

How **The Sixth Amendment** *Guarantees You* *the Right to A Lawyer,* *A Fair Trial, and* *A Chamber Pot*



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PHOTOS BY ART HOLEMAN



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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

UNITED STATES CONSTITUTION Amendment VI

In 1649, John Lilburne needed to pee.

Moreover, he needed a lawyer, the right to subpoena witnesses, time to prepare his case, and the right to testify:

“I earnestly entreat you, that now you will pleased to give me a copy of my indictment, or so much of it, as you expect a plea from me upon, and an answer unto, and counsel assigned me, and time to debate with my counsel, and subpoena for witnesses.”¹

John got none of these rights. But, with persistence, he did get to pee:

“Sir, if you will be so cruel as not to give me leave to withdraw to ease and refresh my body, I pray you let me do it in the Court. Officer, I entreat you to help me to a chamber pot.”²

“[Whilst it was fetching, Mr. Lilburne followeth his papers and books close; and when the pot came, he made water, and gave it to the foreman.]”³

To be fair, judges had to complete trials in one sitting.⁴



1. 4 St. Tr 1296 (quoted in Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 235 (1952)).

John Lilburne aka “Free Born John” was “[a]n honest and true-bred, free Englishman; that never in his life feared a Tyrant, nor loved an Appressor.” Diane Parkin-Speer, *John Lilburne: a Revolutionary Interprets Statutes and Common Law Due Process*, 1 LAW & HIST. REV. 276, 296 (1983) (quoting WILLIAM HALLER and GODFREY DAVIES, *THE LEVELLER TRACTS*, 1647-1653, 449 (1944)). Another description was that Lilburne was “an obstreperous and forward opponent ...

constituted somewhere between a patriot and a demagogue ...”, 8 WIGMORE, EVIDENCE 291 (3d ed. 1940).



2. A **chamber pot** is a bowl shaped container, usually ceramic with lids, kept in the bedroom as a toilet, in common use until the 19th century. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 2d 446 (1942). The terms “potty” and “potty training” come from this phrase.

3. Wolfram at 245-46.

4. Wolfram 239 n. 94 (Not until 1794 did courts have the right to adjourn (i.e. take a break)).

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But these judges had a special commission for the Lord Protector himself: Kill Lilburne.¹ And Lilburne knew it.

Lilburne's fight for his life helped us get the trial rights we take for granted. Thus, he laid the foundation for the list of trial rights that is the Sixth Amendment—the accused's entitlement. And to make sure the accused gets all these rights, the Sixth Amendment finishes the list with the right to a lawyer, "*to have the Assistance of Counsel for his defense.*"

"Counsel for His Defense" in History

Where there are courts, there are lawyers. Ancient Athenians defended themselves in court. But they could hire a *logographos* to write a speech for them to memorize.²

The Romans would appoint a *procurator* to handle legal business, especially when the party could not attend court. His function was like our modern attorney or agent for legal matters.³

For actual court cases, a Roman citizen who came to court to argue for others was a *patronus causarum* ("patron of the cause").⁴ This term came from the great men of Rome, the Patrons or Patricians, who had many dependant client families

and slaves. These were mutual relationships, and the patron would defend them in court. If a patrons was a good lawyer, people sought to attach themselves to him to handle specific cases, hence *patronus causarum*. This is also the source of the modern reference of a lawyer taking on a "client."⁵

The Romans systematically taught rhetoric, and men like Cicero were great trial attorneys and cross-examiners.⁶ Surviving

still are the texts of the Roman lawyer Quintilian on rhetoric and cross-examination.⁷ Indeed, from the Romans we have the first bar license and attempt to prohibit the unauthorized practice of law.⁸

Because the lawyers were patrons and thus leaders of great houses, getting paid officially as an advocate was shunned. The Emperor Claudius set the fee for lawyers at 10,000 *sesterces* or 100 aurei.⁹ In early medieval England, advocates began to

congregate around the King's courts in Westminster, working for a fee.¹⁰ Over two centuries after the Norman Conquest, Edward I issued an edict in 1292 directing the Court of Common Pleas to choose "attorneys and learners" to follow the courts and monopolize the legal profession.¹¹

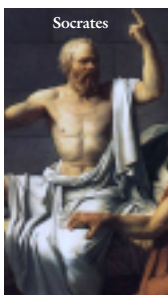


Oliver Cromwell

1. Wolfram at 229. Cromwell issued an "extraordinary commission" of judges to get Lilburne's treason conviction declaring, "The Kingdom could never be settled so long as Lilburne was alive." Quoted in LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 300 (1968).

2. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 32 (1953).

Logographos = *logo* as in the modern "logo" like "team logo" and *graphos* as in the modern "graph" or "graphic." Socrates in his trial famously did not employ a *logographos*. THE WORKS OF PLATO, *Apology* 59-60 (Irwin Edman ed., Benjamin Jowett trans., Random House 1956).

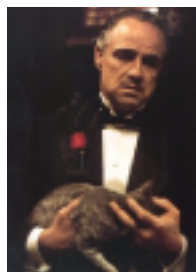


Socrates

3. POUND at 37. Over time, the size of the Empire made this more common.

4. POUND at 44-45. For more on the patron/client relationship see the Godfather movies. Marlon Brando in Francis Ford Coppola's THE GODFATHER (Paramount Pictures 1972). The American Film Institute ranks THE GODFATHER number 2 in its best movies list.

5. POUND at 46.



Quintilianus

7. POUND at 48-49.

Marcus Fabius Quintilianus (ca. 35-ca. 100) was a Roman rhetorician from Spain. The medieval and renaissance schools of rhetoric widely used his writings.

See www.thelatinlibrary.com/quintilian.html (last visited 13 October 2007) for a Latin text and www.public.iastate.edu/~honeyl/quintilian/index.html (last visited 13 October 2007) for an English translation.

6. Cicero Denouncing Catiline - Maccari

See C.A. Morrison, *Some Features of the Roman and the English Law of Evidence*, 33 TUL. L. REV. 577, 582 (1958) In the later empire, trials became inquisitorial and the art of cross-examination and other trial skills declined. *Id.* at 589; see also POUND at 50.

Marcus Tullius Cicero (January 3, 106 BC – December 7, 43 BC) was a Roman statesman, lawyer, political theorist, philosopher, and one of Rome's greatest orators and prose stylists. THE OXFORD CLASSICAL DICTIONARY, *Cicero* 234-38 (1970); THE COLUMBIA ENCYCLOPEDIA 3RD ED. *Cicero* 418 (1963). Classical learning and history had great influence on America's founding fathers. See, e.g., Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 MISS. L.J. 431 (2006).

8. A law of 468 prohibited advocacy by those not admitted to practice in Roman courts. POUND at 51.

9. This is about \$475. POUND at 53. This 10,000 sesterces fee remained the standard, at least officially, throughout the middle ages. St. Ives, canonized 1347, was famous for being such a great lawyer that he always commanded the maximum fee but so honest that he would accept no more. Thus depictions show him with the bag of exactly 10,000 sesterces. On his tomb was inscribed *Sanctus Ivo erat Brito/ Advocatus et non latro/ Res miranda populo*. "St Ives was Breton/ A lawyer and not a thief/ Marvelous thing to the people." THE CATHOLIC ENCYCLOPEDIA at www.newadvent.org/cathen/08256b.htm (last visited 13 October 2007). See also POUND at 53-54. St. Ives, not St. Thomas More, is the patron saint of lawyers. (More is the patron saint of statesmen.)

10. By the 1200s lawyers would hang out at Westminster and follow the court, cashing in on this fee for justice system. DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 183 (2003); J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 20 (2002).



St. Ives



St. Thomas More

11. See DANZIGER & GILLINGHAM at 183 and KEMPIN at 79.

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This meant that the courts trained the lawyers, leading to the Inns of Court system.¹ A key part of that training, in addition to attending lectures and taking notes in court, were the “moots,” or practice arguments.² Because of the Inns of Court system, the training of lawyers in England did not follow the pattern of the rest of Europe with lawyers trained in Roman and canon law in the great universities.³ Rather, English law became its own insular tradition, to which we are heirs.⁴

Trials in the Middles Ages

Although a medieval trial would have had elements like our modern version, there was a striking difference—the role of the jury.

Medieval jurors were the witnesses and came to court expecting to speak more than to listen. Certainly from Norman times and perhaps even earlier, the jurors were self-informed: They would have known the parties and the facts, and the judges would have known less about the case than the jurors.⁵ Indeed, these jurors would have gone out and investigated the case themselves.

In such a system, there was little need for a prosecutor, defense counsel or witnesses. The king did start to send his judges to organize justice; their main job was law enforcement, but in the process they would have assured rough justice. If a judge did not,

the jury of the defendant’s neighbors would have provided some balance. Indeed, the jurors took a specific oath to give a true *verdict*, which would have served as the accused’s main procedural protection.

Over time, the jury became less self-informed. Coming from a larger geographic area and drawing from people with less personal knowledge of the parties and the dispute, the jury lost its investigatory role. Witnesses became a greater feature of the trial. By the middle of the 15th century, jurors had become dependent on in-court testimony.⁶

By 1670 criminal procedure had advanced to the modern procedure of witnesses offering evidence, jurors making factual conclusions, and judges framing the question.⁷ With formalized roles came formalized procedure with the beginnings of procedural protections for the accused. But, this was still a long way from our Sixth Amendment.

Tudor and Stuart Trials

John Lilburne’s 1649 trial exemplified the mode of trial through Tudor and Stuart times.⁸ No counsel, no evidence rules, no right to compel witnesses, and no right to see the indictment beforehand. In these trials, the defendant lived or died depending on

1. From the 13th century, the Inns of Court in London have been hostels and schools for student lawyers training the lawyers of England. They were literally Inns where students lived, ate and trained. Today every English barrister belongs to an Inn, which supervises and disciplines the members, and provides libraries, dining facilities and professional accommodation. Each also has a church or chapel attached to it. Over the centuries the number of active Inns of Court was reduced to four, which are Lincoln’s Inn, Gray’s Inn, Inner Temple and Middle Temple.



Combined arms of the four Inns of Court:

Lincoln’s Inn from 1422, Gray’s Inn from 1569, Inner Temple from 1505, and Middle Temple from 1501. See A.W.B. Simpson, *The Early Constitution of the Inns of Court* 28 CAMBRIDGE L.J. 241 (1970); Paul Brand, *Courtroom and Schoolroom: The Education of Lawyers in England Prior to 1400*, 60 BULL. INST. OF HIST. RESEARCH 147 (1987); S. E. THORNE, ESSAYS IN ENGLISH LEGAL HISTORY, *The Early History of the Inns of Court with Special Reference to Gray’s Inn*, 137-54 (1985).

The Middle and Inner Temple Inns get their name from the fact that they stand on the old English headquarters of the Knights Templar.

The Templars were the zealots yelling “God wills it!” in the movie KINGDOM OF HEAVEN (20th Century Fox 2005).



Simon Templar aka “The Saint” acts the modern-day Knight Templar in the Leslie Charteris books, television show and 1997 movie, *THE SAINT* (Paramount Pictures 1997).

2. POUND at 89-90. By the end of the Middle Ages the legal profession had three categories: 1. Judges and sergeants; 2. Apprentices in the Inns of Court, and 3. Attorneys. POUND at 82. This is the origin of our modern notions of “lawyer” and “attorney.” The sergeants are what we today would think of as a courtroom lawyer, or the English “Barrister”—a lawyer who speaks for you. As early as 1259 the sergeants wore a coif, a headdress that became the wigs English barristers and judges still use today. POUND at 81.



Conversely, an attorney is one

who stands in for you as your agent. Anyone can give someone, not just a lawyer, a “power of attorney” to act in your stead. See generally POUND at 77-93; George C. Thomas III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 561-573 (noting historical distinction between pleaders “sergeants” vs. “attorneys” as agents); J. H. Baker, *Counselors and Barristers: An Historical Study*, 27 CAMBRIDGE L.J. 205 (1969). In England the distinction between solicitor and barrister is part of this history. *Id.* at 572. The Sixth Amendment, however, more generally incorporates the “right to assistance of counsel” encompassing both functions.

3. BAKER at 28. For the outline of the medieval history of continental lawyer and their education in the great universities, see James A. Brundage, *The Medieval Advocate’s Profession*, 6 LAW & HIST. REV. 439 (1988).

The Order of the Coif is an honorary society for law students with good grades.



to the self-informing juries of old. See James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137 (1983).

6. Klerman at 145-48; Anthony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 510 (1975).



7. By 1523, Sir Thomas More argued that jurors should only have evidence from the trial. Shapiro at 5.

4. Modern American lawyers are members of “the Bar.” The term comes from the Inns of Court, which, being Inns, had a bar. Later the bar was a railing that divided the hall in the Inns of Court, with students on one side and the readers or Benchers on the other. Graduating students crossed the symbolic physical barrier and were “admitted to the bar.” This is where the term “barrister” (more common in England) comes from.

5. See Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 127 and 138 (2003) defining the *eyre* and Roger D. Groot, *The Jury in Private Criminal Prosecutions Before 1215*, 27 AM. J. LEGAL HIST. 113, 125-40 (1983) (Groot II) describing the *eyre*; BARBARA J. SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE* 2, 4 (1991); Justin C. Barnes, *Lessons Learned from England’s “Great Guardian of Liberty”: A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L.J. 345, 350 (2005). Also Margaret C. Klingelsmith, *New Readings of Old Law*, 66 U. PA. L. REV. 107 (1917-1918); Margaret H. Kerr, Richard D. Forsyth, & Michael J. Pyley, *Cold Water and Hot Iron: Trial by Ordeal in England*, J. INTERDISC. HIST. 573, 576-77 (1992). Up

8. Tudors: Henry VII, Henry VIII, Edward VI,



Mary, Elisabeth. The Stuarts: James I,



Charles I, Charles II, James II.



what he said. Indeed, Sir Thomas Smith, a scholar and one of Queen Elizabeth's officials,¹ described the trial as an "altercation."

The altercation began as soon as the defendant pleaded not guilty and the sheriff called the local jury. Although the defendant could challenge a juror if he had cause, this rarely happened. The jury was sworn and began to hear evidence, usually from a justice-of-the-peace who read to the court and jury his written record of the defendant and witness's statements. The witness and especially the defendant then gave their statement; it was not testimony because the defendant or his witnesses were not allowed to take an oath. During their statements, the judge interrogated them.²

After this altercation, the judge told the jury what he thought of the evidence and how they should vote. The jury would probably hear several cases and then deliberate. The whole trial lasted less than an hour—a model of brevity and efficiency. To top it off, there was no appeal—you could be convicted and hanged the same day.³ It seems, however, that the process was generally open and confrontational. The universality of this right, however, remained an open question.

And Sir Walter Raleigh had to face the fact that a king could ignore it.

Raleigh and the Confrontation Clause

Walter Raleigh was a poet, courtier and explorer.⁴ He was one of Queen Elizabeth's favorites,⁵ though not a favorite of her successor, James I.

In November of 1603 James had him tried for treason, charging him with conspiring with Lord Cobham and others on behalf of Spain. Upon interrogation in the Tower of London, Cobham implicated Raleigh.⁶ Although Cobham later recanted, at Raleigh's trial the prosecution read his statements to the jury. Cobham, Raleigh argued, lied to save himself:

"Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour."⁷

Raleigh called for his accuser:

"The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face."⁸

Here, Raleigh calls for his common law right to confrontation. Given James' view that "the king is the law speaking" (*i.e.*, not under the law), Raleigh was not to get his common law right.

The judges refused his request, though Raleigh persisted. After all, even in trial by ordeal the accused had the right to con-

— continued

1. Sir Thomas Smith

(1513–1577), an English scholar and diplomat, was one of Elizabeth's most trusted Protestant counselors, appointed in 1572 chancellor of the Order of the Garter and a secretary of state.

Smith's book, *De Republica Anglorum—The Manner of Government or Policie of the Realme of England*, was written between 1562 and 1565, published 1583. See www.constitution.org/eng/repang.htm (last visited 13 October 2007). See Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 504–05 (1990) summarizing Smith's description.



The most prolific modern scholar on this subject, John Langbein, coined the phrase "the accused speaks" model of trial, which describes

the main aspect of trial—the defendant's statement. See, e.g., John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) (Langbein, *Before the Lawyers*). I, however, have chosen to use Sir Thomas Smith's phrase of the "altercation" trial because it better describes the courtroom dynamic and because Smith wrote before Langbein.

2. See Landsman at 513–14 describing judicial interrogation from the inquisitorial model. Tudor and Stuart trials were "nasty, brutish, and essentially short." Landsman at 498 (quoting J. S. COCKBURN, *A HISTORY OF THE ENGLISH ASSIZES 1558–1714* at 109 (1972)).

3. Sir Nicholas Throckmorton's treason trial of 1554 lasted one day from 7:00 a.m. to 5:00 p.m. See generally P. R. GLAZEBROOK, *The Making of English Criminal Law*, 1977 CRIM. L.R. 582, 586–88. He had no lawyer, no time to prepare, no right to call witnesses. The judges and prosecution engaged in "one continuous onslaught on the defendant." *Id.* at 587; George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 603 (1997). But he stood his ground,



defended himself well, and the jury acquitted him. The judges were so angry they sent the jurors to prison! (Judges could do this until 1670). The Supreme Court referred to Throckmorton in *Miranda v. Arizona*, 384 U.S. 436, 443 (1966). Throckmorton was imprisoned, released, and fled to France but by 1557 was back in favor with Queen Mary and later rose rapidly in the service of Queen Elizabeth. His daughter Elizabeth married Sir Walter Raleigh. London's **Throckmorton Street** is named for him.



"Christ and the Woman taken in adultery," 1621



to confrontation was not in the common law but in the colonies from the Puritan's reading of the bible such as the woman taken in adultery without an accuser. "Hath no man condemned thee? Nether do I condemn thee: go and sin no more." *Id.* at 214. Also, St. Paul, accused before the Roman governor Festus, demanded his



accusers come forward: "To whom I answered, that it is not the manner of the Romans for favor to deliver any man to the death before he which is accused, have the accusers before him, and have place to defend himself, concerning the crime." *Id.*; see also *Coy v. Iowa*, 487 U.S. 1012 (1988) (quoting this passage from Acts 25:16).

4. Sir Walter Raleigh (1552 or 1554–1618) established the first English colony in America (June 4, 1584) at Roanoke Island North Carolina. Raleigh counties in North Carolina and West Virginia, among other places, are named for him.

5. Raleigh is the guy who laid his cloak before Elizabeth's feet (one of the great feats of suck-up in history!). His relationship with Elizabeth I is the subject of numerous depictions including the movie *THE VIRGIN QUEEN* (20th Century Fox 1955) (Bette Davis and Richard Todd) and *ELIZABETH: THE GOLDEN AGE* (2008) (Clive Owen and Cate Blanchett), a sequel to *ELIZABETH* (Gramercy 1998). Elizabeth is called "the Virgin Queen" because she never married, probably to keep power; it is not a comment on her chastity. See, e.g., CHRISTOPHER HIBBERT, *THE VIRGIN QUEEN: ELIZABETH I, GENIUS OF THE GOLDEN AGE* (1992). The state of Virginia, however, is named for her.



6. *Crawford v. Washington*, 541 U.S. 36 44–45 (2004), provides a standard history. But see Thomas Davis, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005) and Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493 (2007). See also Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209 (2005), criticizing Justice Scalia's view of history, arguing that the right



St. Paul before Gov. Festus

Festus was one of Matt Dillon's deputy/sidekicks in the TV show *GUNSMOKE*, which came from radio (1952–61) and ran from 1955–1975.



8. Cobham and an older Raleigh.



front his accuser.¹ Not only was he denied, but his trial truly was an altercation with Attorney General Edward Coke, as the final round of the trial demonstrates:

- Coke:** "Thou art the most vile and execrable traitor that ever lived."
Raleigh: "You speak indiscreetly, barbarously and uncivilly."
Coke: "I want [*i.e.*, lack] words sufficient to express thy viperous treason."
Raleigh: "I think you want words indeed, for you have spoken one thing half a dozen times."
Coke: "Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride."
Raleigh: "It will go near to prove a measuring cast between you and me, Mr. Attorney."²

Attorney General Coke at the end of his case decided on a bit of showmanship: He pulled out of his pocket another Cobham letter once again confessing the plot with Raleigh and retracting his retractions with "nothing but the truth, ... the whole truth before God and his angels." Matching the showmanship, Raleigh then pulled out from his pocket yet another Cobham letter exonerating Raleigh: "I never practiced with Spain by your procurement; God so comfort me in this for my affliction, as you are a true subject, for any thing that I know ... God have mercy upon my soul, as I know no treason by you."³ Although Cobham prob-

ably wrote this "last" letter before Coke's, Raleigh got the last word.

In the end, Raleigh never got the right to confront his accuser. And, despite Raleigh's protestations that his trial was "the Spanish Inquisition," the jury convicted him and the court gave him the death sentence.⁴

Although Raleigh's guilt was and is still debated,⁵ the procedure was flawed. This led to various legal reforms guaranteeing the right to confrontation, such as the requirement in treason law of a "face to face" arraignment. Courts also created rules of unavailability, admitting out-of-court statements only if the witness could not testify in person. Courts also ruled that a suspect's statements could only incriminate himself, not another.⁶ These reforms became part of the common law, which more than 150 years later gave the context for the Sixth Amendment's confrontation clause.⁷

Despite these reforms, the altercation criminal trial was slow to change.⁸

Lilburne Still Needed a Lawyer

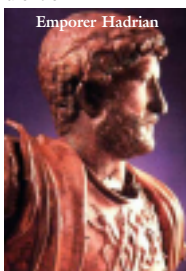
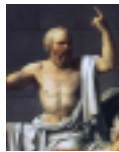
Back to John Lilburne needing to pee

At every point, Lilburne outlined for the jury the unfairness of the process against him:

My prosecutors have had time enough to consult with counsel of all sorts and kinds to destroy me, yea, and with yourselves;

1. Indeed, the right of confrontation has ancient roots coming "to us on faded parchment, ... with a lineage that traces back to the beginnings of Western legal culture." *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988).

Socrates, during his 499 B.C. trial, argued about the lack of confrontation: "And the hardest of all, I do not know and cannot tell the names of my accusers ... for I cannot have them up here, and cross-examine them; and therefore I must simply fight with shadows in my own defense, and argue when there is no one who answers."



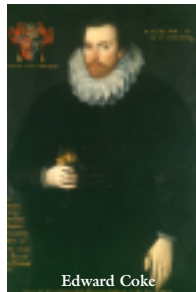
Emperor Hadrian
 THE WORKS OF PLATO, *Apology* 60 (Irwin Edman ed., Benjamin Jowett trans., Random House 1956). An Athenian trial consisted of the parties making a speech during which they called and cross-examined witnesses. POUND at 33.

Although "confrontation" is a modern legal term, the concept is old with Romans requiring proceedings *viva voce* (literally "live voiced"). Frank R. Hermann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 511, 537, n. 290 (1994). For example, the Emperor Hadrian while sitting as a judge rejected written testimony against an accused. *Id.* at 489. Justinian's Code later incorporated this rule assuming that witness will testify before the adverse party. *Id.* at 490-93.

Pope Gregory adopted this rule for the Catholic Church, *Id.* at 493-99, which remained the rule until excepted for heresy prosecutions. *Id.* at 535-37.

The popular understanding of the right to confrontation in Raleigh's own day, one need only look to Shakespeare's *RICHARD II*:

King Richard: "Then call them to our presence, Face to face And frowning brow to brow, ourselves will hear The accuser and the accused freely speak." DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL* 193 (1994) (citing *RICHARD II* at 1.1.15-17); see also Graham at 213 citing *Richard II* and *Much Ado About Nothing*.



Edward Coke
 Miss. L. J. 869, 892-93 (2005).

3. Boyer at 893. Raleigh had contacted Cobham to get this "last" letter by putting a note in a hollowed-out apple, which he threw in Cobham's cell. Given Cobham's numerous contradictory statements, he would have easily been impeached under today's

Federal Rule of Evidence 801(d)(1).



devil had brought it to England (actually, Raleigh gets credit for having popularized tobacco). On the scaffold, after a moving speech, he declared, "I have a long journey to go, and therefore will I take my leave." After putting off his gown and doublet, he asked the executioner to show him the axe. "This is a sharp medicine but it is a physician for all diseases."

2. Many consider Coke's conduct during this trial a blemish on his record as a great in the development of the common law and judging. While on the King's Bench he stood against King James at his life's peril. Perhaps his conduct during the trial was not out of line for its day. For the quotations of Raleigh's cross-examination from the State Trials see Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, The Trial of Treason and the Origins of the Confrontation Clause*, 74



5. One of Raleigh's trial judges lamented "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh." Quoted in *Crawford* at 45 (citations omitted).

6. See *Crawford*, 541 U.S. at 44-45 (citations omitted).

7. In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him. *United States Constitution, Sixth Amendment*.

Also, the treason clause protects these rights in the context of treason trials: "No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court." *United States Constitution, Article III, section 3*.

Just before the American Revolution, colonists such as Thomas Jefferson invoked Blackstone's third volume, identifying confrontation as incident to trial by jury. Graham at 218. Precursors to the Sixth Amendment were John Adams' Massachusetts and George Mason's Virginia constitutions. *Id.* at 216-17. Mason, more than 150 years after Raleigh's execution, wrote the first American confrontation clause in 1776 in his room at Raleigh's Tavern in Williamsburg. *Id.* at 219.



Raleigh's Tavern in Williamsburg, Va.

8. Our friend, John Lilburne, also argued for his confrontation rights in his Star Chamber trial of 1639, 10 years before his 1649 trial featured in this article: "... produce them in the face of the open court, that we may see what they accuse me of; and I am ready here to answer for myself." (Quoted in Graham at 212-214 (arguing that Lilburne's experience had greater effect on the puritan founders of America than Raleigh's trial)).

and I have not had any time at all, not knowing in the least what you would charge upon me, and therefore could provide no defense for that which I knew not what it would be.¹

Despite his repeated requests for a lawyer, Lilburne was on his own.² In 1649, an accused had no right to representation. As one of his judges told him, "Counsel lies in matter of law, not of fact." The idea here was that a defendant did not need a lawyer because no lawyer could present the facts better than the defendant himself. If a legal issue arose, the judge would be the defendant's counsel.³

Lord Keble: "Hear me one word, and you shall have two . . . Your life is by law as dear as our lives, and our souls are at stake if we do you any wrong."

Lilburne would have none of it:

If you will not allow me counsel, I have no more to say to you, you may murder me if you please.⁴

What John Lilburne faced was a mode of trial far more streamlined than today—not having defense counsel made everything go

faster. Indeed, in the typical case, there was no prosecutor either.⁵ But, as Lilburne's trial illustrates, judges often found it impossible to fulfill the function of the defendant's lawyer:

Judge Keble: "I hope the jury hath seen the evidence so plain and so fully that it doth confirm to them to do their dirty duty and find the prisoner guilty of what is charged upon him."⁶

Judge Keble declared this even before Lilburne had presented his defense, belying his prior statement to Lilburne that "your life is by law as dear as our lives."⁷

Even after hearing Lilburne's defense, Keble acted as a cheerleader for the prosecution:

Judge Keble: "... you will clearly find the like treason hatched in England."⁸

Tudor-Stuart judges, like their Norman predecessors, held office at the pleasure of the Crown.⁹ The judge's job was to help the accuser, usually the victim, establish the prosecution case as well as be "counsel for the defendant."¹⁰ Accused felons had to speak in their own defense and to respond to prosecution evi-

1. Wolfram at 237. Lilburne objects here to not getting the indictment before the trial to give him time to prepare his defense. Up until the late 19th century in England, the defendant did not know the nature of the charge or to see the prosecution's depositions. J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 Law & Hist. 221, 223 (1991). In the United States, the Sixth Amendment would guarantee defendants like Lilburne the right "to be informed of the nature and cause of the accusation . . ."

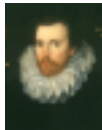
Coupled with the Fifth Amendment's guarantee of an indictment, Lilburne would have had no complaint. Even if Lilburne had gotten the indictment, he would probably not have been able to read it. Until 1362 indictments were written in French or Latin. During Cromwell's time indictments were in English but later went back to French or Latin. Not until 1751 under George II were they written in English. Wolfram 229 n. 58 (citing ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 223-24 (1947)); see also POUND at 127.

2. Actually, not totally. Lilburne did have legal help present and spent a lot of time arguing that his solicitor, "Mr. Sprat," be allowed to talk for him. See, e.g., Wolfram at 240. Lilburne succeeded in getting the court to allow him to have Mr. Sprat "hold your papers and books." *Id.* Lilburne, however, could more than hold his own: Not only could he argue better than judge and prosecutor, but he was no slouch on trial objections:

Attorney-General: "What did lieutenant colonel Lilburne say to you concerning your pay? Did not he ask you . . ."

Lilburne: I pray, Sir, do not direct him what to say, but leave him to his own conscience and memory, and make him not for fear to swear more than his own conscience freely tells him is true."

Many a trial lawyer today misses this objection, which in its modern form is "objection, leading." See Federal Rule of Evidence 611(c).



Coke

3. Lord Keble relied on the law at the time. Lord Coke had written that the accused only needed a lawyer if a legal issue presented: "First, that the testimonies and the proofs of the offense ought to be so clear and manifest, as there can be no defense of it. Secondly, the court ought to be in stead of counsel for the prisoner, to see that nothing be urged against him contrary to law and right . . ." 3 COKE'S INSTITUTES fol. 29 (quoted in Wolfram at 236 n. 81; see also *The Third Part of the Institute of the Law of England: Concerning High Treason and Other Pleas of the Crown in Criminal Causes*, 29 (London M. Fletcher, 1644)).

4. Wolfram at 236. Lilburne is playing to the jury. Also, he was not totally truthful. Typically, he still had plenty to say.

5. One thing to keep in mind is that the Lilburne, Raleigh and Sir Thomas More trials were state trials with prosecutors. Generally prosecutors were a rarity in criminal procedure. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 315 (1973) (Langbein, *Origins*). For the typical criminal case, the judge as counsel system may have worked well enough. An average judge would have been just trying to get through his caseload. The typical jury decided the case after an inquest-type trial. Every juror knew the penalty for most felonies was death and many probably knew of, if not directly knew, the defendant. They had a tradition of deciding the defendant's fate with the verdict of guilty or not guilty regardless of the evidence. In a relatively homogenous community, this might not have been so unjust. See generally Langbein, *Before the Lawyers* at 288-89 and 308 for examples of the procedures in typical cases.

6. (Quoted in Wolfram at 247). Lilburne's trial followed the abuses of Tudors and Stuarts, leading eventually to the end of the judge as counsel idea. A.K.R. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 364 (4th ed. 1958).

7. From the start the judicial bias was clear. During the reading of the indictment, Lilburne saw the prosecutor and judge whispering together:

Lilburne: "Hold a while, hold a while, let there be no discourse, but openly; for my adversaries or prosecutors whispering with the Judges, is contrary to the law of England, and extremely foul and dishonest play: and therefore I pray let me have no more of that injustice."

Mr. Attorney: "It is nothing concerning you (let me give him satisfaction), it is nothing concerning you, Mr. Lilburne."

Lilburne: "By your favor, Mr. Prideaux, that is more than I do know; but whether it be or not, by the express law of England, it ought not to be; therefore I pray let me have no more of it."

This should have been the end of the issue, but Lilburne's judges seem to have been unable to avoid taking the bait and as the reading of the indictment droned on, one of the judges felt he had to justify himself:

Judge Thorp: "Mr. Lilburne, I desire to correct a mistake of yours in the law: You were pleased to condemn it as unjust, for the attorney-general's speaking with me when your indictment was a reading; you are to know, he is the prosecutor for the state here against you, and he must confer with us upon several occasions, and we with him, and this is law."

Lilburne: "Not upon the bench, Sir, by your favour, unless it be openly, audibly, and avowedly, and not in any clandestine and whispering way: And by your favour, for all you are a judge, this is law, or else sir Edward Coke, in his 3d part instit. cap. high treason, or petty treason, hath published falsehoods, and the parliament hath licensed them; for their stamp in a special manner is to that book."

Judge Thorp: "Sir Edward Coke is law, and he says, The attorney-general, or any other prosecutor may speak with us in open court, to inform us about the business before us in open court."

Lilburne: "Not in hugger-mugger, privately or whisperingly."

Judge Thorp: "I tell you, Sir, the attorney-general may talk with any in the court, by law, as he did with me."

Lilburne: "I tell you, Sir, it is unjust, and not warrantable by law, for him to talk with the court, or any of the judges thereof, in my absence, or in hugger-mugger, or by private whisperings."

Lord Keble: "No, Sir; it is no hugger-mugger for him to do as he did; spare your words, and burst not out into passion; for thereby you will declare yourself to be within the compass of your indictment, without any further proof . . ."

Even at this stage, Lilburne played to the jury, evident in his use of the common term "hugger-mugger." WEBSTER'S at 1211 ("hugger-mugger" — "1. To act or confer stealthily. 2. To blunder along."). Lilburne makes his point despite, or perhaps using, the judges' protestations—indeed, his judges and prosecutor never bother to say what they were discussing, a point the jury could not have missed. Wolfram at 233-34.

8. Wolfram at 250.

9. See POUND at 134, noting how American Royal Colonial Governors, like their Stuart king masters, removed judges who did not decide as dictated. Judges only got independence of tenure in 1701. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1050 (1994) (Langbein, *The Privilege*) (discussing the limitations of "court as counsel" and citing Lilburne's trial judges as examples).

10. Talk about a conflict of interest! For example, John Hawles, in his 1689 tract, recognized that judges "generally have betrayed their poor client, to please, as they apprehend their better client, the king." Langbein, *The Privilege*, n.13.



dence as it was given, and as they heard it for the first time. If they did not or could not defend themselves, no one would do it for them.¹ The thinking of the time was that “everyone of common understanding may as properly speak to a matter of fact as if he were the best lawyer.”² The system knew that the only role of defense counsel was to speak as to matters of law, leaving the defendant to fend for himself on any matter of fact.³

Prosecutors and Reasonable Doubt

Prosecutors: Though John Lilburne complained of the injustice of not having a lawyer, the problem for most criminal defendants was that they did not have a prosecutor. If you have a prosecutor, the judge can leave the inquisitorial role. Plus, professional prosecutors, by definition, adhere to professional standards.

From before Norman times, all prosecution was private, with criminal cases treated like modern tort cases.⁴ The self-informed juror generally did not need a prosecutor.

For special cases, however, the king did have his own attorneys. The king had the “*praerogative*” (prerogative) of not having to appear himself in court. Thus, he sent an attorney, at first for specific cases in specific courts, but then generally to appear at any time in any court—an “attorney general.” By the 17th century, these had become the offices of Attorney General and

The problem for most criminal defendants was that they did not have a prosecutor. If you have a prosecutor, the judge can leave the inquisitorial role.

Solicitor General.⁵ These were one of the origins of professional prosecutors.

Another origin was the king’s judges. As discussed, the king’s justices would also often assume a prosecutorial function—the king picked them to be law enforcement.⁶ By Tudor times the king’s Justices-of-the-Peace (JPs) took over the pretrial case investigation for later presentation to the traveling justices from Westminster.⁷ These JPs had a specific role in bail decisions and an early type of subpoena power to advance the prosecution of crime. This backed up private victims in their prosecutions.⁸

Under Queen Mary, Parliament passed several statutes from 1554 to 1555 defining the role of JPs and in essence making them England’s first prosecutor corps.⁹ The JPs served in this prosecutorial/inquisitorial role as an alternative to paid prosecutors well into the 18th century.¹⁰ This prosecutorial function fitted well with the JPs’ traditional role to keep the king’s peace and bail determinations.¹¹

By the 1730s things in England, especially London, began to change. Urbanization and population density pressured the older systems of justice delivery. Before professional police, “thief-takers” who gained rewards for convictions began to dominate criminal justice.¹² In various

— continued


1. Beattie at 223.

2. William Hawkins, *A Treatise of the Pleas of the Crown*, (London 1721). As John Langbein stated when discussing the history of the right to remain silent, “The right to remain silent when no one can speak for you is simply the right to slit your throat, and it is hardly a mystery that the defendant did not hasten to avail themselves of a privilege.” Langbein, *The Privilege* at 1054.

3. See, e.g., J. M. Beattie, *Crime and the Courts in England: 1660–1800*, at 360 (1986) (citing to a trial from the Surrey Assizes in 1752 where the judge explained “your counsel knows his duty very well, they may indeed speak for you in any matter of law that may arise on your trial, but cannot as to matter of fact, for you must manage your defense in the best manner you can yourself.”) (cited in Langbein, *The Privilege* n.34).

4. DANZIGER & GILLINGHAM at 180.

5. Pound at 111-13. These are offices today in the government of the United States. The Attorney General heads the Department of Justice and is the only member of the President’s Cabinet who does not have the title Secretary. The Solicitor General argues for the before the



Supreme Court when the United States’ Government is a party and answers to the Attorney General. He and his assistants argue Supreme Court cases wearing a *morning coat*, a less formal version of the frock coat but more formal than the lounge suit we wear today.

6. Langbein, *Origins* at 314-18; P. R. Glazebrook, *The Making of English Criminal Law: The Reign of Mary Tudor*, 1977 CRIM. L. REV. 582, 583.

7. The office of Justice of the Peace (JP) grew out of the practice from the early 1200s where the king would appoint local knights to “keep the king’s peace.” Under Edward III these knights became regular officials with the name “justices of the peace.” They could arrest and jail suspects and impose an early form of bond. BAKER at 24-25. Early JPs tried felonies but over time they began to have a much more defined role in purely pretrial procedure. By the 16th century they presided over only misdemeanors trials and the duties of arrest and detention. Langbein, *Origins* at 319.

8. Langbein, *Origins* at 320-23; Glazebrook at 584.

9. See Glazebrook generally. Also Langbein, *Origins* at 313; George Jarvis Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L. Q. 9, 28-31 (1932) (Thompson I.). Justices-of-the-Peace conducted an early form of the Preliminary Hearing. Langbein, *Origins* at 319.

JPs still exists today in many states conducting preliminary hearings. Though modern criminal procedure and law constrains these JPs, the form is similar to the medieval period and they still “bind over” defendants for trial. Glazebrook at 584.



Judge Roy Bean (c. 1825–1903) is the most famous of all American JPs. Although known as the “Hangin’ Judge,” there is no evidence he ever ordered an execution. Instead he was an eccentric saloon-keeper who posted signs proclaiming “ICE COLD BEER” and “LAW WEST OF THE PECOS.” He was first elected to office in 1884.

THE LIFE AND TIMES OF JUDGE ROY BEAN (Cinerama Releasing 1972), director John Huston and actor Paul Newman, very loosely based this movie on legends of Bean’s life.

10. Langbein, *Before the Lawyers* at 282. See Bruce P. Smith, *The Emergence of Public Prosecution in London, 1790–1850*, 18 YALE J. L. & HUMAN. 29, 33 (2006) for a discussion of the summary proceedings in police offices that dispensed with the need for victim participation in prosecution.

11. Langbein, *Origins* III at 334-35; Glazebrook at 585.

12. See Fisher at 647; Beattie at 234; Landsman at 572. We would call these “thief-takers” bounty hunters. But,



unlike modern “bounty hunters” who chase known felons and give them to the police, thief-takers notoriously hauled anyone, usually the poor, to court and secured the conviction (and reward) with their own perjured testimony. There were no police forces or prosecutors or defense attorneys to check them. And no “thief taker” could have been as cool as Steve McQueen.



Walter Brennan as Roy Bean with Gary Cooper



THE WESTERNER (Samuel Goldwyn 1940), directed by William Wyler, starred Gary Cooper and Walter Brennan, who won his record-setting third best supporting actor Oscar playing Judge Roy Bean.



6th Amendment

cases such as high treason, the crown had employed attorneys. Now, different parts of the government began to employ lawyers for prosecution.¹ The crown could no longer rely on the victim to prosecute crime.²

The days of compurgation, ordeal and the self-informed jury's rough justice were gone. Prosecutors now had to prove the case with "reason" and evidence, overcoming "reasonable doubts."

Reasonable Doubt: John Lilburne complained bitterly and often about his lack of trial rights. But somewhat offsetting this was a very high standard of proof. Judges held the prosecution, whether victims or lawyers, to the standard of proof "clearer than noon day," which Lilburne's prosecutor argued:

Attorney General: "You have heard the several charges proved unto you; for my part, I think it *as clear as noon-day*."³

This high standard of proof is part of the justification for denying the accused a lawyer.⁴

This "clear as the light of noon day" standard was a mainstay of medieval law, with origins from Canon and Roman law.⁵ It was also articulated as the "any doubt standard"—thus, jurors were to acquit if they had any doubts. Under medieval law, an oath in a compurgation trial or trial by ordeal could defeat reason under the "any doubt" standard.⁶

For prosecution, the balance was this: Though the accused did not have the right to representation, subpoena power, the indictment, or to testify under oath, the prosecutor had the entire burden of proof "beyond any doubt," not just the modern standard

of proof "beyond a reasonable doubt."⁷

But, just as professional prosecutors came on the scene, the intellectual foundation of England was changing. The 17th century was the Age of Reason.⁸ Part of this was the "scientific revolution" stressing a rational approach to observation and a logical/reasonable method for determining and explaining nature. This thinking influenced criminal procedure.⁹ Methodology and reason became the standard for decision-making rather than "irrational proofs."¹⁰

In 1756, Geoffrey Gilbert published one of the earliest works on evidence. He opened it by discussing the nature of human reasoning and abstracting John Locke's *An Essay Concerning Human Understanding*,¹¹ marking the first effort to connect the law of proof with a methodology for decision-making. In this endeavor, Locke and Gilbert depart from medieval thought and jump back to Aristotle's discussion of proof:

[I]t is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs.¹²

Aristotle's point, which Locke and Gilbert echo, is that the nature of proof in science is different than in other human endeavors. For the rhetorician, including the players in a system of criminal justice, a rational approach is to accept "probable reasoning," not absolute proof or "beyond all doubt." "Proof beyond a reasonable doubt," the modern standard, must do.¹³ To establish this proof, the best evidence is necessary but not absolute evidence.¹⁴ This freed the common law jury system from

1. See Beattie at 221-22, 225 noting the appearance of lawyers in court records in the 1720 and 1730s and specifically under the reign of George I.

2. See generally John H. Langbein, *The Prosecutorial Origins of Defense Counsel in the Eighteenth Century: The Appearance of Solicitors*, 58 CAMB. L. J. 314 (1999). Langbein, *The Privilege* at 1070 describes the growth of professional prosecution through the 1770s and 1780s.

3. Wolfram at 243 (added emphasis).

4. For example, Chief Justice Sir William Scroggs said to the Popish Plot defendants that "the proof belongs to [the crown] to make out these intrigues of yours; therefore you need not have counsel, because the proof must be plain upon you, and then it will be in vain to deny the conclusion." (Quoted in Langbein *Before the Lawyers* at 308).



Sir William Scroggs



5. Richard M. Fraher, *Conviction According to Conscience: The Medieval Jurists' Debate Concerning Judicial Discretion and the Law of Proof*, 7 LAW & HIST. R. 23, 23-24, 42 (1989); Morano at 509 (outlining Roman and Canon law origins).

To meet this standard Roman and Canon law (the *ius commune*) require proof by two unimpeachable witnesses or by confession. Thus, because of the exacting standard of proof, the confession became all important. To get it, judicially sanctioned torture became a practice.



The rules for torture, however, were exacting. Also, the defendant had to repeat the confession freely in open court. If not, the court suppressed the statement.

The Rack—the form of torture most often used in England by the king's prerogative for charges of high treason.

6. Morano at 510-11.

7. Coke articulated that "the testimonies and the proofs of the offense ought to be so clear and manifest, as there can be no defense of it." *The Third Part of the Institute of the Law of England: Concerning High Treason and Other Pleas of the Crown in Criminal Causes*, 29 (London M. Flesher, 1644). See Morano at 512 for discussion of Coke and the any doubt standard.

8. The Age of Reason was a 17th-century Western philosophy that began modern philosophy by departing from medieval scholasticism. The "Age of Reason" succeeds the Renaissance and precedes the Age of Enlightenment, or it was the earlier part of the Enlightenment. Among other aspects, it was marked by a return to classical logic and scientific method that began in the Renaissance.



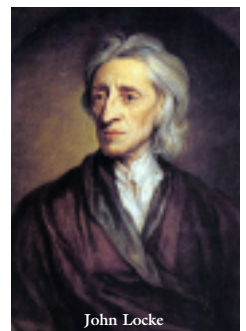
The School of Athens (1509-10) – Raphael

Although created in the Renaissance, the painting well shows the dawn of the Age of Reason.

9. See SHAPIRO 7.

10. Anti-Catholicism drove much of this change in thinking. *Theodore Waldman, Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. OF IDEAS 299, 300-01 (1959). "Moral certainty" became the standard that scientists, philosophers, and religious thinkers used to distinguish themselves from "irrational" Catholics. Waldman at 303 and 310, Shapiro at 7, 19.

11. Waldman at 305-06, 311; Morano at 513-14. See also SHAPIRO at 8, 11, 17, 18, 25, 26 and Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 LEGAL HIST. 252, 256 (1994).



John Locke

12. Waldman at 306, quoting Aristotle, *Ethica Nicomachea*, tr. W. David Ross (Oxford, 1925), Bk. I, Ch. 3, 1094b.

Aristotle, a detail of Raphael's *The School of Athens*. Aristotle gestures to the earth and his belief in knowledge through empirical observation and experience, while holding a copy of his *Nicomachean Ethics*.



13. Concurrently, in tort and civil law, this leads to the "reasonable man" standard. Waldman at 311, 315-16.

14. Waldman at 313. Evidence law does, of course, also employ the higher standard of "scientific proof," especially relating to expert testimony. Federal Rule of Evidence 702 and 703. However, it is still the jury using Aristotle's "probable reasoning" that decides the case.

the Inquisitorial obsession with extraction of confessions to prove a criminal case.

Professional prosecutors, who arrived just as beliefs about the nature of proof were changing, pushed for the “reasonable doubt” standard. The prosecutor had to introduce only certain kinds of logical proof, but no longer proof “clear as the noon day” or “beyond any doubt.”¹ Thus, the push for the *beyond a reasonable doubt* standard was to *decrease* the prosecutor’s burden.

Concurrently, the jury’s role changed. Rather than being self-informed, 17th century jurors were to come to court to listen and decide the facts before them.² Evidence law, based on rational principles, would now determine what the jury heard and the parameters of its decision. In this sense the trial became a closed Newtonian system where human reason could discern God’s clockwork and find truth.³

The question of proof beyond all doubt versus beyond a reasonable doubt played out in the Boston Massacre trials of 1770. Indeed, that may be the first record we have of the prosecution asserting the “beyond a reasonable doubt” standard.⁴

On March 5, 1770, British soldiers in Boston faced an unruly crowd. After provocation, or without any reason at all (depending on whose side you read), the soldiers fired into the crowd, killing five people.⁵

At the murder trials in late 1770, Captain Thomas Preston and eight soldiers had John Adams as their lawyer, a future signer of the Declaration of Independence and second American president.⁶ Prosecuting the case for the crown was Robert Treat Paine, another future signer of the Declaration of Independence.⁷

Adams gave a passionate closing argument that the jury should

acquit if they had any doubt:

[T]he best rule in doubtful cases, is, rather to incline to acquittal than conviction: and ... [w]here you are doubtful never act; that is, if you doubt of the prisoner’s guilt, never declare him guilty; this is always the rule, especially in cases of life.⁸

Paine argued from the perspective of the Age of Reason:

Our law in General that it is *Ultima Ratio* the last improvement of Reason which in the nature of it will not admit any Proposition to be true of which it has not Evidence.⁹

A medieval lawyer or judge would never have made such a statement. But this is the foundation from Locke and Gilbert that Paine builds upon, leading to his argument that doubts had to be reasonable:

[I]f therefore in the examination of this Cause the Evidence is not sufficient to Convince you *beyond a reasonable Doubt* of the Guilt of all ... you will acquit them, but if the Evidence be sufficient to convince you of their *Guilt beyond a reasonable Doubt* the Justice of the Law will require you to declare them Guilty.¹⁰

The judges were split on jury instructions. Senior Judge Edmund Trowbridge charged the jury with the any doubt standard.¹¹

In the end, Adams won. Captain Preston was acquitted and the jury found only two of his men, Hugh Montgomery and Mathew Kilroy, guilty of manslaughter. Their punishment was

1. Morano at 508, 514. See SHAPIRO at 21 for a contrary view and the prosecutorial origins of the “reasonable doubt” standard. Shapiro argues that the older standard incorporating the term “moral certainty” encompassed the “reasonable doubt” standard.

2. Waldman at 314.

3. William Blake’s stylized Newton illustrates the Age of Reason with an intellectual giant using his instruments and brain to pierce the darkness.

4. Morano at 508. The somewhat later Irish Treason trials of 1798 are also another possible source. Morano at

508 noting that this was the belief of May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876); 9 J. WIGMORE, EVIDENCE § 2497 (3d ed. 1940); and C. MCCORMICK, LAW OF EVIDENCE § 341 (2d ed. 1972). Langbein, *Before the Lawyers* at 266 citing McCormick also states that the reasonable doubt standard did not develop until the 19th century. SHAPIRO at 22-23, however, agrees with the Morano view that the Boston Massacre trials have primacy.

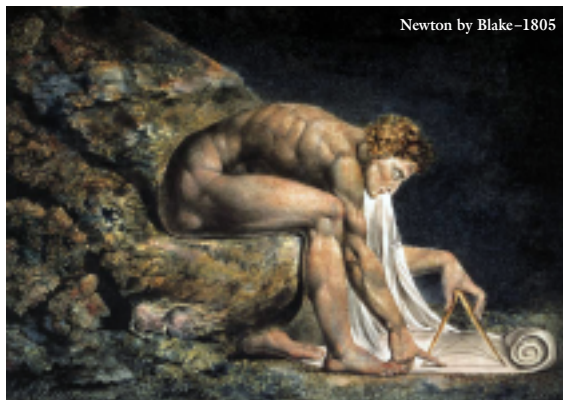
5. This included Crispus Attucks, the first black man to die for American Independence.



Crispus Attucks

For the record of the Boston Massacre trial with speeches and testimony, see the Boston Historical Society site www.bostonmassacre.net/trial/index.htm (last visited 13 October 2007). For the propaganda effect of the Massacre and trial see ARTHUR SCHLESINGER, PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN, 1764–1776 (1958).

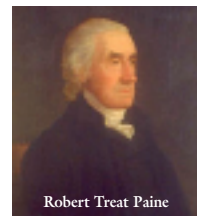
Newton by Blake—1805



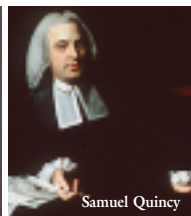
6. John Adams Also for the defense was Josiah Quincy, Jr.
Boston Massacre Trial Bill

7. Robert Treat Paine later served as Massachusetts’ first attorney general (1777–1790) and as a state supreme court judge (1790–1804).

Paine was assisted by Samuel Quincy, see Morano at 516-17, who was



Robert Treat Paine



Samuel Quincy

Josiah Quincy’s brother. The later Revolutionary War separated the two as Samuel Quincy was a Loyalist and left America forever in 1776.

8. Quoted in Morano at 517.

9. *Id.*

10. *Id.* (emphasis added).

11. Morano at 517-18. In addition to Trowbridge and Oliver, Supreme Court Justice John Cushing and Superior Court Judge Benjamin Lynde presided over the trials. Morano at 517.

Interestingly, Justice Peter Oliver agreed with the crown telling the jury “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.” He was a Loyalist and his family were bitter business and political rivals of James Otis and Samuel Adams. He served as Chief Justice of Massachusetts from 1772 until deposed by Revolutionists in 1775. After leaving America during the Revolution he never returned.



Trowbridge



The Boston Massacre

branding on the thumb with a hot iron after receiving “benefit of clergy.”¹

But despite Adams’ successful assertion of the *any doubt* standard, it was the *reasonable doubt* standard that prevailed. Perhaps this was in some part a reaction to the perceived leniency of the Boston Massacre trials. Thus, what began as the prosecutor’s innovation to lessen the *any doubt* standard became the defendant’s primary protection from an erroneous conviction.²

As the Boston Massacre trials illustrate, prosecutors were now facing defendants with trial rights including defense counsel like John Adams. But how did the process get from John Lilburne, who did not get a lawyer despite his pleas, to John Adams and on to the Sixth Amendment guarantee of the defendant’s right to the assistance of counsel for his defense?

The Defendant Gets Lilburne’s Lawyer

Again, Lilburne pleading for counsel:

I am sure by common equity and justice, that I may have counsel and solicitors also assigned me.³

Lilburne’s trial was a state trial. Thus, contrary to the norm, he had a prosecutor trying to kill him. Lilburne’s judges had the same commission.

Lilburne’s trial followed a long line of state cases where the crown had used the seeming legal form of the trial to effect the wishes of the ruler.⁴ Generally that meant killing somebody for “high treason.”

By no means was Lilburne’s trial of 1649 the end of it. Fewer than 20 years afterwards, in the late 1670s, the Popish Plot trials occurred.

The Popish Plot: The Popish Plot (1678–1681) was a conspiracy hatched by two corrupt English clergymen, Titus Oates and Israel Tonge, to discredit English Catholics. They fabricated that a “Popish Plot” existed to murder King Charles II and replace him with James, his Roman Catholic brother. Charles II did not believe Oates, but the conspiracy took on a life of its own fueled by the anti-Catholicism of the day.⁵ King Charles, who already had problems appearing too Catholic with a Catholic wife, could stop neither Oates nor the hysteria.⁶

Oates initially made 43 allegations against various members of Catholic religious orders—including 541 Jesuits—and numerous Catholic nobles.⁷ At one point, Charles II personally interrogated Oates, caught him in a number of lies and ordered his arrest. But Parliament later forced Oates’s release.

The trials before Lord Chief Justice Sir William Scroggs were notorious for the fact that the defendants did not have lawyers and could not testify on their own behalf.⁸

Oates got a state apartment and a £1,200 allowance from Parliament. Purges of Catholics spread as did rumors of plots and French Catholic invasions. At least 15 innocent “Popish Plotters” died the horrible traitor’s death.⁹ As King Charles II moved against him, Oates’s allegations grew even bolder. He eventually denounced the King—strange given that the supposed original plot was to kill Charles II.¹⁰

The abuses of history, including Lilburne’s trial and the Popish Plot, led to reform.

And this reform was the foundation of our Sixth Amendment.

The Treason Act of 1696: Just over 10 years after the Popish Plot, Parliament passed the Treason Act of 1696.¹¹ One of the main

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1. “Benefit of Clergy” had passed into the common law as a basis for granting leniency. For example, instead of hanging a first time offender convicted of manslaughter, he would receive the “burnt in the hand” punishment of a branded “M” for “manslayer.” Originally, this was to stop clerics from invoking the benefit more than once. Congress abolished Benefit of Clergy in 1790 though it survived in some states and may even remain technically available today. The British Parliament did not abolish Benefit of Clergy until 1827. See Jeffrey K. Sawyer, *Benefit of Clergy in Maryland and Virginia*, 34 AM. J. LEGAL HIST. 49 (1990).

2. Morano at 519. See *In re Winship*, 397 U.S. 358, 361-64 and 369-72 (1970) (Harlan, J., concurring).

3. Wolfram at 236.

4. Cromwell proved himself no more principled than the Stuarts in this use of “trials” to effect utilitarian ends.

Cromwell, as the monarchs before him, used the law of “high treason,” which had its roots in the ancient Germanic relationship of faith between a lord and his men. This is why even in modern times the murder of a husband by the wife, or the master by the servant was not just murder but “petit treason.”



Titus Oates

5. Oates was a bad person. He had been an Anglican priest but the church dismissed him from various posts for “drunken blasphemy,” theft, and allegations of sodomy. In 1677 he became a chaplain aboard HMS *Adventurer* but was soon accused of buggery (a capital offence) and spared only because he was clergy.

Oates fled England and joined the Catholic Order of the Jesuits, later claiming it was just to learn their secrets. When he returned to London he befriended the rabid anti-Catholic clergyman Israel Tonge and the two hatched the alleged “plot.” THE CATHOLIC ENCYCLOPEDIA www.newadvent.org/cathen/11173c.htm (last visited 13 October 2007). For the detailed history see JOHN KENYON, THE POPISH PLOT (1972).

6. As part of the hysteria Parliament passed a bill excluding all Catholics from Parliament. In the streets, people played with Popish Plot playing cards lauding Oates, including *Oates uncovers the plot* and *The Executions of the 5 Jesuits*.



7. Sixteen innocent men were executed in direct connection with the plot, and eight others executed as priests in the Catholic persecution that followed. The names of the executed in 1678 are Edward Coleman (Dec. 3); in 1679, John Grove, William Ireland, S.J. (Jan. 24), Robert Green, Lawrence Hill (Feb. 21), Henry Berry (Feb. 28), Thomas Pickering, O.S.B. (May 14), Richard Langhorn (June 14), John Gavan, S.J., William Harcourt, S.J., Anthony Turner, S.J., Thomas Whitebread, S.J., John Fenwick, S.J. (June 20); in 1680, Thomas Thwing (Oct. 23), William Howard, Viscount Stafford (Dec. 29); in 1681, Oliver Plunkett, Archbishop of Armagh (July 1). Those executed as priests were: in 1679, William Plessington (July 19), Philip Evans, John Lloyd (July 22), Nicholas Postgate (Aug. 7), Charles Mahony (Aug. 12), John Wall (aka, Francis Johnson), O.S.F., John Kemble (Aug. 22), Charles Baker (aka David Lewis) S.J. (Aug. 27). THE CATHOLIC ENCYCLOPEDIA, www.newadvent.org/cathen/11173c.htm (last visited 13 October 2007).

8. Oates had his victims at a disadvantage. He testified against them under oath whereas they could only defend with their own un-sworn statements. As Fisher at 618-23 argues, the oath was still the basis of the criminal justice system’s legitimacy, which could not tolerate conflicting oaths. The Treason Act of 1696 not only allowed the defendant to have counsel but also to testify under oath.

9. For example, Edward Coleman sentenced to death on Dec. 3, 1678, was hanged, drawn and quartered.



10. Charles II arrested Oates for sedition and sentenced him to prison and a fine of £100,000. When James II became king, he had Oates retried and sentenced to pillory, public whippings and prison. Ironically, some of the same Jesuits who had been at the mercy of Oates’s sworn testimony could now testify against him and Oates as a defendant could not. Judge Jeffreys declared that Oates was a “Shame to mankind.” Following James II, King William of Orange and Queen Mary pardoned Oates in 1688, and Parliament gave him a pension. Oates died in 1705.

11. Langbein, *The Privilege* at 1067-68, Langbein, *Before the Lawyers* at 309. On the Treason Act being a reaction to perjurers of the Stuarts see Fisher at 617-18.



reforms was guaranteeing the accused the right to counsel in treason cases—about 50 years too late for Lilburne, but his legacy nonetheless.

But this created a strange anomaly in the law: An accused had the right to a lawyer in a treason case and in a misdemeanor case, but not for a felony charge.¹ Thus a person could still face the death penalty without the right to any legal help.

Much of this had to do with social class. Treason defendants tended to be powerful people—or, at least, powerful at one time. They could afford to hire a lawyer.² But, in addition to social class, there were other reasons special to treason trials necessitating a lawyer for the defendant.

For one thing, the Tudors, Stuarts and Cromwell himself did not pick treason trial judges for their impartiality. Defendants like Sir Thomas More and John Lilburne knew this all too well. Moreover, treason law was complex. The government always managed to have its lawyer there to prosecute.³ Thus, treason trials were different in character from the short simple trial of the average guy.

The Trial of the Average Guy: For the average person, especially if he was poor, the trial would not have changed much from the “altercation” of Queen Elizabeth’s time. Existing records show a trial that lasted about half an hour with the judge doing the direct and cross-examination.⁴ The accused defended himself and was expected to give his side of the event, which could exonerate or hang him.⁵ His trial was “adversarial” in that it was public with witnesses and direct confrontation—it is just that the main adversary was the judge and/or witnesses. Not until the 18th century did the

trial become adversarial in the sense of a contest between a prosecutor and defense attorney.⁶

As discussed, by the mid-1700s, professional prosecutors begin to appear as a matter of course. In response, any defendant who could would seek counsel. Their advocacy, by modern standards, was limited, as the following statement from a judge to a defendant in an 1777 trial at the Old Bailey demonstrates:

“Your counsel are not at liberty to state any matter of fact; they are permitted to examine your witnesses; and they are here to speak to any matters of law that may arise; but if your defense arises out of a matter of fact, you must yourself state it to me and the jury.”⁷

Thus, the defendant had to speak for himself, and defense counsel could not even give the jury closing argument.⁸ The lawyer could examine defense witnesses and argue points of law, but little else. But at least defense lawyers were there. Although they could not cross-examine witnesses, they did object to evidence. Over time, these objections developed into arguments and questions of witnesses, and a form of cross-examination.⁹

By the time of the Boston Massacre Trial, it appears that defense counsel had a much more modern role. John Adams argued before the jury after having had the chance to cross-examine the prosecution witnesses. The Sixth Amendment guarantees this expanded right to counsel.¹⁰

With counsel, the nature of the trial changed. Some opposed the expansion of the right to counsel on several grounds, including distaste for the trial becoming nothing more than a lawyer’s contest. But with lawyers there, defendants could assert any number of rights.

Defense Lawyers and the Right to Defend

Two of the rights we take for granted today are the right to use a subpoena to compel witnesses to come to court and the right to testify on our own behalf. A lawyer helps makes both these rights a reality. The power to ask for a subpoena assumes enough legal knowledge to use court procedures well before a trial. Likewise, the defendant having the right to testify, in a way, assumes a lawyer will call him to the stand to do so. Both of these rights, however, were relatively late in coming.

Compulsion of witnesses: In 1649, John Lilburne wanted to subpoena witnesses:

Subpoenas ... [some of my witnesses] are parliament men, and some of them officers of the army, and they will not come in without compulsion.¹¹

As with his other pleas, Lilburne did not get subpoenas.¹² Although Lilburne could call witnesses, he could not subpoena them. Not until the end of the 17th century, with Parliament passing acts in 1696 and 1702, could a defendant compel witnesses and have them sworn.¹³

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1. See KIRALFY at 360-61.

2. Langbein, *Before the Lawyers* at 309. As Langbein puts it, “they legislated safeguards for themselves and left the underlings to suffer as before.”

3. Langbein, *Before the Lawyers* at 309-10.

4. BAKER at 510; Beattie at 221-22. See also Klerman at 135, 145 on the judge’s quasi-prosecutorial role. Regarding judicial power in the colonies see William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 SMU L. REV. 3 (2006).

5. Langbein, *The Privilege* at 1053-54. Langbein notes that any real right to silence would not occur until much later with the advent of defense lawyers in the late 1800s.

6. See generally Langbein, *Before the Lawyers* and John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983) (Langbein, *Ryder Sources*). For Langbein’s definition of the phrase, “The Accused Speaks Trial” see Langbein, *Before the Lawyers* at 283. See also Landsman at 1 (extensively documented demonstration from the Old Bailey Session Papers of the development during the 1700’s of the adversary trial and the transfer of the adversarial parts from judges to lawyers). Also Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149 (1990) (extensively outlining this same change by analyzing evidence scholars from Gilbert to Bentham).

7. Langbein, *The Privilege* at 1054. See also Beattie at 226, 231-32. The Old Bailey is the Central Criminal Court in London (a *bailey* is part of a castle), dealing with major criminal cases.

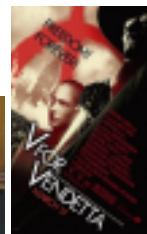


The Old Bailey trial around 1808.

It stands on the site of the medieval Newgate Goal. See www.oldbaileyonline.org for records.

The Old Bailey is often a feature in literature and film: Charles Dickens in *A TALE OF TWO CITIES* has Charles Darnay’s treason trial at the Old

Bailey; Sir John Mortimer used his own experience at the Old Bailey to create the fictional character Horace Rumpole, alias *Rumpole of the Bailey* (BBC 1975–92); *V* in the graphic novel *V for Vendetta* (Quality Comics (U.K.) and Vertigo/DC Comics (U.S.A.) 1982-88) and its film adaptation *V for Vendetta* (Warner Bros. 2006) blows up the Old Bailey.



8. Langbein, *Before the Lawyers* at 313. Part of this older type of trial lives on today in the defendant’s allocation rights at sentencing.

9. Beattie at 233, Langbein, *Before the Lawyers* at 311. See also Landsman at 512 on the growth of lawyer cross-examination.

For an interesting account of a criminal defense lawyer at the time named William Garrow see Beattie at 236; see also Beattie n. 14 for an accounting of lawyer fees.

10. The defendant shall “**have the Assistance of Counsel for his defense.**” **Sixth Amendment.** In England these rights were not formally guaranteed until the Prisoner’s Counsel Act of 1836. Beattie at 250.

11. Quoted in Langbein, *The Privilege* at 1056, citing 4 State Trials at 1312. See also Wolfram at 238.

12. **Subpoena** is a noun from Latin meaning “under penalty,” the first words of the writ (order) commanding the presence of someone under penalty of failure, from sub = “under” and poena = “penalty.”

13. Fisher at 583, 597, 616. See also Langbein, *The Privilege* at 1056.

Defendants Testifying: During medieval compurgation trials, the defendant took an oath. A compurgation trial, however, is about the oath, not the testimony, because the oath *was* the evidence.¹ Thus, before the 16th century the defendant could give his oath. But from the 16th to the 19th centuries (300 years), courts precluded the defendant from doing so, although he could give his statement.²

The reason for the change was that the oath had become not just the evidence but instead the foundation for testimony. This created the potential for conflict because there could now be conflicting testimony, meaning conflicting oaths. Neither society nor the criminal justice system could accept the possibility of conflicting oaths, because the oath legitimated the system. Underscoring this problem was the fact that the jury had not fully come into its modern role as a lie detector.³

Thus, a rule developed in evidence law precluding a party from testifying on his own behalf. The party's interest in the outcome was a temptation for perjury and would therefore undermine the old system of oaths.⁴

This "party witness rule" was to protect the oath.⁵ Thus, making classes of witnesses not competent to testify did the work of lie detecting, so juries did not have to.⁶ The system works if you accept the premise that the damnation of the accused is worse than his execution.⁷

Also, from the point of view of prosecutors, there was an even more practical necessity. If the oath *is* the evidence rather than the testimony, conflicting oaths would cancel each other, and the presumption of innocence would mean no conviction.

The party witness rule was rife with abuse, as Titus Oates demonstrated. For one, it became clear that informants could testify under oath because they were not a "party" to the prosecution, despite the

fact that they were paid for a conviction. Another anomaly was that co-defendants tried separately could testify under oath for each other. But in a joint trial, they could not do so unless they testified for the prosecution.⁸

Thus, the party witness disqualification rule put the defendant at an unfair disadvantage.⁹ The Stuart monarchs, in particular, were infamous for their use of perjurers to achieve state ends. The Treason Act of 1696, allowing defendants to testify under oath, came from this experience.¹⁰ Finally, conflicts between trial witnesses started to become a question of credibility rather than competence.¹¹

In the context of the typical felony trial, however, the right of a defendant to testify under oath was a long time coming. The first statute explicitly giving defendants this right was actually an 1864 statute in Maine. In England it was not until a 1898 statute. Finally, the United States Supreme Court ruled in 1961 on the unconstitutionality of any bar on the defendant testifying under oath.¹²

Thus, the jury comes into its modern role as a lie detector. Although two oaths can now conflict, the jury's verdict conflicts with nothing. The protections for the system today are the law of evidence such as the hearsay rule and the confrontation clause.¹³

Lilburne's Lawyer

In the end, Lilburne never got the lawyer that "common equity and justice" should have given him. But his legacy is our Sixth and Fifth Amendment guarantee of a lawyer.¹⁴ But even the universality of this right was a long time coming. It was not until 1963 that the Supreme Court ruled that every defendant in a serious case must have a lawyer, even if he could not afford one himself.¹⁵

Although Lilburne never got a lawyer, as it turned out, he did not need one—he had the jury. **AT**

1. When the oath itself is qualitative evidence, a natural tendency arises to play a numbers game counting multiple oaths as multiple proofs, John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 85 (1901-1902), giving the side with more witnesses the win. See Fisher at 652-55. The origins for this concept are biblical. Wigmore at 85 n.1 (quoting Deut. 17, 6, 19, 15; Numb. 35, 30; Matt. 18, 16; II. Cor. 13, 1; I. Tim. 5, 19; Hebr. 10, 28; John 8, 17). From there the notion moved into Roman and Canon Law, Wigmore at 84, and the English Chancery courts. Wigmore at 99.



2. Robert Popper, *History and Development of the Accused's Right To Testify*, 1962 WASH. U. L.Q. 454; 464-65. See also Fisher at 596-97 noting the oddity that a defendant could testify in misdemeanor and in civil cases at the time.

We call it a witness "stand" because in England the witness actually stands in a box to testify. In the United States, the witness sits in the "stand."



3. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 599 (2006) (arguing that the jury did not have its modern a role as lie detector). The jury may have had a much more active lie-detection role at an earlier time than Professor Fisher may have accounted.

In 1607, Francis Bacon wrote "the supply of testimony and the discerning and credit of testimony [were left to the] juries consciences and understanding." Later in the century Sir Matthew Hale, the legal historian and most distinguished judge of his time wrote that trial was "the best method of searching and sifting out the truth [because juries] weigh the credibility of Witnesses, and the Force and Efficacy of their Testimonies." (Quoted in SHAPIRO at 11-12).

4. For quotes in Blackstone on the exclusion of the infamous or interested witnesses, including defendants, see Popper at 456 (1962). The modern reaction to this rule can be seen in Federal Rule of Evidence 601, which provides "Every person is competent to be a witness except as otherwise provided in these rules or by statute." Moreover, Federal Rule of Evidence 603 requires a witness to take an "oath or affirmation" before testifying. These modern rules react to the older system protecting the oath itself. See Fisher at 591.

5. James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW & HIST. REV. 95, 96, 107 (1994).

6. Fisher at 625-26.

7. Fisher at 599.

8. Popper at 457. Indeed, the rule on co-defendants not being allowed to testify in a joint trial lasted in England until the Statute of 1869. Popper at 469.

9. James Oldham, *Truth-Telling in the Eighteenth-Century English Courtroom*, 12 LAW AND HIST. REV. 95, 103 (1994) (quoting Gilbert and noting that the lack of oath rendered the defendant's testimony as the equivalent of hearsay).

10. As Gilbert was to write, "By the now Law in Cases of Treason the Witness against the King are admitted to their Oaths, because this [party disqualification rule] was abused in the late Reigns to derive a Credibility on the King's Witnesses as being upon Oath, tho' contradicted by Men of better Credit upon their Words only." Quoted in Fisher at 617.

11. Oldham at 98.

12. *Ferguson v. Georgia*, 365 U.S. 570, 593 (1961).

13. Fisher at 708; John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1194 (1996).

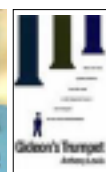
14. It never hurts to return to the actual words of the Sixth Amendment: "and to have the Assistance of Counsel for his defense." The right to counsel from the Fifth Amendment comes in the context of the right to remain silent, which is meaningless without a lawyer to assert the defense. In the context of the need of counsel for the right to remain silent, see Langbein, *The Privilege* at 1048.

For a brief history of lawyers in the colonies before the American Revolution see POUND at 130-74.



Clarence Earl Gideon

15. *Gideon v. Wainwright*, 372 U.S. 335 (1963), was the Supreme Court's landmark case requiring that every defendant charged with a serious crime must have a lawyer under Constitutional Amendments 6 and 14. The State of Florida, Department of Corrections Web page features Gideon—ironic given that the case was against Florida. www.dc.state.fl.us/oth/timeline/1963-1965.html (last visited 14 October 2007). See Paul M. Rashkind, *Gideon v. Wainwright: A 40th Birthday Celebration and the Threat of a Midlife Crisis*, FLA. B. J., March 2003, Volume 77: No. 3.



Throughout the middle ages, the European Inquisitorial mode of trial allowed for the lawyer's "honorarium" for defending the accused poor from public funds. WALTER ULLMAN, LAW AND JURISDICTION IN THE MIDDLE AGES, *The Defense of the Accused in the Medieval Inquisition* 481-89 (1988). Thus, the 1963 *Gideon* decision was late on the scene. See ANTHONY LEWIS, *GIDEON'S TRUMPET* (Reissue ed. 1989) and the movie (1980) starring Henry Fonda as Clarence Earl Gideon. The title refers to the biblical Gideon who ordered his small force to attack a larger enemy and won using trumpets in a trick. JUDGES 7:16-22.