case was a 1782 Maryland petition for freedom, *Toogood v. Scott*.<sup>62</sup> Petitioner Eleanor Toogood contended that she was free because she was a descendant of a free white woman. The defendant presented a court judgment that had rejected the petitioner's mother's petition for freedom and had found her to be a slave.

Toogood's counsel maintained that that judgment did not preclude Toogood's freedom. He contended that if a mother were owned by one person and her child by another, then a judgment freeing the mother would not be conclusive proof freeing the child. Instead, the child's owner would be able to produce evidence that the child was a slave. The lawyer conceded that the judgment could be admitted, but its use would have to be limited. He stated, "Certainly the judgment in favour of the mother is not conclusive evidence, and is only admissible as testimony upon the principle that hearsay evidence is allowed to prove descents, marriages and pedigrees."<sup>63</sup> The lawyer then went on to say that the judgment at issue could only be admitted for those limited purposes and was otherwise inadmissible. He stressed Toogood's lack of an opportunity for cross-examination at the proceeding which had produced the judgment:

The record proof in the cause between [petitioner's mother] and *John Beale*, is not admissible as evidence in this case, only upon the principle that hearsay and reputation is evidence to prove a marriage. The present parties being different, the depositions or proof taken in that case, cannot be received as evidence, but on that ground.

A deposition cannot be given in evidence against any person not a party to the suit; and the reason is, that he has not [had] liberty to cross-examine the witness.<sup>64</sup>

His argument is noteworthy. He presented, as was accepted, that a person could not have a deposition admitted against him if he had lacked the chance to cross-examine the deposed witnesses. He then contended that the principle should control the hearsay that was at issue in the *Toogood* case, which was similar to, but was not, a deposition.

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61. Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349, 427-29 (2007).

62. 2 H. & McH. 26, 1782 WL 7 (Md. 1782).

63. *Id.* at 29.

64. *Id.* at 33.

The reported opinion does not give the court's reasoning, but the court concluded that the prior judgment "was no bar to *Eleanor Toogood*"<sup>65</sup> and she was granted her freedom.

Certainly the principle relied upon in *Toogood*, that a deposition could not be introduced if the party against whom it was offered had not had the chance to cross-examine, was well accepted in early America. Thus, a 1791 Connecticut court excluded a deposition, stating "an opportunity to cross-examine a witness is very important to a party. . . ." <sup>66</sup> A 1794 Delaware case also excluded a deposition and stated, "Depositions cannot be read against those who have not had a cross examination . . ." <sup>67</sup> A North Carolina court excluded a deposition because it was not established that it was taken at the designated place and concluded, "Were we to allow of the reading of this deposition, we should establish a precedent which would put it in the power of man to deprive his adversary of the benefit of the cross-examination whenever he pleased."<sup>68</sup>

As happened in *Toogood v. Scott*, counsel and courts used the rationale that a deposition could not be admitted when the party had not had the opportunity to cross-examine to conclude that similar, but non-deposition, hearsay should also be excluded. For example, in an ejectment action, the lower courts permitted the testimony of "one of the persons said to be a juryman on the execution of the writ of *ad quod damnum*" who related what one of the chain carriers on the survey of the disputed land had said at the proceeding for that writ.<sup>69</sup> Defense counsel objected to the hearsay and gave the absence of cross-examination as a reason for the exclusion of the evidence: "The hearsay evidence of any person, unless it be one of the parties (if against him) is inadmissible in a case of this sort. It does not appear that the chain carrier was upon oath at the time he made the declaration, or that he was cross examined."<sup>70</sup> The court apparently agreed. Judge Roane said, "It is very true, that by the general rules of law, hearsay evidence is inadmissible. The reason

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65. *Id.* at 37.

66. *Williams v. Fitch*, 1 Root 316, 1791 WL 422, at \*1 (Conn. Super. Ct. 1791).

67. *Polk's Lessee v. Minner*, 1 Del. Cas. 24, 1794 WL 153 (Del. 1794).

68. *English v. Camp*, 2 N.C. (1 Hayw.) 358, 358 (N.C. 1796). *See also* *Burton's Lessee v. Prettyman* 1 Del. Cas. 154 (Del. 1797), where in an ejectment action a deposition from a former ejectment action was offered. Defense counsel objected, stating that only one of the defendants had been a party in the former action and "that the other three had no benefit of a cross examination." *Id.* at 155. Plaintiff's counsel argued that the deposition concerned pedigree, "as to which hearsay is good evidence." *Id.*

The court ruled that the portion of the deposition that concerned pedigree was admissible against the defendant who had also been a party in the former proceeding, but "as to the rest of it, strike it out; and with regard to the other defendants, if their title does not acknowledge any part of the contents of it, we will direct the jury with regard to them to take no notice of it." *Id.*

69. *Claiborne v. Parrish*, 2 Va. 146, 1795 WL 522, at \*1 (Va. 1795).

70. *Id.*

of the rule is so well founded and so generally known, that it is unnecessary to state it.”<sup>71</sup>

In the 1794 North Carolina case of *Christmas v. Campbell*,<sup>72</sup> the court recognized the necessity for cross-examination, not merely as a formalistic requirement but as a means to help produce reliable evidence. The action concerned the collection of a debt. The defendants claimed that the plaintiff’s agent had induced them to confess the judgment by promising that if the defendants paid a portion of the debt by a certain date, the execution of the remainder would be postponed. The plaintiff denied that such a promise had been made and offered the agent’s affidavit to that effect. The court, in excluding that evidence, not only mentioned the lack of cross-examination but stressed the practical importance of cross-examination. The court stated:

[H]is affidavit cannot be received, because it was taken *ex parte*, and for want of cross examination may appear in a different dress now from what it would appear were he cross examined by the complainants, who might suggest matters that he would recollect, and which for want of such suggestion, he might not remember.<sup>73</sup>

Indeed, in excluding a deposition in a criminal case, that same 1794 court made a general pronouncement about the connection between cross-examination and admissible evidence. The court announced, “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine . . . .”<sup>74</sup>

The 1795 Virginia case of *Schwartz v. Thomas*<sup>75</sup> shows that both American lawyers and judges held quite sophisticated notions about the connection between hearsay and cross-examination. In this slander action, the defendant objected to the admissibility of J. Smith’s testimony that he had received a letter from Joseph Smith of North Carolina, a person who did not testify. The letter stated that the letter writer had heard of a slanderous report with regard to the plaintiff. On appeal, the attorney for the plaintiff (labeled the defendant

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71. *Id.* Judge Roane went on to say that the hearsay rule had exceptions, but that the proponent of the hearsay had to establish that the hearsay fell within an exception, and the proponent had not done so. The judge also gave an alternative ground for excluding the hearsay. He said that the hearsay declarant should not have been allowed to testify even though he had been in court “on account of the turpitude of his own conduct . . . . Most clearly then, it was improper to admit as evidence his declarations made when not on oath.” *Id.* at \*2.

72. 2 N.C. (1 Hayw.) 123, 1794 WL 111 (N.C. 1794).

73. *Id.* at \*2. Even as early as 1768, some in America seemed to be contending that hearsay should be excluded not simply for the formalistic reason that the absence of cross-examination made it inadmissible, but because hearsay was not reliable. *See Norris’ Lessee v. Pottee*, 4 H. & McH. 508, 1768 WL 12 (Md. 1768), where, concerning an evidentiary dispute, “it was contended that it was mere hearsay evidence, and that of a single witness. Such evidence is liable to the imperfection of memory, and when the remembrance of things fail, men are apt to entertain opinions in their room.” *Id.* at \*3.

74. *State v. Webb*, 2 N.C. (1 Hayw.) 103 (N.C. 1794).

75. 2 Va. (2 Wash.) 167, 1795 WL 529 (Va. 1795).

in error in the case report) contended that the letter was not offered for its truth but was still relevant on damages. He said:

This letter was not introduced to prove *the fact* that the slanderous words had been spoken, but that the *report had been spread*. The witness thought the defendant had been injured by the speaking of those words, because the letter proved that the slander had circulated. If hearsay evidence can be admitted in any case, it surely ought in a case of this sort.<sup>76</sup>

The court agreed, and each judge wrote an opinion stressing that cross-examination would not have affected the probative value of the evidence. Judge Roane stated:

That the report had circulated so as to come to the knowledge of the writer, is as clearly established by the letter itself, as if he had deposed to the same effect . . . , and no cross examination could possibly do away a conviction that he who spoke of the report, had heard it.<sup>77</sup>

Judge Fleming noted:

This case is very different from what it would have been, had the letter been produced to prove the speaking of the words, or the propagation of the report by the defendant. In the one case the party might have derived benefit from the cross examination of the writer, in the [present] case it would have been impossible.<sup>78</sup>

This court displayed quite modern notions of the connection between hearsay and cross-examination. The out-of-court statement was allowed because the cross-examination could not have affected the value of the evidence. Underlying the court's reasoning was the unstated corollary that an out-of-court statement should be excluded when cross-examination not occurring in front of the jury could have affected the weight of the evidence.<sup>79</sup>

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76. *Id.* at \* 2 (emphasis in original).

77. *Id.* at \*3.

78. *Id.* at \*4.

79. At least some early American lawyers not only sought cross-examination, but argued that cross-examination in front of the jury was necessary for the cross-examination to have full effect. Thus, an attorney for a defendant charged with manslaughter seeking a trial postponement in order to have witnesses testify at the trial urged that merely taking depositions would not suffice. The attorney said, "A viva voce examination before the jury is necessary to our safety. On depositions, though we cross-examine, we shall lose the manner, appearance, temper, &c., of the witnesses, so important in weighing their credit." *United States v. Moore*, 26 F. Cas. 1308, 1308 (C.C. Pa. 1801). The court, however, did not agree. It held that the trial could be delayed only if the defense agreed to the taking of depositions from prosecution witnesses who had been jailed pending trial so that those witness could be released from custody if the trial were postponed. *Id.* at 1308-09.

By 1808, an American court in *Dunwiddie v. Commonwealth*<sup>80</sup> concluded that the admission of hearsay could violate “fundamental” rules by denying cross-examination. In a case of bastardy, the lower court had permitted the warrant before the justice of the peace to be read as proof that the defendant was the father of the child. The appeals court found the error so clear that little needed to be said and merely stated:

It is sufficient to say...[the admission of the evidence] is a violation of the most fundamental rules of evidence; withholds from the person accused an advantage which was most unquestionably his right—the benefit of a cross-examination; and, if admitted, it would also confine to a justice of the peace, the exclusive right of inquiring into the truth of the fact charged.<sup>81</sup>

Here the court not only saw the basic connection between the admission of hearsay and the denial of cross-examination but also suggested that the hearsay should not be admitted because it prevented the party from developing the facts, the basic component of the adversary system.

This sampling of cases is not a comprehensive survey of why early American courts excluded hearsay.<sup>82</sup> It does show, however, that at least a number of American courts and lawyers saw the connection between the hearsay rule and cross-examination at a time when that connection was just gaining currency in England. Since that same rationale was also being stated, often quite forcefully, on this side of the Atlantic at the same time, Americans were not simply following English practice, for then there would have been a time lag between the development of the English rationale and its articulation in America. Instead, these cases indicate that America independently saw that the admission of hearsay could deny the important trial right of party cross-examination. The recognition of this connection in England came as English procedure grew increasingly adversarial. Its independent recognition in America, once again, indicates that America developed its own adversary system.

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80. 3 Ky. (Hard.) 290 (1808).

81. *Id.* at 290.

82. This sampling is also not meant to suggest that early American courts always excluded hearsay or always gave reasons for their decisions concerning hearsay. *See, e.g.,* *Goodwin v. Harrison*, 1 Root 80 (Conn. Super. Ct. 1781), which was an “[a]ction of the case, for giving her a dose in some toddy, to intoxicate and inflame her passions.” *Id.* at 80. The defendant lodged a hearsay objection to the plaintiff’s mother testifying concerning the plaintiff’s “complaints . . . the next morning, after the affair happened, and what she said about it.” *Id.* The court admitted the evidence, with the case report only stating that “the mother was allowed to relate what the plaintiff told her the next morning when she saw first saw her—as being an exception from the general rule, founded upon the necessity of the case.” *Id.* at 80-81.

## VI. EARLY AMERICAN ADVERSARIAL TRIALS

As we have seen, an adversary system was functioning at the beginning of the nineteenth century in New York City,<sup>83</sup> but the contention here is that the guarantee of a right of counsel, the creation of public prosecutor, the regular appearance of counsel for both sides in criminal cases, and the early emergence of the rationale that the denial of cross-examination compelled prohibitions on hearsay all indicate that an adversary system was operating in America even earlier, and certainly before one operated in England. The best proof of this assertion would come from examining what happened in ordinary trials in early America. Something like trial transcripts from that period would be required. Unfortunately, such material does not exist. Earlier, however, I discussed two criminal proceedings from early America where records similar to trial transcripts have been preserved.<sup>84</sup> Both show a vigorous adversary system at work, and case reports from early America also indicate an adversary system functioning throughout the new country even in the eighteenth century.

The first of the two criminal proceedings available with nearly full reports are the famous Boston Massacre trials of 1770. Those proceedings show a fully functioning adversary system operating in Massachusetts even before Independence and provide a striking contrast to English criminal trials at the same time. In England, trials were then, at best, at the incipient stage of adversariness. The few defense counsel who then appeared in England could not fully represent criminal defendants. At most, if judges permitted it, they could examine and cross-examine witnesses. In contrast, the defense counsel in the two Boston Massacre trials, led by John Adams, acted as adversarial advocates fully through all stages of the trials. I previously summarized their efforts by stating,

John Adams and his colleagues cross-examined prosecution witnesses; 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 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. Contradictions with other witnesses were highlighted. Attempts were made to enhance the defense witnesses' credibility. Statements to the jury were not impartial recitals of evidence, but clever arguments for why the defense theory ought to be

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83. *See supra* Part III.

84. Jonakait, *supra* note 1, at 136-143, 155-63.

accepted. These were lawyers acting as we expect modern defense attorneys to act, as advocates for their clients in all parts of the trial.<sup>85</sup>

Significantly, nothing indicates that defense counsel were breaking new ground in using their tools as they did. As I contended before,

Lawyers uncertain of their advocacy role or its limits were unlikely to perform as brilliantly as these lawyers did. . . . [T]he skill with which these attorneys performed, their ready acceptance of the advocacy role, and the absence of anything indicating that the advocacy was remarkable all suggest that the adversarial nature of the trial was not unusual.<sup>86</sup>

The other criminal proceeding from early America where I could find a nearly complete report came thirty years after the Boston Massacre trials. This 1800 New York City trial once again shows a fully functioning adversary system. While the full right to counsel was still decades in the future in England, Levi Weeks, who was charged with murder, had lawyers who defended him “by sophisticated use of cross-examination, brilliant arguments to the jury, and dexterous presentation of their case.”<sup>87</sup> I have stated elsewhere that this was, in effect,

a modern trial. It was modern because the attitudes and duties of the participants were like their present-day equivalents. . . . 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

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85. *Id.* at 137-39 (footnotes omitted).

86. *Id.* at 140, 143 (footnote omitted). The Boston Massacre trials indicate in another way that American criminal procedure did not just follow English practices but often blazed a path in advance of England. John Langbein states:

The beyond-reasonable-doubt standard emerged only in the second half of the eighteenth century. The historical literature long focused on a series of treason trials in Ireland in 1798 as the first appearance of the standard, although more recent scholarship has found the beyond-reasonable-doubt standard in use in colonial Massachusetts (in the Boston Massacre trials) as early as 1770.

LANGBEIN, *supra* note 3, at 262 (footnotes omitted). See also Jonakait, *supra* note 1, at 141 n.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 [one of the Massacre trials], 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.”

*Id.* (quoting 3 LEGAL PAPERS OF JOHN ADAMS 309 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

87. Jonakait, *supra* note 1, at 158-59.

be from the clash of proof and contentions presented to the jury. This system was adversarial.<sup>88</sup>

Noteworthy again is that the attorneys' skill, apparent comfort, and acceptance of their roles demonstrate an adversary system firmly in place. Thus, "[t]he facility with which the participants used this system indicates that it was already well-established when Levi Weeks was tried."<sup>89</sup>

The trial itself had no great legal significance and concerned only locally sensational matters, but it did feature notable people. The presiding judge was John Lansing, who was formerly a delegate to the Constitutional Convention of 1787. The prosecuting attorney, Cadwallader David Colden, came from a prominent New York family. Weeks was defended by Aaron Burr, Alexander Hamilton, and Brockholst Livingston, who would later serve for seventeen years on the United States Supreme Court.<sup>90</sup> The trial is clear evidence that the adversary system was accepted by leaders of the country long before that system was truly established in England.

While the Boston Massacre and Levi Weeks trials were the only criminal proceedings from the late eighteenth century for which transcript-like records of American trials are available, normal case reports from that period also reveal, or suggest, an adversary system widely at work. For example, in a 1786 Connecticut case, William Green was charged with adultery. Witnesses had testified that they had seen the accused in bed with the married and undressed Tryphena Rossetar. The court report then states, "Which fact was not contested by the counsel assigned for the prisoner[.]"<sup>91</sup> Of course, this statement shows representation by a defense counsel and that it was considered important enough for a lawyer to be appointed, but it indicates more. The case report indicates that it was not considered the court's role but that of counsel to develop the facts at trial as an advocate and challenge damning evidence. If that was not done, as it was not done in *Green*, then the inculpatory testimony could be taken as true. The key component of the adversary system is a defense attorney challenging the evidence presented against an accused, and the William Green case suggests that that crucial role for attorneys was already well established by at least 1786 in Connecticut.<sup>92</sup>

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88. *Id.* at 162-63 (footnote omitted).

89. *Id.* at 163.

90. *Id.* at 156-57.

91. *State v. Green*, 1 Kirby 87, 88, 1786 WL 139 (Conn. Super. Ct. 1786).

92. In a motion for arrest of judgment, the attorneys for Green argued that the evidence was not sufficient to sustain the jury's verdict convicting the accused of adultery. Instead, they contended the evidence only showed a lesser crime. *Id.* A statute provided for whipping up to thirty lashes of the man and woman when a man was merely found in bed with a married woman without proof of intercourse. *Id.* The attorneys contended "[t]his statute was expressly provided for cases like the present, where clear proof cannot be had of the act of adultery; for the law will not punish men with the severity affixed to the crime of adultery, upon

The report of the 1790 New Jersey case *State v. Wells*<sup>93</sup> also reveals the operation of this central facet of the adversary system. The accused was convicted of manslaughter after killing James Cooper in a dispute over a turkey. Lawyers represented both the prosecution and the defendant, and the case illustrates that the accepted role for defense counsel was to establish a defense on the facts and present and elicit the facts to support it. The case reports states,

The defence set up by the prisoner's counsel was that of excusable homicide. . . . [T]hey examined one or two witness to show that the prisoner was on friendly terms with the deceased, and to rebut an idea which had been rather intimated than proved, that there was a previously subsisting quarrel between them.<sup>94</sup>

Reports of a 1794 Delaware case and a 1795 Pennsylvania case again show both sides represented and that the defense attorneys were not merely limited to cross-examining but also presented evidence. In the Delaware case, *State v. Farson*,<sup>95</sup> the prosecutor objected to a defense witness as incompetent, and the witness was not allowed to testify.<sup>96</sup> Similarly, in the Pennsylvania case

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mere presumption." *Id.* The court affirmed the conviction, stressing the role and power of the jury. The court unanimously held:

The jury are by law the proper judges of the weight of the evidence, on the whole circumstances of the case: And although the prisoner by the same testimony, might have been proceeded against and convicted on another statute, for a lower offense; yet it cannot from thence be inferred, that the evidence was not sufficient to convict him of adultery.

*Id.*

93. 1 N.J.L. 424, 1790 WL 349 (N.J. 1790).

94. *Id.* at \*2. The attorneys for both sides also objected to some of the evidence offered by their adversaries. Defense counsel objected when the prosecution's counsel offered testimony to prove the accused's conversations about the affray, claiming that such evidence was inadmissible because the accused's written confession had already been introduced. *Id.* at \*3. The court in considering whether a new trial should be granted ruled that the testimony was properly admitted. *Id.* at \*4. The prosecuting attorney objected when the accused offered character evidence about the deceased and himself. *Id.* at \*3. The reviewing court held that it was an error to exclude this evidence. The court, however, went on to state,

Still, if evidence of this kind is admitted, I should think it my duty to inform the jury, that it should receive little attention in any case, unless where the fact is itself dubious, or where the charge rests altogether upon presumptive testimony. Against the positive declarations of honest witnesses, it ought not be permitted to weigh.

*Id.* at \*4. A new trial was not ordered.

95. 1 Del. Cas. 23 (Del. 1794).

96. The assaulted person was white. Defense called a free Negro to testify. The prosecution's counsel objected, stating that previous cases indicated that "the prosecutor is a party applying for redress; if so, the present prosecutor is a party, and, being white, a Negro

*Respublica v. Langcake and Hook*,<sup>97</sup> a trial for maihem and assault and battery,<sup>98</sup> the prosecutor successfully objected when the defense counsel sought to introduce hearsay.<sup>99</sup> While the defense evidence was rejected in each case, both reports indicate an adversary system in operation where the advocates were charged with presenting or trying to prevent the evidence.

A detailed report of a 1796 North Carolina case *State v. Norris*,<sup>100</sup> a murder prosecution, quite clearly demonstrates again that a full adversary system was in operation in America well before that system existed in England. Indeed, in *Norris* that adversarial process began even before jury selection. The defense attorneys read to the court an excerpt from an inflammatory newspaper article and moved to delay jury selection. The court denied that motion,<sup>101</sup> and a defense attorney then asked that if the defense challenged a juror as biased that the juror be examined under oath as to whether the juror had expressed an opinion against the accused. The public prosecutor, the Solicitor General, objected. The trial was apparently presided over by two judges, and after argument, the two split as to whether the potential jurors could be questioned under oath.

Defense counsel did not capitulate but rather advocated a way around the difficulty that may have given the accused an advantage in the jury selection. Counsel proposed that jurors challenged for expressing an opinion be set aside to see if a jury could be selected from the rest of the jurors. The attorney suggested that

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cannot be sworn against him.” *Id.* at 23-24. The court concluded that the witness could not testify, and the accused was convicted. *Id.* at 24.

97. 1 Yeates 415, 1795 WL 708 (Pa. 1795).

98. *Id.* at 415. The report notes that at trial, “[t]he cause was very ably and ingeniously argued by Messrs. *Thomas and Porter* on the part of the state (Mr. *Ingersoll*, the attorney general, being sick) and by Messrs. *Rawle and Moses Levy* on the part of the defendants.” *Id.* at 416.

99. Out-of-court statements were “offered in evidence by the counsel for the defendants.” 1 Yeates at 415. The lawyers contended that the hearsay was admissible as dying declarations. *Id.* The court concluded that the evidence was inadmissible, stating:

The general rule was, that hearsay was inadmissible, but there were some exceptions in particular cases, and among others the declarations of the deceased person on an indictment for murder, founded principally on the [necessity] of the case. No such necessity could be pretended here, there having been several witnesses present at the different transactions. It would lie on the defendants to establish the evidence contended for, as an exception from the general rule, which cannot be done.

*Id.* at 416.

100. 2 N.C. 429, 1796 WL 327 (N.C. 1796).

101. Judge Williams stated, “[t]he people in this country do not take for truth, every thing that is published in a newspaper. The jury well know they are to be governed only by the evidence and the law. I trust no one will be so much prejudiced against the prisoner, as to be led to an unjust condemnation.” *Id.* at \*1.

if the panel shall be gone through, and the jury not completed, that then we consider of the jurors whose names are noted, and how the exception shall be tried—perhaps we may get a jury before the panel is gone through, and then it will not be necessary to consider further of the exceptions.<sup>102</sup>

Both judges assented to this, and a jury was selected.

The advocacy role of the defense counsel should be noted here. Those attorneys apparently had information that some of the potential jurors were biased and could not be expected to divulge their bias under the ordinary procedures. Counsel clearly saw it as part of their lawyerly duty to shape the jury by finding a way to keep these potential jurors from sitting, and ingeniously suggested procedures to get that result.

The case report's lengthy recitation of the presented evidence indicated that many people witnessed the events. The witnesses generally agreed that the deceased, Daves, had apparently challenged the accused to a fight. Those two exchanged insults, and Daves tripped Norris and threw him to the ground. After Norris got up, Daves hit him. Norris left briefly, but returned. Not all agreed about what then transpired. The report's summary of the evidence states:

Norris, after an absence of three or four minutes, returned, running, and as Mrs. Thompson says, stopt in the street opposite to [the deceased and others]—as the other witnesses says, he ran up to Daves without stopping—Daves discovered him, and went towards him. Mrs. Thompson and Dudley say, Daves inquired whether he had a weapon, club or stick, which Norris denied and they met. Campbell says, Norris cried out, come on, I am ready for you. Mrs. Thompson says, blows passed upon their meeting, which she believed were given by Daves. Dudley says, he did not see Daves strike before the stab—the other witnesses say nothing of blows at this time. Immediately upon the last meeting, the deceased received the mortal wound of which he died.<sup>103</sup>

The extensive report of the evidence, while taking many pages, does not generally indicate the lawyers' roles in the presentation and challenging of the evidence, except at one point where it refers to cross-examination. The report states:

Upon the cross-examination of the witness [Campbell, who was apparently a friend of Daves, or at least with him before the first altercation], he said Daves kicked at Norris after he fell in the first combat . . . ; and that Norris was gone three or four minutes before he returned . . .<sup>104</sup>

This specific mention of the defense cross-examination may have been given to highlight the importance of the elicited fact for the defense. Defense

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102. *Id.* at \*2.

103. *Id.* at \*5.

104. *Id.* at \*3.

counsel would contend that the crime was not murder, but only manslaughter, because of the heat of passion caused by a recent, violent provocation.

Summations followed, and those addresses to the jury were by advocates in an adversary system. The Solicitor-General first discussed the difference between murder and manslaughter.<sup>105</sup> The prosecutor then relied on the facts of the case to appeal to the jurors using the equivalent of a modern safe-streets appeal:

Disputes, and fighting in consequence of them, happen every day in the streets, and elsewhere—will the law say, when one is worsted he may quit the affray, go home, provide himself with a knife, return and plunge it into the body of his adversary, and that he shall be guilty of no more than manslaughter? Such a doctrine will deluge the country in blood. The life of every man who is drawn into a quarrel and contends with another, will be in danger. What can be more cruel, more indicative of a malignant heart, than this deed of the prisoner?<sup>106</sup>

The Solicitor-General concluded, as a good advocate might today, by stressing the evidence favorable to his side and downplaying the unfavorable facts. He argued:

In the present case there are circumstances which shew deliberation, and a design concealed in the breast of the slayer: he was asked whether he had a weapon? He said, no. Again, or a stick? He answered, no. Why did he conceal this circumstance? What other motive could he have but to induce Daves to come upon him, that he might strike the fatal blow? . . . As to the blows said by Mrs. Thompson to have passed immediately before the stab, no stress is to be laid upon them, because if they actually did pass, Norris had come to that spot armed with a deadly weapon, to take away the life of the deceased, upon a black and diabolical design, the true sense of the term malice: . . . he is guilty of

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105. The prosecutor said that murder was killing with malice aforethought, but that term was used in a legal sense. Malice existed:

[W]here the fact of the killing is attended with such circumstances as shew the slayer to have a cruel and diabolical temper and disposition, above what is ordinarily found amongst mankind. . . . It is the cruelty of the action, and the malignity of heart the action discovers, to which the law attributes the crime of murder . . . . This cruelty and malignity of heart is discoverable from the action itself, and the causes that lead to it. If the cause that lead to it be such a conduct on the part of the person slain, as would in ordinary tempers have produced only a slight resentment, not rising so high as to aim at the life of the offender, but only to a punishment proportionable to the offence, and yet the person offended. . . [kills with a weapon the] circumstances . . . shew the heart of the slayer to have been more than ordinarily cruel . . . .

*Id.* at \*5.

106. *Norris*, 1796 WL 327, at \*5

murder, although he was stricken by the other before the mortal wound was given.<sup>107</sup>

The two American defense attorneys then did what they could not have done in England—they addressed the jury. The reporter did not give a lengthy account of their argument, but said that they “commented upon the evidence at great length, and with much ingenuity, placing it in as favourable a light for the prisoner as possible.”<sup>108</sup> It is clear, however, that they stressed provocation and the time sequence, for the case notes that they said it was manslaughter “when the fact is done in the heat of passion and resentment, excited upon violent provocation given: and the killing need not be whilst both parties are combating, . . . but if committed in so short a time after the irritation, as that the passions have not had time to subside and cool.”<sup>109</sup>

After both judges gave instructions,<sup>110</sup> the jury returned a verdict of manslaughter.<sup>111</sup>

*State v. Norris* is distinguished from other case reports of the period by its detailed reporting of the trial, which the reporter indicated was done because many who attended the trial thought the accused guilty of murder and therefore castigated the jury for its decision. The reporter continued, “Perhaps the learned may be of opinion, when they meet with this case, that the jury gave a proper verdict.” He counseled against prejudgments, and concluded,

At any rate, the attributing motives to any who are from duty concerned in such trials, is of pernicious example. It has a tendency to distract the judgment by the terror of public censure, and to render it less efficacious in perceiving facts and

107. *Id.*

108. *Id.* at \*6.

109. *Id.*

110. The judges did not give entirely consistent instructions. Judge Haywood said that killing after sufficient provocation was manslaughter, and further stated that if the killing had occurred in the first altercation,

I think it would have been but manslaughter [, but i]f he came up, and nothing more passed before the stab, as the witness Campbell and Dudley say there did not; then it is for the jury to consider, whether the three or four minutes intervening . . . was sufficient time for the passions to cool. . . . If it was not, the case falls under the same consideration as if the fatal stroke had been given when Daves first struck him.

*Id.* Judge Williams, however, stated:

I cannot think it an excuse to reduce the offence to manslaughter, where two person quarrel and fight, and one goes some distance, gets a knife, and returns and kills the other with it—such disputes happen every day. If we say it is not murder to kill shortly after, under such circumstances as this man was killed, much blood will be spilt in a very short time—it will be establishing a dreadful precedent.

*Id.* at \*7.

111. Norris “was burnt in the hand and discharged.” *Id.*

circumstances in their true light—the opinions of men may differ, and yet all be actuated by the purest intentions.<sup>112</sup>

This homily not only defends the jury's verdict, it also seems to indicate the strength of the then-existing adversary system. Surely if jurors were condemned for the murder acquittal, the attorneys who represented the "murderer" would also have likely faced opprobrium. Even so, the attorneys zealously advanced their client's cause.

*Norris*, however, is more than just another example of a full American adversarial trial when such trials did not occur in England. It also lends strong support for the proposition that the institution of public prosecution in America helped move American procedures onto different paths than those trod in England. During the trial, the Solicitor General sought to introduce evidence that he conceded was not normally admissible, but he contended, successfully, that the fact of public prosecution had altered circumstances such that a change in the law should result.

When the prosecutor sought to introduce evidence that one of his witnesses had previously made statements different from those to which she testified at trial, he conceded that in civil cases a party calling a witness could not discredit the witness. The reasons for that rule, he maintained, however, should not apply to the public prosecutor. He said,

In civil cases the party converses with the witness before his introduction, and knows what he will swear; and is generally acquainted with the character of the witness, and with the degree of credit he is entitled to—when he produces a witness to the court, it is an admission on his part that the witness is credible, as he claims a benefit from the testimony—it is proper in such cases he should be bound by his admission, but the reason for that rule will not apply to criminal cases, where the prosecution is carried on by the officer of the public, not at the instance of any particular prosecutor—that public officer is a stranger to the persons he produces as witnesses—he has in general no opportunity of knowing either any thing of the character of the witness, or of what it is he will swear, otherwise than as he collects it from others in course of the conversation.<sup>113</sup>

The defense objected, but neither side could find precedent for what the prosecutor proposed. Even so, the court allowed the evidence. One judge noted that an accused could get people to state publicly facts indicating his guilt, and then be called by the prosecution and relate a different story:

Were not the Solicitor allowed to impeach such evidence, a wide door would be opened for the acquittal of the prisoner by false testimony . . . . It is a very easy matter [for the prisoner] to procure [witnesses] to be introduced for the state, as

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112. *Norris*, 1796 WL 327, at \*8.

113. *Id.* at \*4.

the Solicitor-General, not being acquainted with the witnesses, would think it his duty to summon and introduce all such persons as he was informed could swear any thing against the prisoner.<sup>114</sup>

In other words, at least in this case, the circumstances of public prosecution led an American court to fashion new rules. Once again, American courts were setting their own course in criminal procedure and evidence.

A Delaware case report describes yet another fully adversarial proceeding in 1797, in which a slave called Negro George was tried for rape.<sup>115</sup> The report gives summaries of the testimony, sometimes delineating cross-examination. The public prosecutor, the Attorney General, seemingly built a strong case, with the victim identifying the accused as the attacker and other witnesses tending to confirm both her version and her good character.

The accused was represented by three attorneys, and their opening address to the jury promised an alibi. Those attorneys then presented a series of witnesses who not only testified that the accused was at his owner's house at the time of the crime, but also raised doubts about the victim's identification in other ways. Thus, the victim said that she had scratched her assailant and drew blood, but several defense witnesses said they saw no marks on the accused shortly after the attack. Defense witnesses indicated that the victim had first labeled someone other than the defendant as the rapist. A prosecution witness had testified that the accused's shoe fit into an incriminatory footprint at the scene, but a defense witness stated that the defendant's shoe left a larger print than the examined impression. A witness testified to the darkness of the crime's night, and an almanac was read to establish sunset and moonrise.

In all, twenty witnesses testified, and then both sides summed up. The reports of the summations are brief, but it is clear that the defense conceded a crime was committed but contended that the identification of the accused was not convincing enough to convict.<sup>116</sup> After the judge gave instructions, the jury returned a not guilty verdict.<sup>117</sup>

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114. *Id.*

115. *State v. Negro George*, 2 Del. Cas. 88, 1797 WL 403 (Del. 1797).

116. One defense counsel said, "I believe the crime was committed but it was not committed by George, if the evidence leaves a doubt on your mind of the guilt of the accused you ought not to find him guilty." *Id.* at \*3. Another defense lawyer stated:

Where there is a conviction not from positive proof but violent presumption, there must be a well concerted train of circumstances to make it appear, and there is no other probable way to account for the circumstances. She did not know him at the time and could have no better knowledge after. Innocence appears in the whole conduct of the prisoner and is a strong circumstance in his favor.

*Id.*

117. The court pointed out that the evidence was sometimes contradictory and that it was for the jury to determine what weight to give the evidence. *Id.* The court continued, "In this case where the life of a man is depending, you are to be fully satisfied in your minds and

Three years later, a case report indicates another adversarial trial charging a slave known as Negro George with rape.<sup>118</sup> Again the state was represented by the Attorney General,<sup>119</sup> and this time the court appointed an attorney for the accused.<sup>120</sup> The brief report indicates direct and cross-examination, and that each side addressed the jury. A verdict of guilty was quickly returned, and the accused was hanged.

The final example here of an early American adversarial proceeding is the federal trial in Massachusetts reported as *The Ulysses*,<sup>121</sup> where ship officers were tried for mutiny. The defendants did not contest that a mutiny occurred but contended that it was justified. The report briefly summarizes the evidence and contains a long footnote explaining the court's rulings on a number of evidentiary issues, which shows both sides represented by attorneys acting as advocates seeking to admit and exclude evidence. The bulk of the report, however, consists of summaries of the summations. The defense counsel did what they could not have then done in England: they addressed the jury with skillful arguments about the facts. One defense attorney attacked the credibility of the ship's captain, who had testified. The attorney noted that the captain did not have the kind of interest in the case to make him incompetent as a witness, and then continued:

But, has [he] not a character to gain or lose, or is he a bankrupt in reputation? Has he not the strongest human feelings of resentment and revenge to gratify? Almost every actual motive, which influences human conduct, impels him to color his evidence, and to effect the conviction of the defendant.<sup>122</sup>

The attorney then went on to highlight evidence that the attorney contended showed acts of cruelty and ferocious temper by the captain that justified the mutiny.

As a good advocate would, one of the prosecuting attorneys did not let this go unchallenged. He responded that the defense counsel had said that the captain "must be under the influence of strong passions, but perhaps, not more so than the witnesses in behalf of the defendants. They were all engaged in one common cause; they had a fellow feeling. Their interest and reputation

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consciences before you can convict, but, if you have a doubt remaining from the circumstances of his guilt, you will acquit." *Id.*

118. *State v. Negro George*, 2 Del. Cas. 137, 1800 WL 226 (Del. 1800). Negro George was listed as the slave of Susan Heavelow in this case. In the earlier case, Negro George was listed as the slave of John Tenant. *Id.* at \*2.

119. Mr. Ridgely was the prosecuting Attorney General in this case as well as in the other Negro George rape trial. *Id.*

120. Mr. Vining was appointed for the accused. A Mr. Vining was also one of the counsel in the earlier rape trial of a Negro George.

121. 24 F. Cas. 515 (C.C.D. Mass. 1800).

122. *Id.* at 518.

were engaged equally with [the captain's]."<sup>123</sup> The prosecutor then sought to bolster the captain's credibility by placing blame for any shortcomings on the prosecution. The captain, the prosecutor maintained, "had not designedly omitted any thing. If he had omitted facts, it arose from the negligence of his counsel, who had omitted to interrogate him, and not from his crafty design."<sup>124</sup>

The prosecutor highlighted the evidence favorable to the government. He stated:

It was proved . . . that [Salter, the mutiny's ringleader] had been found sleeping on his watch. It was clear, that Salter, excited by disappointment, and revenge, had stimulated the crew to mutiny. . . . Some of the crew, in their evidence, confessed, that though [the captain] was a violent man, using most intemperate language, and threatening to heave some overboard, and to leave others on some desert island, . . . yet, they regarded them merely as words of passion, and never feared, that he would attempt to realize his threatenings.<sup>125</sup>

These summations again indicate a strong adversary system at work in America before something comparable existed in England. The attorneys made skillful, passionate, and adversarial arguments to the jury that could not have occurred abroad.

This sampling of cases from early America is not meant to be representative, but indicative. It does not show that every trial then was as adversarial as some of those discussed. But those cases discussed—from Boston, New York City, Connecticut, New Jersey, Delaware, Pennsylvania, North Carolina, and from a federal court—do indicate that an adversary system was widely in operation before the nineteenth century began. Attorneys for the prosecution and defense presented and challenged evidence. The judges did not dominate or orchestrate factual presentations, but acted as arbiters between the two sides and gave instructions to the juries. Defense lawyers were not limited to only one part of the trial, but participated at every stage, from jury selection, opening statements, and the presentation and challenging of evidence to summations. Perhaps most important, the attorneys acted as advocates. Evidence was marshaled to support theories of the cases. Juries were not just left on their own to contemplate the meanings of and inferences to be drawn from the evidence, but rather lawyers' arguments on both sides were directed to the juries to support advocates' theories of the case. These are examples of a full adversary system, and the number of examples and the lawyers' skilled performances at least indicate that a full adversarial process was not a rare aberration but an accepted way of trying American cases even at the end of the eighteenth century.

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123. *Id.* at 519.

124. *Id.*

125. *Id.*

VII. THE SIGNIFICANCE OF THE EARLY INCEPTION OF THE ADVERSARY SYSTEM IN AMERICA

Whether the adversary system developed on an earlier track in America than in England has, of course, historical interest, but its importance goes beyond that. Key components of the system are constitutionalized in the Sixth Amendment to the United States Constitution,<sup>126</sup> and the history of the development of the adversary system in America should matter to those who believe the Framers' original intentions control present interpretations of Sixth Amendment rights. The Supreme Court took that originalist approach in *Crawford v. Washington*,<sup>127</sup> where the Court concluded that the Sixth Amendment's right of confrontation "is most naturally read as a reference to the right of confrontation at common law."<sup>128</sup> *Crawford* then explored English common law to define that right.<sup>129</sup>

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126. *See, e.g.,* *Faretta v. California*, 422 U.S. 806, 818 (1975), where the Court in interpreting the right to counsel said:

The Sixth Amendment includes a compact statement of the rights necessary to a full defense. . . . [T]hese rights are basic to our adversary system of criminal justice. . . . The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

*Id.*; *see also* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 582 (1988) ("In other words, the right to notice, counsel, confrontation, and compulsory process are specific components of the fundamental guarantee to an accused that he can defend himself through our adversary system.")

127. 541 U.S. 36 (2004).

128. *Id.* at 54; *see also id.* at 43 ("The founding generation's immediate source of the [confrontation] concept . . . was the common law."). *But see* Jonakait, "Witnesses" in the *Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 194 (2006).

*Crawford* seems to take an originalist approach in concluding that the common law of 1789 controls the right of confrontation, but this . . . is misleading. The contention that this is the most natural reading of the Clause is merely an unsupported assertion. The Framers' intentions for the confrontation provision were not stated and are simply unknowable.

*Id.* (footnote omitted).

129. For example, *Crawford* discussed the history of examinations before English Justices of the Peace and concluded: "Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases." 541 U.S. at 46. The Court then cited three English cases from

If, however, Farming-Era America had departed from English criminal procedures and had moved to firmer adversary procedures that were then unknown in England, it is unlikely that the true sources for Sixth Amendment rights can be found in the English practices and law. America had gone beyond the restrictive practices of England, and it makes little sense to believe that the Framers were constitutionalizing what had been altered and abandoned.<sup>130</sup> If the Sixth Amendment today is to be constrained by the provisions' original meanings,<sup>131</sup> interpreters need to be concentrating on the American history of the adversary system's development, not the English history, for surely it was the American developments that were the foundation for the rights that were constitutionalized.

### CONCLUSION

America did not simply adopt its adversary system from England, but blazed its own path to it. The American course preceded the English move to a full adversary system. This is indicated by the guarantee of the right to counsel and the institution of public prosecution. It is evidenced by the widespread appearance of both prosecution and defense counsel in colonial times, the existence of a functioning adversary system in early New York City, the development of the connection between the hearsay rule and cross-examination, and the many examples of the adversary system in operation in eighteenth-century America. The early rise of the American adversary system

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1791, 1789, and 1787. The Court went on to summarize its historical survey and stressed English developments:

[T]he principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.

*Id.* at 50.

130. See Jonakait, *supra* note 1, at 164 (“[The Sixth Amendment 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.”).

131. *Cf. id.*:

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 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.

*Id.* at 166.

is significant because it indicates that the focus should not be on English but on American history when Sixth Amendment rights are interpreted.