

## FROM EXCULPATORY TO INCULPATORY JUSTICE: A HISTORY OF DUE PROCESS IN THE ADVERSARIAL TRIAL

*Alan Cusack\**

### **Abstract**

This paper explores the historical context behind the emergence of the due process value system which lies at the heart of the Anglo-American legal tradition. By demonstrating, in particular, the reformative impact which the emergence of adversarial sensibilities in the late eighteenth century had in relieving the testimonial obligations of an accused, the paper explores the shift which occurred during this period towards an inculpatory model of justice. Significantly, this inculpatory model rejected the pro-prosecutorial bias which had epitomised the pursuit for justice in seventeenth and early eighteenth centuries. Moreover, whereas the antecedent exculpatory justice model was predicated upon the pro-active prosecutorial efforts of the aggrieved victim, this inculpatory programme rejected the victim's experiential narrative with the State assuming exclusive responsibility for the prosecution of crime.

With an accused therefore no longer facing the limited prosecutorial resources of the victim, but rather the unlimited resources of the State, an equality of arms framework emerged to protect his rights. Resulting in a re-configuration of courtroom relations and an elevation of evidential standards, this equality of arms framework prompted the birth of our adversarial legal dynamic and cultivated some of the most important due process values which lie at the heart of our modern trial process.

**Keywords** Criminal Process, Adversarialism, Legal History, Criminal Law, Due Process, the Adversary Process, Criminology.

### **Introduction: Terror, Mercy and Discretion in the Seventeenth Century**

Social order in the sixteenth and seventeenth centuries was maintained through the subtle interplay of a savage punitive code and a well-established culture of legal clemency. In this regard, the punitive landscape of this mercurial era was, at once, dominated by both the solemn institution of the gallows and a well-established system of concessions.<sup>1</sup> These two interdependent elements were vital in sustaining

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\* BCL, LL.M, PhD Candidate and I.R.C.H.S.S. Scholar at University College Cork email [104405242@umail.ucc.ie](mailto:104405242@umail.ucc.ie). The author would like to thank the anonymous reviewer for helpful comments on an earlier draft of this article. The views expressed, as well as any errors contained within, remain the sole responsibility of the author.

<sup>1</sup> Griffiths, has described the early modern trial as 'a product of the *Ancien Regime*, a method of dispute resolution tooted in irrational medieval dogma'. See Cerian Charlotte Griffiths, 'The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial,' *Law, Crime and History* 2 (2014) 28-47, p.30.

the exculpatory legal system's legitimacy; the brutality safeguarded the authority of the ruling class, while clemency considerations ensured that the number of episodes of gross punishment never rose beyond a socially-acceptable level.

The distinct sense of threat to hegemonic order which prevailed during the seventeenth century is perhaps most clearly evident in the political contributions of the essayist Timothy Nourse. For Nourse, as indeed for many of the ruling gentry of the epoch, the common people of England were to be regarded as 'very rough and savage in their Dispositions, being of leveling Principles, and refractory to Government, insolent and tumultuous'.<sup>2</sup> Driven thus by a belief in the inexorable depravity of the weaker social classes, the gallows became an ever-more common presence within a brutal society which 'cherished the death sentence'.<sup>3</sup> Indeed nowhere is this era's obsession with capital punishment more apparent than within England's statute book at the beginning of the eighteenth century where the number of capital statutes grew in number from a total of 50 in 1688 to in excess of 200 by 1820.<sup>4</sup>

Acting, however, as an important counterbalance to the inevitable bloody consequences of this brutal punitive programme was a subtle, but unmistakable, culture of legal clemency. From the individual empowerment of victims in sympathetically framing (or, indeed, abandoning) criminal charges to the freedom of the judiciary to deliver merciful pronouncements, the criminal justice system operated in a uniquely discretionary manner which, at every turn, emphasised clemency. Indeed, in the absence of a professional police force, the bonds of fidelity cultivated by this policy of patriarchal clemency were fundamental in commanding hegemonic order. To quote Hay:

discretion allowed a perpetrator to terrorize the petty thief and then command his gratitude, or at least approval of his neighbourhood as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity.<sup>5</sup>

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<sup>2</sup> Timothy Nourse, *Campania Foelix* 2<sup>nd</sup> edn, (Garland, 1982) pp.15-16. Originally published in 1706.

<sup>3</sup> Douglas Hay, 'Property, Authority and the Criminal Law,' in Douglas Hay, Peter Linebaugh and E.P Thompson (eds.) *Albion's Fatal Tree* (Pantheon, 1975) pp.17-63, p.17.

<sup>4</sup> Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, vol.1 (Stevens and Sons, 1948-1986) p.4.

<sup>5</sup> Hay, 'Property, Authority and the Criminal Law,' p.48.

## 1 The Exculpatory Model of Justice

Owing to its predication upon infrequent acts of expressive punishment, the criminal justice framework which existed in the seventeenth and early eighteenth centuries was uniquely informal in its disposition. Operating in a partisan, flexible and selective manner, justice was, in the words of King, a 'private and negotiable process involving personal confrontation rather than bureaucratic procedure'.<sup>6</sup> Unsurprisingly adversarial sensibilities were at best, primitive during this era and the prosecution burden in criminal affairs rested entirely on the victims of crime. Thus, once victims made the pro-active determination to proceed with a prosecution,

it was [their] energy, for the most part that carried the case through the various prosecution stages. Victims, for example, engaged in the fact-finding, gathered witnesses, prepared cases, presented evidence in examination in chief and bore the costs involved.<sup>7</sup>

Justice, in effect, was a private endeavour; not a public crusade.

Moreover for those victims who had the fortitude of will and financial resources to sustain a formal criminal charge, they were tasked with the additional burden of interacting with a distinctly abrupt and erratic trial process. To quote Kilcommins and Vaughan, criminal trials in the seventeenth century were 'amateur, hasty and relatively unstructured affairs'.<sup>8</sup> Approached by a victim often lacking any procedural guidance or financial support and conducted amidst the solemn gaze of an accused's petty juror peers, the trial apparatus was 'both chaotic and intimidating'.<sup>9</sup> Adding to this chaos was an unrelenting courtroom programme which dictated that trial proceedings progress at a remarkably fast pace. Indeed so breath-taking was the speed at which early modern justice was administered that Cockburn likened the trial process to 'rushing...a wild elephant through a sugar plantation'.<sup>10</sup> In spite of the fact that the trial 'can rarely have taken as much as an hour', it nevertheless enjoined upon an accused within this extremely narrow timeframe to skilfully navigate his way

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<sup>6</sup> Peter King, 'Decision Makers and Decision-Making in the English Criminal Law, 1750-1800,' *The Historical Journal* 27(1) (1984) 25-58, p.25.

<sup>7</sup> Shane Kilcommins and John Considine, 'Rethinking the 'Equality of Arms' Framework between the State and the Accused in the Republic of Ireland,' *Irish Probation Journal* 4(1) (2007) 32-45, p.33.

<sup>8</sup> Shane Kilcommins and Barry Vaughan, *Terrorism, Rights and the Rule of Law: Negotiating State Justice in Ireland* (Willan Publishing, 2008) p.48.

<sup>9</sup> Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-century England* (Cambridge University Press, 1987) p.141.

<sup>10</sup> J.S. Cockburn, *A History of English Assizes from 1558-1714* (Cambridge University Press, 1972) p.123.

through a series of burdensome and biased procedural obstacles if he wished to be spared from the gallows.

### **Prosecutorial Bias**

#### **(a) The Marian Pre-Trial Procedure**

Enshrined within the Marian Committal Statute 1555<sup>11</sup>, this pre-trial procedure mandated that a Justice of the Peace perform a rudimentary examination of a criminal allegation in order to determine whether pre-trial detention was merited. In seeking to re-enforce ties of patronage, Justices of the Peace were not formally trained magistrates but were members of the local gentry knowledgeable in civil and political affairs. Their central role was to distil from an accused a narrative of events and to prepare a submission for the trial court containing all matters 'material to prove the felony'.<sup>12</sup> This legislative emphasis on testimony against the accused was deliberate and the Marian pre-trial procedure was ostensibly tailored to assist the prosecution. To this end, the justices were empowered to bind over all prosecution witnesses (including, the victim) in recognizances and, if necessary, they could commit the defendant to gaol pending his formal trial. Indeed, the distinct prosecutorial bias underpinning this procedure is acutely apparent in Barlow's pejorative instruction that Justices of the Peace ought not to 'examine Witnesses that expressly come to prove the Offender's Innocence'.<sup>13</sup>

Reflecting on the biased nature of this procedure, Stuntz has remarked that the Marion pre-trial process resembled, in many respects, aspects of modern police practice in allowing information to be gathered from 'an uncounseled, and frequently frightened and confused, defendant'.<sup>14</sup> In serving to re-enforce the prosecutorial bias of the system, the accused often approached the pre-trial inquiry unaware of his right to remain silent and without the benefit of a formal caution. In this regard an accused often 'impaled himself at pre-trial' in a manner which rendered worthless any latent

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<sup>11</sup> An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners (1554-1555), 1 & 2 Phil. & Mar. c.13.

<sup>12</sup> Ibid. [emphasis added]. For a full account of the Statute see John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard University Press, 1974) p.256.

<sup>13</sup> Theodore Barlow, *The Justice Of Peace: A Treatise Containing The Power And Duty Of That Magistrate* (Lintot, 1745) 190 [emphasis added]. For a more detailed account of Barlow's instruction see John Langbein, *The Origins of the Adversary Criminal Procedure* (Oxford: Oxford University Press, 2003) p.43. According to Langbein it was the duty of a Justice of the Peace to 'help the accuser build the prosecution case, rather than to serve as a neutral investigator.'

<sup>14</sup> William Stuntz, 'The Substantive Origins of Criminal Procedure,' *Yale Law Journal* 105 (1995) 393-449, p.417.

defence raised at the substantive trial.<sup>15</sup> For instance, Beattie recalls a case in 1759 where an Old Bailey court admitted confession evidence made by a servant at a pre-trial hearing in circumstances where she was falsely assured that she could keep the stolen items if she confessed her guilt.<sup>16</sup> While admittedly, as Langbein, has shown, by the 1760s judicial acceptance of such confessions was becoming an ever-more infrequent occurrence<sup>17</sup>, this particular case, it is submitted, is emblematic of the pro-prosecutorial bias which informed the Marian procedure for the best part of two centuries.<sup>18</sup>

**(b) The Lawyer-Free 'Altercation' in the Courtroom**

In stark contrast to the procedural formality of our contemporary adversarial trial, the early modern courtroom dynamic took the shape - to borrow the terminology of Smith - of an 'altercation' between an accused and his accuser.<sup>19</sup> Significantly, this altercation took place in the absence of counsel. Resembling, what Langbein has termed as a 'lawyer-free contest of amateurs', the courtroom spectacle of the seventeenth century demanded, in effect, that an accused stand as both a defendant and a lead witness in his own trial with the victim acting as chief prosecutor.<sup>20</sup>

The parties, however, did not approach this courtroom confrontation with an equality of arms. Indeed that a prosecutorial bias existed within the early modern criminal justice framework is apparent from the contribution of Thomas Green who notes that the courtroom trial was:

a contest in which the accuser and the accused exchanged their stories in a heated give-and-take. The accuser might be prompted by the bench, which

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<sup>15</sup> John Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law,' *Michigan Law Review* 92 (1994)1047-1058, p.1061.

<sup>16</sup> *Old Bailey Proceedings* (January 1759, t17590117-25) as cited in John Beattie, 'Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780' *Law and History Review* 25(1) (2007) 61-100 at n.55.

<sup>17</sup> For instance, a judge refused to accept a written confession in 1774 when John Leigh, the chief clerk at Bow Street magistrate's office, acknowledged that John Fielding had told the accused that if he confessed "he would endeavor to save his life" as quoted in Beattie, 'Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780', n.59.

<sup>18</sup> Langbein notes that by the 1760s the bench had adopted a rule - known as the 'confession rule' - which declared that only confessions given freely and voluntarily would be allowed as evidence. See Langbein, *The Origins of the Adversary Criminal Procedure*, pp.218-223.

<sup>19</sup> Thomas Smith, *De Republica Anglorum*, Mary Dewar (ed.) (Cambridge University Press, 1982) p.114. Originally published in 1583. See also Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law,' pp.1047-1049.

<sup>20</sup> John Langbein, 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors' *Cambridge Law Journal* 58(2) (1999) 314-365, p.314.

had in hand a written record of the charges he has laid before the justices, or in the pretrial sessions before the assizes clerks.<sup>21</sup>

In contrast to such prosecutorial support, the defence was 'put by the accused, for himself and by himself. No one interceded on his behalf to influence the impression he made upon the jurors.'<sup>22</sup> Thus, with the exception of misdemeanour offences, there was a general prohibition against the presence of defence counsel in the courtroom. In short, persons accused of a capital or a felony offence were expected, in the words of Pulton, 'to answer it in proper person, and not by attorney or counsel learned'.<sup>23</sup> Consequently, the entire structure of the pre-modern criminal framework was orientated around the direct delivery and reception of an accused's testimony: 'all of the pressure was brought to bear on a single point: the jurors waited to hear the accused speak for himself.'<sup>24</sup>

This denial of defence counsel - which was to last until the 1730s - was popularly justified on the theoretical rationale that the guilt or innocence of an accused could best be determined by apprehending 'the defendant's immediate and unrehearsed responses to the evidence as it was presented'.<sup>25</sup> Hawkins perhaps best encapsulated the spirit of this prohibition when he opined:

The very Speech, Gesture and Countenance, and Manner of Defense of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which would probably not be so well discovered from the Artificial Defense of others speaking for them.<sup>26</sup>

In essence, it was feared that the admission of defence counsel would result in a suppression of the truth; or perhaps more precisely, that defence counsel 'would be so covert in their speeches, and so shadow the matter with words, and so attenuate the proofs and evidence, that it would be hard, or long to have the truth appear'.<sup>27</sup>

Moreover, there was a widely-held belief that an innocent defendant was equally as capable as a professional attorney in recounting matters of fact. Again this view

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<sup>21</sup> Thomas Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (University of Chicago Press, 1988) p.135.

<sup>22</sup> *Ibid.*

<sup>23</sup> Ferdinand Pulton, *De Pace Regis et Regni* (Companie of Stationers, 1609) p.193.

<sup>24</sup> Green, *Verdict According to Conscience*, p.137.

<sup>25</sup> John Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', *Law and History Review* 9(2) (1991) 221-269, p.223.

<sup>26</sup> William Hawkins, *A Treatise of the Pleas of the Crown 1716-1721*, (S. Sweet, 1824) vol.2, p.400.

<sup>27</sup> Pulton, *De Pace Regis et Regni*, p.193.

found public articulation in the critical works of Hawkins who formally announced that: 'Every one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer...' because 'the Simplicity and Innocence, artless and ingenious Behaviour of one whose conscience acquits him, ha[s] something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own'.<sup>28</sup>

A further, final justification often raised to support the denial of defence counsel was the theory that the Court would act as counsel for the accused. That an accused should be afforded the luxury of such eminent legal support was widely regarded as providing a more than adequate legal safeguard. To quote Coke, 'it is far better for an accused to have a Judge's opinion for him, than many counsellors at the Bar'.<sup>29</sup> Importantly this counsel assistance was strictly limited to matters of law, not fact. Thus, as Beattie has observed, the Court's obligation merely encompassed a duty to 'protect defendants against illegal procedure, faulty indictments, and the like. It did not mean that judges would help the accused to formulate a defense or act as their advocates'.<sup>30</sup>

The commitment of the early modern Court to the defendant's cause in addressing questions of law should not be over-exaggerated. It should, in particular, be remembered that the representative function of the judiciary was in direct conflict with the bench's wider role in applying the rule of law. It was thus not uncommon for a court to prejudice, rather than support, an accused's case. For instance, in the trial of John Lilburne, the judge - in advance of hearing the defence - declared to the jury, 'I hope the Jury hath seen the Evidence so plain and so fully, that it doth confirm them to do their duty, and find the Prisoner guilty of what is charged upon him'.<sup>31</sup> The theory of the court as counsel for the defence ignored the fact that the judiciary held their office at the pleasure of the Crown.<sup>32</sup> In this regard some judicial decisions may have been taken, not on the merits of equity, but on the application of political pressure. Thus as John Hawles remarked in 1689, judges of the early modern epoch

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<sup>28</sup> Hawkins, *A Treatise of the Pleas of the Crown*, p.400.

<sup>29</sup> *R v Walter Thomas* (1613) 2 Bulstrode 147, 80 ER 1022.

<sup>30</sup> Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.223.

<sup>31</sup> See John Lilburne, *A Complete Collection of State Trials* (1554), Thomas Bayly Howell (ed.) (London: T.C. Hansard, 1816) at p.1269. For greater detail in respect of John Lilburne's trial, see Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law,' at p.1050.

<sup>32</sup> See Act of Settlement (1701), 12 & 13 Will. 3, ch.2, §3.

*'generally...betrayed their poor Client, to please, as they apprehended, their better Client, the King.'*<sup>33</sup>

**(c) Evidential Barriers for Defendants**

In compounding the prosecutorial bias which confronted defendants in seeking to account unaided for their innocence, the early modern criminal justice framework did not accommodate a presumption of innocence. As Beattie has pointed out, to the extent that any probative burden existed, it rested on the shoulders of the accused, not the accuser:

if any assumption was made in court about the prisoner himself, it was not that he was innocent until the case against him was proved beyond reasonable doubt, but that if he were innocent he ought to be able to demonstrate it for the jury by the character and quality of his reply to the prosecutor's evidence.<sup>34</sup>

Thus, in effect, in the seventeenth and early eighteenth centuries, the onus was on an accused to engage in self-exculpation.<sup>35</sup> According to Stephen, the duty resting on an accused was clear, 'the jury expected from him a clear explanation of the case against him; and if he could not give it; they convicted him'.<sup>36</sup>

In seeking to discharge this probative burden, defendants had to contend with a series of evidential hurdles. Perhaps most significantly, witnesses for the accused occupied a procedurally limited role in the courtroom, enjoying a jurisdiction which was procedurally inferior to their prosecutorial counterparts in two key respects. Firstly, the prosecution - through the guise of the Marian pre-trial procedure - benefitted from compulsory process to require the appearance of its witnesses at trial. By contrast, there was no comparable means of compelling the appearance of defence witnesses in court. In fact it would take the promulgation of the Treason Act in 1696 for a right of compulsory process to be afforded on an equal basis to

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<sup>33</sup> Hawles, J., *Remarks Upon the Tryals of Edward Fitzharris, Stephen Colledge, Count Coningsmark, The Lord Russel, Collonel Sidney, Henry Cornish and Charles Bateman*, (London: Jacob Tonson, 1689) at p.22.

<sup>34</sup> John Beattie, *Crime and the Courts of England, 1660-1800* (Clarendon Press, 1986) p.341.

<sup>35</sup> See Kilcommmins and Vaughan, *Terrorism, Rights and the Rule of Law*, p.49.

<sup>36</sup> James Fitzjames Stephen, *A General View of the Criminal Law of England* (MacMillan, 1863) pp.194-195.



defendants in treason cases<sup>37</sup>, with such a right not formally being recognised in felony cases until the early eighteenth century.<sup>38</sup>

The second form of privilege afforded to prosecution witnesses in the early modern criminal trial was that, unlike the testimony of their adversarial opponents whose evidence was forbidden to be sworn, prosecution evidence was received on oath thereby investing it with enhanced credibility. This dichotomy in the persuasive authority afforded to the testimony of prosecution witness over defence witnesses is unmistakably apparent in Dalton's manual for Justices of the Peace, *The Countrey Justice*, which recounts how the assizes judges,

will often hear Witnesses and Evidence which goeth to the clearing and acquittal of the Prisoner, yet [the judges] will not take [it] upon oath, but do leave such Testimony and Evidence to the Jury to give credit to or think thereof, as they shall see and find cause.<sup>39</sup>

Once again this pro-prosecutorial bias persisted until the landmark enactment of the Treason Trials Act 1696 which recognised a defendant's right to have witnesses testify on oath in treason trials for the first time.<sup>40</sup> An Act of 1702 would subsequently extend this right to cases of felony.<sup>41</sup>

Notwithstanding the fact that the criminal accused enjoyed no right of compulsory process, nor any right to have the testimony of his witnesses sworn, those witnesses who did in fact present themselves in court on his behalf ostensibly enjoyed an equal right of audience as their prosecutorial counterparts. In other words, there was no absolute rule forbidding defence witnesses in the early modern trial. As Langbein has pointed out, there is ample evidence to suggest that by the seventeenth century, witnesses for the defence were 'routinely heard'.<sup>42</sup> For instance, the diary of Henry Townsend - a Worcestershire JP active in the late seventeenth century - contains accounts of cases in which assize judges heard witnesses for the defence: 'The

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<sup>37</sup> Treason Act 1696 §§1, 7.

<sup>38</sup> 1 Anne, Stat.2 (1702), c.9, §3, see further Peter Westen, 'The Compulsory Process Clause' *Michigan Law Review* 73(1) (1974) 71-184.

<sup>39</sup> Michael Dalton, *The Countrey Justice* (Societie of Stationers 1618), p.412.

<sup>40</sup> Treason Act 1696, §§ 1, 7.

<sup>41</sup> 1 Anne, Stat. 2 (1702), c.9, §3. For further discussion see John Beattie, *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror* (Oxford University Press, 2001) p.319; Langbein, *The Origins of the Adversary Criminal Procedure*, p.52.

<sup>42</sup> Langbein, *The Origins of the Adversary Criminal Procedure*, p.56.

Judges usually hear evidence on behalf of the prisoner, but not upon oath, yet with a charge to speak the truth before God as upon oath'.<sup>43</sup>

While there was, thus, no explicit rule in the altercation trial which prohibited the testimony of defence witnesses, two important State Trials - namely the cases of Throckmorton<sup>44</sup> and Udell<sup>45</sup> suggest that the ad hoc denial of defence witnesses was a persistent threat to the exoneration agenda of those accused of *political* wrongs. In the former case, which concerned a charge for treason, Langbein recounts how one of the trial judges dismissed Throckmorton's witness, John Fitzwilliams, with the words: 'Go you ways Fitzwilliams...the court had nothing to do with you; peradventure you would not be so ready in a good cause.'<sup>46</sup> In the latter case meanwhile, which concerned a charge for libelling the queen, Langbein informs us that the trial judge invoked the Queen's majesty in dismissing Udall's witness: 'the witness offering themselves to be heard, were answered, that because their witness was against the Queen's majesty, they could not be heard.'<sup>47</sup>

It has been suggested that this judicial inclination in favour of dismissing prosecution witnesses in State Trials is explicable by the early modern criminal trial's accommodation of an extensive pre-trial investigative process which was undertaken by the Privy Council.<sup>48</sup> This line of reasoning holds that the bench's hostility towards the latent appearance of defence witnesses at trial stemmed effectively from a judicial perception that the defendant ought to have produced such witnesses at the Council's pre-trial hearing where their evidence could have been more properly and appropriately investigated.<sup>49</sup>

A further challenge, above and beyond the procedural subjugation of defence witnesses, posed by this exculpatory paradigm resided in the fact that 'most defendants accused of serious crime were jailed pending trial'.<sup>50</sup> It should be borne in mind that confinement conditions in seventeenth century jails were appalling; a fact

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<sup>43</sup> R.D. Hunt, 'Henry Townshend's 'Notes of the Office of a Justice of the Peace' 1661-3' in *Miscellany II* (Worcestershire Historical Society, New Series, volume 5 1967) p.68 as quoted in Langbein, *The Origins of the Adversary Criminal Procedure*, p.56.

<sup>44</sup> *R v Nicholas Throckmorton* (1554) 1 State Trials 834.

<sup>45</sup> *R v John Udall* (1590) 1 State Trials 1271.

<sup>46</sup> 1 State Trial at p.855. See also Langbein, *The Origins of the Adversary Criminal Procedure*, p.54.

<sup>47</sup> 1 State Trials at p.1281. See also Langbein, *The Origins of the Adversary Criminal Procedure*, p.54.

<sup>48</sup> *Ibid*, p.55.

<sup>49</sup> *Ibid*, p.55.

<sup>50</sup> Langbein, *The Historical Origins of the Privilege Against Self-Incrimination*, p.1057.

evidenced in Cockburn's findings that between 1558 and 1625 at least 1,291 prisoners died in Home Circuit jails.<sup>51</sup> The exposure of the accused population to such inhospitable confinement conditions often impeded them from delivering an effective defence at trial, as they appeared 'dirty, underfed and surely often ill' such that they could not 'cross-examine vigorously or challenge the evidence presented against them'.<sup>52</sup>

Finally, the hostility of the pre-trial detention procedure was compounded by the Court's refusal to permit an accused to obtain a copy of the indictment against him. The brutality of this denial of due process rights however was not lost on the accused population. Indeed a stark appreciation of the prosecutorial bias can be found in the pleas of the accused in *R v Stephen College*<sup>53</sup>: 'I have been kept a close prisoner in the Tower ever since I was taken: I was all along unacquainted with what was charged upon me'.<sup>54</sup>

## 2 Shifting Paradigms: The Impact of the Enlightenment

By the middle of the eighteenth century there was a growing awareness amongst the social governing forces that the bloody penal code was no longer effective. Although the preceding century had witnessed a spectacular increase in the number of capital offences, Hay notes that, on a pragmatic level, the actual number of capital executions during this period remained 'relatively stable'.<sup>55</sup> In support of this contention we find the empirical research of Jenkins who has shown that the number of executions for felony offences fell from an average of one in four offences in the late sixteenth century to one in every ten offences during the reign of Queen Anne (1702-1714).<sup>56</sup> In essence, and as Hay has perfectly encapsulated, the central failing of the early modern criminal justice machinery was its discretionary disposition which, in practical terms, had the effect of ensuring that 'more of those sentenced to death were pardoned than were hanged; thieves often escaped punishment through

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<sup>51</sup> J.S. Cockburn, *Calendar of Assizes Records: Home Circuit Indictments Elizabeth I and James I: Introduction* (HMSO, 1985) pp.36-39. See also Langbein, *The Historical Origins of the Privilege Against Self-Incrimination*, p.1057.

<sup>52</sup> Beattie, *Crime and the Courts of England*, pp.341, 350-351.

<sup>53</sup> *R v Stephen College* (1681) 8 State Trials 549 at p.569 as quoted in p.51.

<sup>54</sup> As quoted in Langbein, *The Origins of the Adversary Criminal Procedure*, p.90.

<sup>55</sup> Hay, 'Property, Authority and the Criminal Law,' p.22.

<sup>56</sup> Philip Jenkins, 'From Gallows to Prison? The Execution Rate in Early Modern England,' *Criminal Justice History* 7 (1986) 51-71, p.57.

the absence of a police force, the leniency of prosecutors and juries, and the technicalities of the law.<sup>57</sup>

### ***Developments in Legal Epistemology***

Contributing in no small way to society's disenfranchisement with the unpredictable tenets of personal justice was the timely emergence of the measured political contributions of the Classical School of early criminology. Encapsulated perhaps most famously in the early utilitarian writings of Thomas Hobbes the disciples of this School - which included Locke, Rousseau and Beccaria - were uniformly united by a normative belief in the value of securing social order through a governance framework predicated upon social contract epistemology. For Hobbes, credited by many as the apologist of social contract theory, peace in society could only truly be cultivated through a shared willingness amongst all persons to 'conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will'.<sup>58</sup> Without popular subjugation to a Common Power, mankind, Hobbes proclaimed, would be forever destined to remain in 'that miserable condition of Warre, which is necessarily consequent...to the natural Passions of men, when there is no visible Power to keep them in awe'.<sup>59</sup> In other words, in the absence of a popularly supported Sovereign an anarchic social climate-or, 'state of nature'<sup>60</sup> - would prevail within which the life of man would be 'solitary, poore, nasty, brutish and short'.<sup>61</sup>

Similar collectivist sentiments, albeit lacking somewhat of the dystopian vigour of Hobbes, were to be heard echoing throughout the liberal philosophical contributions of his fellow countryman, John Locke. Significantly, however, while Locke ostensibly supported Hobbes' central thesis of collective social subjugation, he refused to endorse his predecessor's absolutist approach. Thus, whereas under a pure Hobbesian formulation of the social contract, man-kind are expected to confer 'all

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<sup>57</sup> Hay, 'Property, Authority and the Criminal Law,' p.23.

<sup>58</sup> Richard Tuck, (ed.) *Hobbes: Leviathan* (Cambridge University Press 2011) p.120.

<sup>59</sup> *Ibid*, p.117.

<sup>60</sup> In Hobbesian terms the 'state of nature' refers to the natural condition of mankind, free from the governing dictates of an absolute authority. Such a state gives rise to a universal tension as all men, free from the bonds of authority, are naturally predisposed to savage competitive strife: 'during the time men live without a common power to keep them all in awe, they are in that condition which is called Warre; and such war is of Man against every man.' This is the fundamental precept of the famous Hobbesian principle of '*bellum omnium contra omnes*'.

See Tuck, *Hobbes: Leviathan*.

<sup>61</sup> *Ibid* at p.89.

their power and strength upon one Man, or upon one Assembly of men',<sup>62</sup>, under Locke's measured natural law theory, popular acquiescence to 'Civil Government' is only justified for the solemn purpose of protecting property rights; or to use Locke's own terminology, for the purpose of 'making Laws with Penalties of Death and consequently all less Penalties, for Regulating and Preserving Property'.<sup>63</sup>

While, given the formative roles played by Hobbes and Locke in establishing social contract philosophy - the former offering the epistemological basis for the theory, the latter refining it into a more reflexive model - England might well be regarded as the spiritual home of social contractarianism, it was ultimately in Italy that the philosophy blossomed into an effective reformative tool. Specifically, the Italian architect responsible for transforming this liberal ideal into a workable rational framework was Cessare Beccaria whose contribution to the Enlightenment acted as a catalyst for the pan-European rise of the Leviathan State and the ensuing emergence of due process sensibilities.

In his seminal treatise, *On Crimes and Punishments*,<sup>64</sup> Beccaria proposed a social contract theory which was premised on an understanding that members of society surrender some measure of individual liberty in order to secure social peace and security under the protection of the sovereign.<sup>65</sup> Focusing, like his English predecessors, on issues of collective - rather than personal - interest, Beccaria's theory was founded upon a belief that popular and civilised order could only be sustained through a rational rule of law framework exercised by the sovereign under whose authority free citizens unite to form a society.<sup>66</sup> Taking, then, Helvétius' principle of 'utility' as its touchstone,<sup>67</sup> Beccaria's social contract theory suggested that the outstanding objective of the sovereign is to strive towards securing 'the greatest happiness shared among the greater number'.<sup>68</sup>

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<sup>62</sup> Ibid, p.120.

<sup>63</sup> John Locke and Peter Laslett, *Locke: Two Treatises of Government* (2<sup>nd</sup> edn, Cambridge University Press 1967), p.286.

<sup>64</sup> Cessare Beccaria, *On Crimes and Punishments* (Cambridge University Press, 1995). Originally published in 1764.

<sup>65</sup> Under Beccaria's theory an individual is expected to yield up no more liberty 'than the smallest possible portion consistent with persuading others to defend it'. See Beccaria, *On Crimes and Punishments*, p.11.

<sup>66</sup> In particular, Beccaria emphasised that punishment had to be limited to the least amount necessary to ensure liberty, equality and freedom and 'everything more than that is no longer justice, but an abuse'. See Beccaria, *On Crimes and Punishments*, p.11.

<sup>67</sup> Claude-Adrien Helvétius, *De l'esprit* (Thomson Gale, 2003). Originally published in 1759.

<sup>68</sup> Beccaria, *On Crimes and Punishments*, p.7.

In keeping with his support for the calculative proportioning of social pain and pleasure,<sup>69</sup> Beccaria's proposed that the sum of the collective welfare of those who sacrificed their liberty for the greater good under the social contract legitimated the sovereign right to punish; a right which the sovereign was expected to exercise properly and proportionately. In particular, Beccaria emphasised that punishment under the social contract could only be justifiable if it was limited to the least amount necessary to have a deterrent effect; the overarching purpose of the criminal law being 'nothing other than to prevent the offender from doing fresh harm to his fellows and do deter others from doing likewise'.<sup>70</sup> To this end, Beccaria maintained that:

punishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.<sup>71</sup>

For Beccaria then, punishment needed to be 'public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law'.<sup>72</sup> Stressing, thus the value of punitive consistency over sporadic brutality, Beccaria's contribution challenged the governing mechanisms of theatre and mercy relied upon by the ruling elite which, in his view, amounted to little more than episodic rituals of 'premeditated pomp and slow tortures'.<sup>73</sup> If, as Beccaria maintained, the certainty of punishment will always 'make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all', then it was clear that a more efficient, structured and objective trial apparatus was required.<sup>74</sup> Importantly within this new civilised regime there could be no room for the ad hoc expressive brutality witnessed throughout the seventeenth century which 'drew attention from the crime to the criminal and by constant repetition prevented any useful lessons from being learned by the spectators because they either sympathised with the condemned or became hardened to suffering'.<sup>75</sup>

Given the universality of his themes and the generality of his politico-legal reformative programme, Beccaria's ideas were 'widely, and remarkably quickly,

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<sup>69</sup> Anthony Draper, 'Cesare Beccaria's Influence on English Discussions of Punishment, 1764-1789', *History of European Ideas* 26 (2000):177-199, p. 181.

<sup>70</sup> Beccaria, *On Crimes and Punishments*, p.31.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, p.113.

<sup>73</sup> *Ibid.*, p.65.

<sup>74</sup> *Ibid.*, p.63.

<sup>75</sup> Philip Rawlings, *Crime and Power: A History of Criminal Justice 1688-1998* (Longman, 1999), p.43.

incorporated into English penal theory debate'.<sup>76</sup> Indeed, as Draper has remarked, the liberal precepts contained in *On Crimes and Punishments* were 'eagerly adopted' by the English intellectual academy 'as a declaration of the fundamental principles that ought to underpin the application of the penal sanction in an 'improved' civilisation'.<sup>77</sup> This reformative influence is, for example, acutely apparent in the work of William Blackstone who explicitly endorsed the Italian scholar's work in the fourth and final volume of *Commentaries on the Laws of England*.<sup>78</sup> In particular, Blackstone supported Beccaria's rationalised hypothesis that social order in civilised society can best be sustained through a system of governance which derives its effectiveness from its retributive inevitability, not its visible intensity:

It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the certainty, than by the severity, of punishment.

Moreover, Blackstone shared Beccaria's impatience with the disproportionate brutality of the subsisting penal code and Parliament's seeming fetishism for enacting capital statutes which, in arousing compassion from victims and juries, served to undermine the deterrent effect of the criminal law:

So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy.<sup>79</sup>

Blackstone, however, was not alone in celebrating the significance of Beccaria's work and Jeremy Bentham was also quick to voice his enthusiasm for the Italian scholar's philosophical contribution. Most notably, Bentham proclaimed in 1776 that 'when Beccaria came he was received by the Intelligent as an Angel from heaven would be by the faithful'.<sup>80</sup> Given such warm praise it is hardly surprising to find that Bentham's contribution to the English criminological academy owed much of its normative disposition to the liberal sentiments set forth in *On Crimes and*

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<sup>76</sup> Draper, *Cesare Beccaria's Influence on English Discussions of Punishments*, p. 182.

<sup>77</sup> *Ibid*, p. 179.

<sup>78</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Isaiah Thomas 1765) p.14-19 as quoted in Draper, *Cesare Beccaria's Influence on English Discussions of Punishment*, p.184.

<sup>79</sup> *Ibid*, p.185.

<sup>80</sup> Jeremy Bentham, *A Fragment on Government; or, a Comment on the Commentaries* (2<sup>nd</sup> ed.) (E. Wilson and W. Pickering, 1823) p.xxii.

*Punishments*. In particular, it would seem that Bentham was ideologically taken with Beccaria's account of the principle of utility which he recast in its now celebrated utilitarian form of 'the greatest happiness of the greatest number'.<sup>81</sup>

In devising 13 'rules or canons' to be considered in the application of punishment, Bentham set forth a considered programme for proportionate punitive engagement which had been noticeably absent from the generalised contributions of Hobbes, Beccaria and Blackstone. Standing at the heart of his positivist crusade was Bentham's outstanding desire to quantify the pain caused by a given criminal transgression in order to allow the State to respond to it proportionately in a manner which would best guarantee a surfeit of social happiness.<sup>82</sup> In this regard Bentham shared Beccaria's view that the outstanding objective of punishment must be to act as a deterrent, rather than a retributive, device. According to Bentham, punishment was 'annexed by political authority to an offensive act, in one instance; in the view of putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances'.<sup>83</sup>

Unsurprisingly, given his insistence on the introduction of a calibrated calendar of consistent, proportionate punishment, Bentham was normatively opposed to the immense volume of capital offences accommodated in the English statute book in the late eighteenth century. By 1831, as Draper has pointed out, Bentham appeared to have rejected capital punishment outright when, on reflecting on the success of the abolition of capital punishment in Tuscany,<sup>84</sup> he observed:

In Tuscany, in the whole interval between the abolition of death-punishment, in that Grand Duchy...and the re-establishment of it- the average number of crimes was considerably less than those after that same re-establishment...in that same interval, assassinations no more than six: while, in the Roman States, not much larger than Tuscany, the number, in a quarter of the year, was no less than sixty.<sup>85</sup>

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<sup>81</sup> Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*, J. H. Burns and H. L. A. Hart (eds.) *The Collected Works of Jeremy Bentham* (The Athlone Press 1977) p.393.

<sup>82</sup> Draper, *Cesare Beccaria's Influence on English Discussions of Punishment*, p.193.

<sup>83</sup> J.H. Burns and H.L.A. Hart, (eds.) *An Introduction to the Principles of Morals and Legislation, the Collected Works of Jeremy Bentham* (Clarendon Press, 1996) p.157.

<sup>84</sup> Grand Duke Leopold of Tuscany abolished capital punishment in the city in 1786 as a result of Beccaria's scholarship. See further, Draper, *Cesare Beccaria's Influence on English Discussions of Punishment*, p. 196; Marcello Maestro, *Voltaire and Beccaria as Reformers of Criminal Law* (Columbia University Press, 1942) p.141.

<sup>85</sup> Bowring, (ed.) *The Works of Jeremy Bentham*, vol.1, (Tait, 1838-1843) as cited in Draper, *Cesare Beccaria's Influence on English Discussions of Punishment*, p.196.



It would, however, be somewhat misleading to attribute Bentham's opposition to the spectacle of the scaffold entirely to the liberal, philosophical contributions of Beccaria. A good deal of the credit for Bentham's subscription to the abolitionist cause is arguably owed to his close acquaintanceship with Sir Samuel Romilly.<sup>86</sup> Another disciple of Beccarian liberalism, Romilly was an ardent opponent of the gallows and, following his appointment as Solicitor General under the new Whig government of 1806,<sup>87</sup> he embarked upon an intensely pro-active reformative campaign to secure the abolition of capital punishment. To this end Romilly would be responsible for the introduction of three bills to repeal the death penalty in 1810, along with a further two similar bills in 1811.<sup>88</sup> While ultimately none of these reformative efforts would prove successful - owing in no small part to the entrenched conservatism of the then serving Lord Chief Justice Ellenborough - Romilly's contribution nevertheless sparked important debate in the House of Lords on the need for procedural reform.<sup>89</sup>

### ***Developments in Legal Practice***

The shift which took place in the normative tone of legal scholarship in the aftermath of the Enlightenment coincided directly with a corresponding shift in the procedural dynamic of the criminal legal process. Perhaps most significantly, the eighteenth century witnessed active governmental involvement in the administration of the criminal law for the first time. With George I's controversial accession as King of Great Britain and Ireland in 1714 and the ensuing threat which this development

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<sup>86</sup> For a greater exploration of Bentham's friendship with Romilly see H.A. Holland, 'Jeremy Bentham', *Cambridge Law Journal* 10(3) (1948-1950): 8-32, p.11.

<sup>87</sup> See further, Lord Hope of Craighead, 'The University College London Bentham Club Presidential Address 2010: 'In Law, Is Procedure Really That Important?', *Juridical Review* 3 (2010) 149-162.

<sup>88</sup> In 1810 the proposals in question included Bills to repeal the death penalty in cases of theft from a shop above the value of five shillings (10 and 11 Will 3, ch. 32), theft from a dwelling house above the value of 40 shillings (12 Anne Stat. 1, ch. 7), and theft on board vessels on navigable rivers above the value of 40 shillings (24 Geo. 2, ch. 45). The latter two Bills succeeded in getting through the House of Commons in 1811 but were rejected in the House of Lords. See further Neville Crago, 'Lord Ellenborough as Criminal Legislator', *University of Western Australia Law Review* 12 (1975-1976) 499-517, p.508.

<sup>89</sup> In this respect, Romilly's liberal legislative endeavours were reminiscent of the anti-establishment, counter-hegemonic sentiment of William Godwin who in 1793 passionately questioned, "What can be more shameless than for society to make an example of those whom she has goaded to breach of order, instead of amending the her own institutions which, by straining order into tyranny, produced the mischief?" See William Godwin, *An Enquiry Concerning Political Justice, and its Influence on General Virtue and Happiness*, (2 vols.) (G.G.J. and J. Robinson, 1793) at p.713.

posed to hegemonic order,<sup>90</sup> the governmental class became uniquely sensitive to domestic disturbances which threatened the stability of the regime. Thus, not only did George I's ministers introduce the first penal sanctions to be financed by central government directly - in the shape of the Transportation Acts of 1718 and 1720 - they also, as Beattie explains, 'brought public resources to bear on the administration of the criminal law by paying the prosecution charges in a number of felony cases, including fees to solicitors to prepare briefs and to barristers to argue them in court'.<sup>91</sup>

Thus, in representing arguably one of the most significant structural developments to have occurred in the history of the Anglo-American trial, what had previously been viewed as a 'roughly balanced conflict in court between two equally unprepared amateurs - the victim of an offence and the accused defendant - was altered...by the involvement of solicitors in the management of prosecutions and the more professional preparation of cases'.<sup>92</sup> Ultimately this professionalization of the criminal process would sound the death knell for the active courtroom presence of the victim; signalling a shift in the normative framework of the criminal process towards a public, rather than private, programme of law enforcement.

Unquestionably two of the largest beneficiaries of this increased governmental investment in the administration of the criminal law were Henry and John Fielding, the famous half-brothers who served as magistrates at Bow Street, Covent Garden from 1746-1780. While Henry Fielding's efforts as a novelist are often celebrated for cultivating popular awareness of society's civic duty to enforce the law,<sup>93</sup> it was as a magistrate that he would exert his greatest influence over the practical design of criminal justice proceedings. Upon succeeding Sir Thomas De Veil<sup>94</sup> at Bow Street in 1746, Henry Fielding set about applying the generous resources afforded to him by

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<sup>90</sup> It is widely acknowledged, for instance, that George I's accession to the throne in Great Britain and Ireland precipitated the Jacobite Rebellion of 1715. See further Bruce Lenman, *The Jacobite Risings in Britain: 1689-1746* (Holmes & Meier, 1980).

<sup>91</sup> Beattie, 'Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780', p.66.

<sup>92</sup> *Ibid.*, p.66-67.

<sup>93</sup> See Henry Fielding, *An Enquiry Into the Causes of the Late Increase of Robbers with some Proposals for Remediating the Evil*, (A. Millar, 1751) at p.164. This text encompasses anecdotes and commentary amassed by Henry Fielding from his time as a magistrate. In particular Fielding asserts that victims are often too 'fearful', 'delicate', 'indolent', 'avaricious' or 'tender-hearted' to maintain a prosecution. Fielding, in this regard, campaigned to raise greater awareness amongst his fellow men of their duties to support the enforcement of the law. Fielding also favoured the introduction of a police force.

<sup>94</sup> De Veil had been an important magistrate at Bow Street in the years prior to the office's occupation by the Fielding brothers. See Anthony Babington, *A House in Bow Street: Crime and the Magistracy, 140-1881* (MacDonald, 1969).

the government towards funding an autonomous body of officers who were tasked specifically with apprehending serious offenders and bringing them to the office for pre-trial examination and commitment to trial. To this end, Fielding invested Bow Street with a nascent professionalised investigative framework which would later see it rise to become the singularly dominant magistrate's office in the metropolis.

Following Henry Fielding's death in 1754, John Fielding assumed leadership of Bow Street and - in building on his brother's legacy - he injected a renewed vigour into the office's movement towards achieving greater professionalization of its magisterial work. For instance, he extended the opening hours of, and the number of magistrates sitting at, Bow Street making it easier for victims to lay charges, identify assailants and deliver evidence.<sup>95</sup> In addition, Fielding retained clerical staff at Bow Street for the purpose of gathering and storing details of criminal wrongdoing thereby transforming the office into an important clearinghouse for information about offences and offenders. Fielding was also one of the first magistrates to broadcast crime reports in the press which, in turn, served to raise greater popular awareness of, not only the high level of victimisation in English society, but also the important remedial work undertaken by his office.

However, while each of these reforms certainly contributed to the rise of Bow Street as 'the centre of policing and prosecution in the metropolis',<sup>96</sup> it was Fielding's establishment of a body of 'quasi-official detective policemen'<sup>97</sup> - the Bow Street Runners - which most clearly cemented the office's reputation as the singularly outstanding magistrate's office in England. Representing, in effect, a nascent species of the first professional police force in the English legal tradition, these 'runners' played a highly important role in realising Fielding's ambition for a more effective crime control paradigm. As Beattie explains, until this point in time, 'no magistrate had ever commanded the services of men who could be sent to investigate offenses, apprehend suspects, and in general support the efforts of victims of crime to bring perpetrators to be examined and prosecuted'.<sup>98</sup> Indeed, the warm reception shown by the burgeoning masses of post-Enlightenment society for the professional criminal justice services offered by Fielding is clearly evidenced in the significant level of successful felony commitments which emanated from Bow Street in the late

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<sup>95</sup> Beattie, 'Sir John Fielding and Public Justice: The Bow Street Magistrates' Court, 1754-1780', p.73.

<sup>96</sup> *Ibid*, p.64.

<sup>97</sup> *Ibid*, p.71.

<sup>98</sup> *Ibid*, p.71.

eighteenth century, whereby almost half of all Middlesex felony commitments between 1767-1773 came from Bow Street.<sup>99</sup>

### 3 The Inculpatory Model of Justice

The dawn of the nineteenth century broke amidst a re-orientated criminal legal landscape. Within the nascent stages of the emergent inculpatory legal regime, the victim lost his status as a prosecutorial actor as the State 'gradually colonised the ownership of the wrongfulness of criminal wrongdoing'.<sup>100</sup> Significantly, this emergence of the State as a stakeholder in the criminal process cultivated an overt formalisation and professionalization of the courtroom 'altercation' as the government brought public resources to bear in retaining counsel for the prosecution of offences. With the accused population therefore no longer facing the meagre testimonial resources of an aggrieved victim but rather the 'unlimited resources of the State',<sup>101</sup> an equality of arms framework emerged which was aimed at safeguarding their rights and offsetting the argumentative might vested in the publically-resourced victim prosecutor. Resulting in an expansion of exclusionary rules of evidence, the imposition of a formal burden of proof and the recognition of an accused's right to silence, this movement addressed the 'bad economy of power' of the exculpatory model of justice which, according to Foucault, 'vested too much...on the side of the prosecution...while the accused opposed it virtually unarmed'.<sup>102</sup>

#### ***Due Process Developments***

##### ***(a) Private Prosecution Associations, Professional Policing and the DPP***

The emergence of a Statist prosecution apparatus in the early nineteenth century was precipitated by the appearance several decades earlier of private prosecution associations. These associations served to enforce the collective interests of various social groups in the eighteenth century. As Philips has observed,

the formation of voluntary associations offered members a relatively cheap and easy way of plugging some of the worst gaps in the system of police and prosecution, by providing the individual prosecutor with the organization and money needed to make the system work fairly efficiently for him.<sup>103</sup>

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<sup>99</sup> *Ibid*, p.77.

<sup>100</sup> Shane Kilcommins and Mary Donnelly, 'Victims of Crime with Disabilities in Ireland: Hidden Casualties in the 'Vision of Victim as Everyman' *International Review of Victimology* 20(3) (2014) 305-325, p.306.

<sup>101</sup> Kilcommins and Vaughan, *Terrorism, Rights and the Rule of Law*, p.62.

<sup>102</sup> Michel Foucault, *Discipline and Punish* (Allen Lane, 1978) p.79.

<sup>103</sup> David Philips, 'Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760-1860, in Douglas Hay, and Francis Snyder (eds.) *Policing and Prosecution in Britain 1750-1850* (Clarendon Press: 1989) 113-170, p. 130.

Coinciding thus with the slow decline of the exculpatory model, the late eighteenth century witnessed a 'rapid proliferation of extra-parochial prosecution associations'.<sup>104</sup>

Allied to the evolution of private prosecutions was the contemporaneous birth of professional thief-takers and public prosecution awards. For Rawlings, the pre-trial emergence of such prosecution incentives served to encourage 'professionalism and detachment from victims and communities'.<sup>105</sup> These subtle developments paved the way for professional policing by demonstrating the greater courtroom persuasiveness of professional prosecutions by comparison to the uncivilised combative approach of the victim-prosecutor.

One of the earliest tangible signifiers of a shift in popular sensibilities towards a Statist enforcement machinery was the birth of centralised policing. Ireland was to be the chosen site for this paradigm shift and a new era in law enforcement commenced with the introduction of the Dublin Police Act 1786. The success of this Act would soon convince the popular masses of Britain to introduce a similar scheme of professional policing. Such was the vibrancy of social support for centralised State security that, according to Hay and Snyder, by the nineteenth century 'the policeman came to epitomize (for virtually the entire middle class) security and order'.<sup>106</sup> Popular faith in the efficiency of State-driven law enforcement would ultimately culminate a century later with the establishment of the Office of the Director of Public Prosecutions in England in 1879. With the Leviathan State firmly established as the rightful institution for prosecutorial expression, a framework was now in place to support the due process exigencies of adversarialism.

### **(b) Full Defence Counsel Representation**

An important first step towards the cultivation of our modern adversarial courtroom dynamic can be traced back to the landmark legislative recognition of a right to defence counsel for charges of treason as introduced in the aptly named Treason Act

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<sup>104</sup> Peter King, 'Prosecution Associations and their Impact in Eighteenth-Century Essex' in Douglas Hay and Francis Snyder (eds.) *Policing and Prosecution in Britain 1750-1850* (Clarendon Press: 1989) 171-207, p.201.

<sup>105</sup> Philip Rawlings, *Crime and Power: A History of Criminal Justice 1688-1998* (Longman, 1999) p.21.

<sup>106</sup> Douglas Hay and Francis Snyder, 'Using the Criminal Law: 1750-1850: Policing, Private Prosecution and the State', in Douglas Hay and Francis Snyder (eds.) *Policing and Prosecution in Britain 1750-1850* in *Policing and Prosecution in Britain 1750-1850* (Clarendon Press, 1989) 3-52, p.46.

1696.<sup>107</sup> Enacted primarily in response to growing political pressure from the Whig population who had suffered grievously during the inequitable treason trials of the Stuart regime, the Act sought - for the first time - to formally redress the prosecutorial bias of the early modern trial dynamic.<sup>108</sup> Not only did the Act relax the traditional prohibition on defence counsel but it also introduced a previously unthinkable code of due process provisions into English law including the right of an accused to an advanced copy of an indictment, the right of an accused to take legal advice on such an indictment and the right to *sub poena* defence witnesses to testify under oath at trial.<sup>109</sup> Both normatively and procedurally therefore, the Act was highly important in terms of symbolising 'the dawn of an adversarial system built around equality and due process, which could protect the individual from the almighty power of the state'.<sup>110</sup> Significantly, the equitable legacy of the Act was restricted to those political classes who were faced with a charge of treason. While, according to Beattie, an argument had been made contemporaneously with the Act's introduction to extend the right to defence counsel to those accused of felony, this proposition failed due largely a pragmatic appreciation of the fact that 'the accused in most felony cases were poor'.<sup>111</sup>

Notwithstanding such partisan legislative non-enthusiasm for ameliorating the testimonial experience of non-treason defendants, by the mid-eighteenth century court reports were replete with references evidencing the increased presence of defence counsel within all areas of the criminal law calendar as 'the rule prohibiting the defendant to have counsel gave away suddenly'.<sup>112</sup> Arising, not from any positive legislative determination, but from what Beattie has termed 'a decision by the judges'; the increasing frequency of legal representation in the courtroom reflected a growing appreciation amongst the judiciary of the pro-prosecution focus of the 'altercation' trial.<sup>113</sup>

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<sup>107</sup> Treason Act 1696, 7 Will. 3, ch.3, §§1, 7 (henceforth 'the Act').

<sup>108</sup> In the words of Smith, 'the Treason Trials clearly demonstrated that the fairness of the 'altercation' model could no longer be taken for granted'. See Thomas Smith, 'Zealous Advocates: The Historical Foundations of the Adversarial Criminal Defence Lawyer', *Law, Crime and History* 1 (2012):1-20, p.5.

<sup>109</sup> 7 & 8 Will. 3, ch.3, § 1. For more detail on the concession introduced by the Act see Langbein, *The Historical Origins of the Privilege Against Self-Incrimination*, p.1067.

<sup>110</sup> Smith, 'Zealous Advocates', p.6.

<sup>111</sup> Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.224

<sup>112</sup> Beattie, *Crime and the Courts of England*, p.357.

<sup>113</sup> Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.224. Langbein shares Beattie's view that the increased presence of lawyers in the courtroom was facilitated by liberal application of judicial discretion: 'The change seems to have been implemented in the practice of individual judges, exercising the trial judge's traditional

With the accused population increasingly tasked with overcoming the vigorous prosecution approaches of professional thief-takers and, in some instances, State-funded professional prosecutions, the popularity of defence counsel in all criminal cases grew exponentially over the course of the eighteenth century as 'the judges relaxed the rubric of court as counsel in favour of counsel as counsel'.<sup>114</sup> For instance, according to Beattie's examination of the Old Bailey Session Papers, the level of defensive representation rose from 6% of cases in 1755 to between 27%-36% of all cases by the end of the century.<sup>115</sup> In essence, and as the case of *R v John Barrett* illustrates, by the late eighteenth century an accused's right to defence counsel no longer be denied: 'Permit[ting] counsel to examine and cross-examine...though at first a pure indulgence, yet now seems to be grown into a right...'.<sup>116</sup>

However, in bearing testimony to the enduring importance of direct accused testimony to the early Victorian criminal process, the role initially occupied by defence counsel in the courtroom was procedurally limited. With the exception of treason trials, defence counsel could only comment upon matters of law, not matters of fact. Thus, they were restricted to the limited role of leading examinations-in-chief and engaging in cross-examination.<sup>117</sup> They could not address the jury directly, nor could they comment on evidence or deliver an accused's account of events.<sup>118</sup> Each

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discretion in the conduct of trial business'. See Langbein, *The Origins of the Adversary Criminal Procedure*, p.173.

<sup>114</sup> Langbein, *The Origins of the Adversary Criminal Procedure*, p.168. Interestingly, both Beattie and Langbein both acknowledge the earliest unambiguous sighting of defence counsel in the courtroom occurred in Surrey in 1732. See further Beattie, *Crime and the Courts of England*, p.357; Langbein, *The Origins of the Adversary Criminal Procedure*, p.168.

<sup>115</sup> Beattie, *Crime and the Courts of England*, p.226-228. Beattie acknowledges that a contributing factor in the growth in the recorded instances of defensive representation was the general improvement which occurred in the detail of court reports in the eighteenth century. However, for Beattie, this development alone could not account for such a vast increase in the reported instances of defense counsel; rather it evidences a general growth in the presence of counsel at trial.

<sup>116</sup> *R v John Barrett* (1733) 18 State Trials 1229 at p.1236.

<sup>117</sup> In practice, as Griffiths notes, 'counsel would frequently push the boundaries limiting their jurisdiction using questioning of witnesses to paint a clear picture of the defence to the jury without directly addressing them'. See Griffiths, 'The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial', p.37.

<sup>118</sup> For instance, Langbein gives an account of an Old Bailey Trial in 1766 where a judge strictly outlined the procedural limits of a defence counsel's authority: 'your counsel cannot speak for you. You must do that yourself, if you have anything to say'. See *Old Bailey Session Papers* (December 1766, no.23) 11 at p.12 as quoted in Langbein, *The Origins of the Adversary Criminal Procedure*, p.171. Similarly, in a 1783 Old Bailey case, a trial judge instructed the defendant- William McNamara- as follows: 'Mr. McNamara, it is now your time to make your defense...[Y]our counsel...cannot make a defense, he can only examine witnesses and observe on points of law'. See *Old Bailey Session Papers* (September 1783,

of these affairs remained firmly within the jurisdiction of the accused on the basis that 'it was essential that the judge and the jury hear the defendants speaking for themselves'.<sup>119</sup> Moreover, the admittance of counsel beyond treason trials remained firmly at the discretion of the courts<sup>120</sup> and as Coke was quick to remind the accused population, 'in no case' could a defendant 'pray counsel learned generally, but must show some cause'.<sup>121</sup>

In building on the liberal reformative movement of the eighteenth century, the nineteenth century witnessed a renewed political effort to introduce a holistic legal representative framework into the English trial. Helmed by William Ewart and Sir James Mackintosh, this liberal political crusade emphasised the importance of observing compulsory process in the treatment of all accused persons, not merely those faced with misdemeanour or treason charges. In particular Mackintosh drew public attention to the success which the admission of full defence counsel in treason trials had achieved in securing a more certain culture of criminal convictions.<sup>122</sup> The rejection by the new colonies of North America of the principle of limited counsel engagement provided a timely boost to the campaign towards full defence: 'We have never admitted that cruel and illiberal principle of the common law of England that when a man is on trial for his life, he should be refused counsel'.<sup>123</sup>

At a time of unprecedented social pre-occupation with liberal legal epistemology - a time which saw the right to full counsel representation receiving constitutional recognition in the American Bill of Rights, 1789<sup>124</sup> and heard cries for procedural

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no.641) 857 at p.858 as quoted in Langbein, *The Origins of the Adversary Criminal Procedure*, p.171.

<sup>119</sup> Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.231.

<sup>120</sup> The discretionary nature of this right attracted the ire of Blackstone who remarked, 'this is a matter of too much importance to be left to the good pleasure of any judge, and it is worthy [of] the interposition of the legislature'. See Blackstone, *Commentaries on the Laws of England* (Isaiah Thomas 1765) p.349-350.

<sup>121</sup> Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (M. Flesher, for W. Lee, and D. Pakeman, 1644), p.137.

<sup>122</sup> For instance, in 1821 Mackintosh informed the House of Commons that when a right of counsel representation was recognised in treason trials, its 'benefit was universally felt as a safeguard for the subject'. See *Parliamentary Debates* 4:1512-1514 at p.1513. As quoted in Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial' at p.252.

<sup>123</sup> Zephaniah Swift, *A System of the Laws of the State of Connecticut* (John Byrne, 1795-1796) at p.398 as quoted in Langbein, *The Origins of the Adversary Criminal Procedure*, p.40.

<sup>124</sup> See U.S. Constitution, Amendment 6 which provides that 'in all criminal prosecutions, the accused shall have the Assistance of Counsel for his defense'.



reform from His Majesty's Commissioners on Criminal Law in England<sup>125</sup> - that the Prisoner's Counsel Act 1836 was introduced.<sup>126</sup> Conceived - in the words of its apologist, William Ewart - for the purpose of giving 'freedom, certainty and vigour to the arm of justice',<sup>127</sup> this Act finally recognised the right of persons accused of felony 'to make full Answer and Defence thereto, by Counsel learned in the law'.<sup>128</sup> Thus all of a sudden the criminal conflict became the property, not of the accused and his accuser, but of their professional representatives who, according to Brougham, were focused on protecting their client's needs 'by all means and expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty'.<sup>129</sup> Gradually therefore the trial evolved from an 'expressive theatre' which sought the discovery of truth to an objective process which sought the determination of justice;<sup>130</sup> in other words, 'the altercation trial gave way to a radically different style of proceedings, the adversary criminal trial'.<sup>131</sup> For those accused of crime, this increased lawyerisation of the criminal process fundamentally re-shaped their experience of the adjudicative process.

The stark promotion of due process epistemology which the emergence of full counsel representation precipitated for the accused population is perhaps most clearly evidenced in two distinct developments which occurred at the close of the eighteenth century, namely: (1) a re-configuration of courtroom relations, and (2) an expansion of evidential standards.

*(1) The Impact of Lawyerisation: The Re-configuration of Courtroom Relations*

Unlike the informal, chaotic procedure by which claims were presented in the early modern trial, parties to a criminal dispute were now expected to present their cases in their totality before undergoing a rigorous process of cross-examination. At the heart of this shift in the prevailing courtroom protocol stood an overarching desire to

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<sup>125</sup> The 'commissioners reporting on the criminal law' were appointed by the Melbourne government in 1834. The Commission in its conclusion noted as follows: 'We think that even the present restrictions on the speeches of Counsel for the prosecution are very injurious to the interests of justice...'. See *Second Report from His Majesty's Commissioners on Criminal Law: Parliamentary Papers*, (Government Printer, 1836), p.16.

<sup>126</sup> Hereinafter the 1836 Act,

<sup>127</sup> (1834) Parliamentary Debates 24 at 160. As quoted in Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.257.

<sup>128</sup> 6 & 7 Wm. IV, c.114 (1836)

<sup>129</sup> Henry Brougham, *The Trial at Large of Her Majesty Caroline Amelia Elizabeth, Queen of Great Britain; in the House of Lords, on Charges of Adulterous Intercourse*, (2 vols.) (T.Kelly, 1821).

<sup>130</sup> Kilcommins and Vaughan, *Terrorism, Rights and the Rule of Law*, p.59.

<sup>131</sup> Langbein, *The Origins of the Adversary Criminal Procedure*, p.253.

test the prosecution case. Thus, if as Beattie has argued, the early modern criminal framework was centred on an unarmed defendant who 'rarely challenged [the victim's evidence] systematically', the modern trial by contrast was dominated by a professional advocate who demanded evidential certainty.<sup>132</sup>

With the evolution of a more invasive cross-examination procedure came 'a more sceptical habit of mind toward the prosecution side'.<sup>133</sup> No longer concerned with simply rebutting the allegations of a victim on a piecemeal basis, an accused and his counsel now vehemently challenged identification evidence, suggested motives and witness accounts with the underlying aim of 'casting doubt on the validity of the factual case being presented by the defendant'.<sup>134</sup> Indeed no-one epitomised the changing ethos of defensive engagement more clearly than William Garrow who, according to Langbein, 'became renowned for his intimidating cross-examinations, his success at avoiding the limits of full defence and his creativity in devising evidentiary and other legal objections'.<sup>135</sup> For Landsman, the aggressive defensive strategies adopted by advocates such as Garrow at the end of the eighteenth century represented 'the clearest demonstration that adversarial attitudes and methods had come to dominate the courtroom'.<sup>136</sup>

Buoyed by the support of pro-active professional counsel, the defendant for the first time became, in the words of Friedman, a 'courtroom player at his own trial'.<sup>137</sup> Recognised - following the introduction of the Criminal Evidence Act 1898 - as having a right to testify under oath,<sup>138</sup> permitted to present a full case at trial and supported by counsel in conducting cross-examination, the accused population benefitted enormously from the re-configured, due process landscape of the adversarial courtroom.

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<sup>132</sup> Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.234.

<sup>133</sup> Ibid, p.235.

<sup>134</sup> Beattie, *Crime and the Courts of England*, p.375.

<sup>135</sup> Langbein, *The Origins of the Adversary Criminal Procedure*, p.306. Beattie, for instance, recalls Garrow's combative defence of a young man accused of highway robbery in 1784 at a time when defence counsel only had a very limited jurisdiction in the courtroom. In this particular case Garrow undermined the credibility of the victim, William Grove, who was also the prosecutor. During cross-examination Grove was unable to rebut Garrow's insinuation that his primary purpose in bringing the prosecution was to receive the statutory reward of £40. See *Old Bailey Sessions Papers* (May 1784, no. 637) at 818-824 as quoted in Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', pp.239- 241.

<sup>136</sup> Stephan Landsman, 'The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England' *Cornell Law Review* 75 (1989-1990), 496-609, p.532.

<sup>137</sup> Lawrence Friedman, *Crime and Punishment in American History* (Basic Books, 1993) p.245.

<sup>138</sup> Criminal Evidence Act, section 1.

(2) *The Impact of Lawyerisation: The Expansion of Evidential Standards*

Beyond altering the traditional dynamic of the courtroom, the increased presence of lawyers encouraged a striking elevation in evidential standards as defence counsel increasingly 'sought to limit the case their clients would have to answer'.<sup>139</sup> Thus, within a lawyer-dominated legal environment pre-occupied with the emerging logic of adversarialism, the burden of proof shifted onto the crime victim or the prosecutor as a presumption of innocence emerged as a cardinal principle within Anglo-American legal culture.<sup>140</sup> This spirit of adversarialism dictated that the prosecution reach a more exacting standard of evidential certainty in delivering its case. Championing the rights of an accused and the exigencies of adversarial justice, our modern 'beyond reasonable doubt' standard thus emerged as a constituent element of the inculpatory courtroom dynamic.<sup>141</sup> The standard for considered due process justice was now in place; a standard which- in contrast to the prosecutorial bias of the exculpatory model- proudly proclaimed that 'the truth of the crime will be accepted only when it is completely proven'.<sup>142</sup>

Allied to the recognition of this exacting prosecutorial burden was an unprecedented growth in the corpus of exclusionary rules of evidence as victim allegations came under increasing scrutiny. Encompassing, inter alia, the introduction of corroboration warnings for accomplice testimony, a recognition of the inadmissibility of hearsay evidence, greater scrutiny of the voluntariness of confessions and a rejection of bard character evidence, these rules, in effect, provided the evidential foundation for our modern adversarial process.<sup>143</sup>

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<sup>139</sup> Beattie, 'Scales of Justice Defense Counsel and the English Criminal Trial', p.235.

<sup>140</sup> For an early example of judicial deference towards the presumption of innocence, see *R v Hobson* (1823) 1 Lew CC 261. In this case Holroyd, J. announced that it was a 'maxim of...law that ten guilty men should escape rather than one innocent man should suffer'. In this regard, Holroyd J.'s dicta recalls the earlier contributions of Blackstone who famously wrote that 'it is better that ten guilty persons escape, than that one innocent suffer'. See William Blackstone, *Commentaries on the Laws of England* (Isaiah Thomas 1765), p.349.

<sup>141</sup> It is perhaps worth mentioning at this juncture that Coke had long campaigned for an exacting burden of probative certainty in criminal convictions. According to Coke 'the evidence to convic[t] should be so manifest, as it could not be contradicted'. Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (M. Flesher, for W. Lee, and D. Pakeman, 1644), p.137.

<sup>142</sup> Foucault, *Discipline and Punish*, p.97. For instance, in the case against Richard Corbett in 1784, we find the trial judge directing the jury that 'if there is a reasonable doubt, in that case that doubt ought to decide in favour of the prisoner'. See *Old Bailey Session Papers* (July 1784, no.670) 879 at 895 as quoted in Langbein, *The Origins of the Adversary Criminal Procedure*, p.264.

<sup>143</sup> For greater discussion of the emergence of exclusionary rules of evidence see Beattie, *Crime and the Courts of England*, pp.363-377.

## Conclusion

The courtroom dynamic which confronted a criminal accused in the early nineteenth century bore little resemblance to the chaotic, unpredictable arena which had dominated the criminal adjudicative process two centuries earlier. Tasked with the responsibility for commanding social order within an increasingly urbanised and emerging capitalist economy, the trial apparatus could no longer sustain the informal character-based considerations which had epitomised its search for truth under the exculpatory regime of the seventeenth century. Within this new liberal climate there was no room for the pro-prosecutorial bias which had defined the early modern pursuit for justice. Buoyed by the timely, tempered and rationalised contribution of the Enlightenment academy, the State emerged as the central institution for punitive engagement as 'an economy of continuity and permanence...replace[d] that of expenditure and excess'.<sup>144</sup>

With the dawn of the State-prosecution era came the dawn of adversarialism and the birth of due process rights. Helmed by the combative figure of the professional advocate, this emerging adversarial movement was a vital component in a broader equality of arms framework which sought to protect an accused from the unlimited prosecutorial resources of the State. Thus it was during this formative, post-Enlightenment era that our now entrenched culture of counsel-led cross-examination first emerged relegating the victim, the judiciary and the jury to the role of spectators in the evidence-adducing process. In contrast to the amorphous legal code of seventeenth century society, there now stood an expanding corpus of exacting evidential standards. Encompassing, *inter alia*, a shift in the burden of proof, an articulation of the 'beyond reasonable doubt' standard, a recognition of the presumption of innocence and an expansion of exclusionary rules of evidence, the eighteenth century movement for reform effectively established many of the probative assumptions and due process values which continue to underpin our modern adversarial trial dynamic.

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<sup>144</sup> Foucault, *Discipline and Punish*, p.87.