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The Origins of Adversary Criminal Trial in America

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This Article explains how defense counsel were introduced into American felony trials. Building on John Langbein's work on England in The Origins of Adversarial Criminal Trial, *it argues that American jurisdictions pioneered the use of defense counsel in felony cases, a practice that was not allowed in England until the 1730s (and then only in piecemeal fashion). Rejecting some earlier attempts that have sought to locate this right in the seventeenth century, it argues that the relevant time frame is the first decades of the eighteenth century, when American jurisdictions, either by statute or by judicial practice, extended the right of counsel to felony defendants. Pennsylvania, perhaps spurred by Parliament's elimination of jury trials in*

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piracy cases, took the lead in 1701. The American innovation of defense counsel for accused felons would eventually spread throughout the common law world. Famed American defense lawyers, such as the fictional Perry Mason, are not American copies of English originals, but a distinctive American creation.

The Article then turns to the most plausible explanation for this innovation: the parallel development of public prosecution by lawyer prosecutors. Every American jurisdiction that recognized felony defense counsel had previously introduced public prosecutors. But the connection was not necessarily automatic or immediate. Not every jurisdiction that introduced public prosecutors recognized a right to felony defense counsel, and those that did often delayed the introduction by several decades or more. At minimum, the process was far messier and less predictable than some accounts have suggested.

Finally, the Article turns to the possibility of American influences on England. It argues that the American introduction of felony defense counsel may have made it easier for English courts to do the same. English judges would have been more likely to adopt a procedural innovation if they knew that it had been adopted successfully elsewhere. The Article suggests that the English Inns of Court may have helped transmit transatlantic legal knowledge, and it identifies specific American members of the Inns who could have played a crucial role. Although direct evidence on this point will likely remain elusive, it is plausible that the American introduction of felony counsel contributed to the rise of such counsel in England. Unlike many other areas of common law, where American courts simply followed English practice, this aspect of English law may have deep American roots.

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INTRODUCTION

In the summer of 2020, HBO released *Perry Mason*, a television series depicting the early career of a Los Angeles criminal defense attorney in the 1930s.[1] To younger viewers, the name Perry Mason probably meant very little, and the series' primary attraction was the portrayal of the title role by acclaimed Welsh actor Matthew Rhys, best known for playing Russian spy Philip Jennings in *The Americans*.[2] For an older generation, however, the name "Perry Mason" would have been virtually synonymous with "criminal defense attorney." Mason was the

[1] *See Perry Mason*, HBO, www.hbo.com/perry-mason (last visited July 6, 2023) [https://perma.cc/C8WQ-H7SJ].

[2] *See Matthew Rhys*, WIKIPEDIA, www.en.wikipedia.org/wiki/Matthew_Rhys (last visited Sept. 12, 2023) [https://perma.cc/H3BP-WDBK].

brainchild of lawyer and novelist Erle Stanley Gardner, who depicted him as the ferocious defender of the wrongfully accused in over eighty books.[3] Gardner's vivid courtroom scenes proved readily adaptable to other media, and soon Perry Mason was appearing on film, on radio, and on television, most notably in a famous 1957-1966 CBS series starring Raymond Burr.[4]

The character's influence can hardly be overstated. At her confirmation hearing, Justice Sonia Sotomayor recalled that she was inspired to pursue a legal career by watching *Perry Mason* on television.[5] Justice John Paul Stevens was a fan.[6] As of the fall of 2012, Perry Mason had been quoted in 256 judicial opinions and in 981 law review articles.[7] He has been described as "the most influential figure on the public view of lawyers since Abe Lincoln."[8] In the American popular imagination, Perry Mason — a flamboyant character with a commanding role in the courtroom — is the essence of a criminal defense attorney.

The legend of Perry Mason is intimately tied to the distinctive structure of the common law criminal trial. It is an adversarial process dominated by lawyers, who develop the evidence, determine what witnesses to call, and interrogate the witnesses directly. Lawyers for the prosecution lead off, bearing the burden of proof, and their case is then fiercely challenged by defense attorneys. Criminal defendants may testify, but they cannot be compelled to do so, and the defense's side is

[3] *See Erle Stanley Gardner*, WIKIPEDIA, https://en.wikipedia.org/wiki/Erle_Stanley_Gardner (last visited July 6, 2023) [https://perma.cc/USC9-B5F9].

[4] *See Perry Mason*, WIKIPEDIA, https://en.wikipedia.org/wiki/Perry_Mason#Adaptations (last visited July 6, 2023) [https://perma.cc/QUU8-4K7J].

[5] Joan Biskupic & Kathy Kiely, *Perry Mason's Words "Molded" Sotomayor*, ABC NEWS (July 15, 2009, 7:38 PM), https://abcnews.go.com/Politics/story?id=8095294&page=1 [https://perma.cc/R2D5-53F3].

[6] Gina Holland, *Justice Stevens Hits His Prime After 30 Years on Court*, OCALA STARBANNER (Dec. 18, 2005, 11:01 PM EST), https://www.ocala.com/story/news/2005/12/19/justice-stevens-hits-his-prime-after-30-years-on-court/31144503007/ [https://perma.cc/LWL6-HELR].

[7] Ross E. Davies, *The Popular Prosecutor: Mr. District Attorney and the Television Stars of American Law*, 16 GREEN BAG 2D 61, 63 (2012).

[8] David Margolick, *At the Bar; Raymond Burr's Perry Mason Was Fictional, but He Was Surely Relevant and, Oh, So Competent*, N.Y. TIMES, Sept. 24, 1993, at A26.

often presented entirely through counsel.[9] During witness testimony, the judge is a largely passive figure, primarily ruling on the admissibility of evidence.[10]

The criminal trial in civil law countries, however, is strikingly different. Judges, not attorneys, play the lead role in developing evidence and questioning witnesses.[11] The trial is deliberately structured as a search for truth, not a determination of whether the prosecution has met the burden of proof.[12] It is a judge-driven process with little room for courtroom theatrics or playing to a jury.[13]

Lawyers trained in the common law tradition celebrate the common law criminal trial — we are so used to it that it seems obviously superior to its civil law counterpart.[14] But unlike, say, civil juries, the modern adversarial common law criminal trial is a relatively late development — Perry Mason would have been just as out of place in seventeenth-century England as in modern-day France.

Prior to the eighteenth century, common-law felony trials bore little resemblance to their modern form.[15] Most significantly, felony defendants were denied representation by counsel.[16] Lacking an advocate to speak for them, accused persons by necessity had to speak for themselves. As memorably explained by William Hawkins in 1721, "[T]he very Speech, Gesture, and Countenance, and Manner of Defence of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered

[9] U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . .").

[10] John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 263 (1978).

[11] *See* William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 44 (1996).

[12] *Id.* at 51-52.

[13] *Id.* at 43-44; *see also* Mary C. Daly, *Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems*, 2 J. INST. FOR STUDY LEGAL ETHICS 65, 70-71 (1999).

[14] For a balanced exploration of both systems, see David Alan Sklansky, *Anti-Inquisatorialism*, 122 HARV. L. REV. 1634 (2009).

[15] *See* J.H. Baker, *Criminal Courts and Procedure at Common Law 1550–1800*, *in* CRIME IN ENGLAND 1550–1800, at 15 (J.S. Cockburn ed., 1977).

[16] *Id.* at 36-38.

from the artificial Defence of others speaking for them."[17] Prosecutions were regularly brought by private parties, typically the victim, and trials were frequently rambling altercations between the accuser and the accused.[18]

At some point, this older form of English felony trial was transformed into its modern equivalent. Professor John H. Langbein provides a detailed explanation of this process in his magisterial book, *The Origins of Adversary Criminal Trial*.[19] Langbein argues that the first significant change came in 1696, when Parliament enacted the Treason Trials Act, which permitted defense counsel to appear in treason cases.[20] Beginning in the 1730s, defense counsel began to appear in ordinary felony cases at the Old Bailey (the central criminal court in London), and over the course of the eighteenth century, they became increasingly significant to English criminal procedure.[21]

Langbein argues that the introduction of lawyers into felony criminal trials led to a number of consequences, including the development of a prosecutorial burden of proof, an exclusionary law of evidence, and a meaningful right of an accused to remain silent.[22] By the end of the eighteenth century, the older felony trial (which Langbein refers to as the "accused speaks" trial) had been fundamentally transformed into the modern adversarial criminal trial, in which lawyers for the accused test the weaknesses of the prosecution's case.[23]

Langbein's scholarship will likely remain the definitive account with respect to developments in England, where the common law originated. But it was not the only common law jurisdiction. As Langbein notes in an especially intriguing aside, "Another anomaly, not much understood,

[17] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 400 (London, Eliz. Nutt & R. Gosling 1721).

[18] JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 11-12, 13-14 (2003).

[19] *Id.*

[20] *Id.* at 67-105.

[21] *Id.* at 106, 168-169. Langbein's argument is based on London trials at the Old Bailey. *Id.* at 107. John Beattie has found that defense counsel began appearing in felony cases in Surrey as early as 1732. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 356-57 (1986).

[22] LANGBEIN, *supra* note 18, at 5-6, 178-251, 258-84.

[23] *Id.* at 252-343.

is that in parts of British North America the rule against defense counsel was not followed."[24]

This Article argues that developments in British North America were far more than an "anomaly." Adversary criminal trial in felony cases was initially developed in America. American jurisdictions, not England, first guaranteed a right to criminal defense counsel in felony cases.[25] And, importantly, it is possible that the American experience informed later English developments, and accounts for the English willingness to permit defense counsel in felony cases. Perry Mason — the flamboyant defense counsel for accused felons — is not just an American copy of an English original, but a distinctive American creation.

Part I provides a brief overview of seventeenth-century English practice with respect to defense counsel in criminal cases. In felony cases, defense counsel could raise points of law, but were forbidden from any further participation, such as examining witnesses or addressing the jury. By contrast, in misdemeanor cases, a full defense by counsel was permitted.

Part II explores how and when defense counsel were introduced into American felony trials. It argues that attempts to locate this development in the seventeenth century are misguided, and that the pivotal year was 1701, when Pennsylvania formally recognized a right to defense counsel in felony cases. There is no direct evidence of the motivation for this change, although a strong possibility is that Pennsylvania was responding to Parliament's elimination of jury trial for piracy cases in 1700. Other colonies followed, either through statutory recognition or through judicial recognition, although the precise details are often maddeningly frustrating to trace.

Part III turns to the rise of lawyer prosecutors, explaining how American jurisdictions employed lawyers as prosecutors well before public prosecution became common in England. It argues that the introduction of public prosecutors was a necessary condition for the

[24] *Id.* at 40. On defense counsel in Canada, see Donald Fyson, *The Canadiens and the Bloody Code: Criminal Defence Strategies in Quebec After the British Conquest, 1760–1841*, 47 QUADERNI STORICI 771, 779-85 (2012). For a 1767 trial transcript from Quebec, with extensive cross-examination by defense counsel, see [FRANCIS MASERES?], THE TRIAL OF DANIEL DISNEY, ESQ. (New York, John Holt, 1768).

[25] *See infra* Part II.

recognition of felony defense counsel but was not a sufficient condition. Some jurisdictions with public prosecutors did not authorize felony defense counsel at all, and others delayed authorization until many decades later. The connection between public prosecutors and felony defense counsel, although clearly established, is not as immediate or as automatic as some accounts have suggested.

Part IV addresses the influence of the American experience on England as transmitted through the English Inns of Court. It argues that American students and members at the Inns could have brought awareness of American practices to their English counterparts. English judges, informed by this experience, might have then been more willing to consider such an experiment in England. Although definitive proof on this point is not available, it is at least possible that the origins of English adversary criminal trial in felony cases actually lie in America.

I. OVERVIEW OF SEVENTEENTH-CENTURY ENGLISH PRACTICE

English courts in the seventeenth century consistently applied a rule barring criminal defendants in treason and felony cases from employing counsel during the trial.[26] Counsel could not speak for the defendant, could not interrogate witnesses, and could not address the jury.[27] The origins of this rule are not entirely clear, and there is some evidence that counsel may have been employed more broadly in the fourteenth and fifteenth centuries.[28] But by the sixteenth century, at least, the rule had become fixed. Christopher St. German's influential 1530 treatise *Doctor and Student*, for example, argued that indictments brought by the king were motivated entirely by justice, unlike appeals of felony (civil suits brought by the victim) which were often motivated by private malice.[29] Thus, "[I]t began that they shold haue no councell vpon indytementes/

[26] LANGBEIN, *supra* note 18, at 26-28.

[27] *Id.*

[28] David J. Seipp, *Crime in the Year Books*, *in* LAW REPORTING IN BRITAIN 15, 22-26 (Chantal Stebbings ed., 1995).

[29] ST. GERMAN'S DOCTOR AND STUDENT 284-86 (T.F.T. Plucknett & J.L. Barton eds., 1974).

& that hath so longe contynued that it is now growen into a custome & into a maxym of the law that they shal none haue."[30]

The one exception concerned pure issues of law. Counsel could raise legal challenges to the indictment, and they could argue points of law if those arose in the trial.[31] But such opportunities were rare, and few defendants would have had the awareness or the resources to take advantage of them.[32] In a survey of over 5,000 indictments between 1558 and 1625, for example, J.S. Cockburn found only six instances in which trials were delayed because of objections to the legal form of the indictment.[33]

By contrast, defendants were presumed to be fully capable of dealing with factual issues themselves. As William Hawkins explained, "[E]very one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer" since it required "no manner of Skill to make a plain and honest Defence."[34] The "Simplicity and Innocence, artless and ingenuous Behavior of one whose Conscience acquits him" is "more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own."[35]

Curiously, defense counsel were allowed to appear in misdemeanor cases.[36] Very little information is available about the conduct of such cases in the seventeenth and eighteenth centuries. C.W. Brooks found that both barristers and attorneys appeared before the justices of the peace in quarter sessions (the primary forum for trial of misdemeanors).[37] Langbein notes that in the nineteenth century, younger barristers gained trial experience by practicing in the quarter

[30] *Id.* at 286; *see also* GREGORY DURSTON, CRIME AND JUSTICE IN EARLY MODERN ENGLAND: 1500–1750, at 482-93 (2004).

[31] DURSTON, *supra* note 30, at 497-98.

[32] LANGBEIN, *supra* note 18, at 26-28.

[33] J.S. Cockburn, *Trial by the Book? Fact and Theory in the Criminal Process 1558–1625*, *in* LEGAL RECORDS AND THE HISTORIAN 60, 65 (J.H. Baker ed., 1978).

[34] HAWKINS, *supra* note 17, at 400.

[35] *Id.*

[36] DURSTON, *supra* note 30, at 496-97; LANGBEIN, *supra* note 18, at 36.

[37] C.W. BROOKS, PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE "LOWER BRANCH" OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND 190 (1986).

sessions courts, and he suspects that the practice was probably much older.[38]

Although arguments could be made to support the distinction between felony and misdemeanor, many seventeenth-century critics, including even the notorious Judge Jeffreys, were unpersuaded.[39] Why, they asked, should counsel be allowed when a small fine was at stake but denied in cases of a man's life?[40] A 1652 law reform commission led by Sir Matthew Hale unsuccessfully proposed that "as well as in matters of fact as law, where there shall any person plead as of counsel against the prisoner, in such the prisoner may have counsel."[41]

The first significant change came in 1696, when Parliament enacted the Treason Trials Act, allowing defense counsel to appear in cases of high treason.[42] Defendants were allowed to make a "full Defense by Counsel learned in the Law."[43] This included not just examining and cross-examining witnesses, but also making an opening statement and closing argument to the jury.[44] The Act was prompted by a series of notorious treason cases in the reigns of Charles II and James II, which came to be perceived as serious miscarriages of justice.[45] In treason cases, which presented issues of exceptional complexity, the Crown was always represented by experienced counsel, and the bench was often

[38] LANGBEIN, *supra* note 18, at 37.

[39] *Id.* at 39.

[40] *Id.*

[41] *Several Draughts of Acts*, *in* 6 A COLLECTION OF SCARCE AND VALUABLE TRACTS 177, 235 (Walter Scott ed., London, T. Cadell & W. Davies, 2d ed. 1811). On the Hale Commission, see Mary Cotterell, *Interregnum Law Reform: The Hale Commission of 1652*, 83 ENG. HIST. REV. 689 (1968). Hale had raised numerous points of law when representing a client in a 1651 treason trial before the High Court of Justice. *The Trial of Mr. Christopher Love*, *in* 2 A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANOURS 83, 157-74 (London, T. Wright, 4th ed. 1776); *see also* JOHN M. COLLINS, MARTIAL LAW AND ENGLISH LAWS, C. 1500–C. 1700, at 200 (2016).

[42] An Act for Regulateing of Tryals in Cases of Treason and Misprision of Treason 1696, 7 & 8 Will. III, c. 3.

[43] *Id.*

[44] LANGBEIN, *supra* note 18, at 93.

[45] *Id.* at 68-69. For a thorough examination of the background of the Act, see Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 LAW & HIST. REV. 215 (1993).

perceived as unduly favorable to the prosecution.[46] Langbein suggested that allowing defense counsel was a way of "evening up" the disadvantages experienced by the defense.[47] But these factors arguably did not apply to cases of ordinary felony, and so the Act's benefits were limited to cases of treason.[48]

II. THE INTRODUCTION OF AMERICAN DEFENSE COUNSEL

The subject of defense counsel in seventeenth- and eighteenth-century America poses nearly intractable challenges to the legal historian. For the most part, legislation can be readily accessed, but court records from this period have survived in only the most haphazard manner. Even more frustratingly, the court records that do survive do not typically indicate the presence or absence of defense counsel. Similar problems were present in the English sources, and Langbein was able to complete his study only by relying on the published series of *Old Bailey Sessions Papers*, accounts of criminal trials prepared for popular consumption.[49] But even these did not consistently reveal information about counsel.[50] Unfortunately, the American sources lack anything even remotely as useful as the *Old Bailey Sessions Papers*, and we must pick through the dross, hoping for flecks of gold.[51]

Although there was much debate over the applicability of parliamentary statutes to the colonies,[52] colonial courts appear to have followed the Treason Trials Act on the rare occasions on which a treason

[46] LANGBEIN, *supra* note 18, at 84-86.

[47] *Id.* at 102.

[48] *Id.* at 97-102.

[49] *Id.* at 168.

[50] *Id.*

[51] For early attempts at the problem, see WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 14-18 (1955); Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 3 (1954). Rackow's unfamiliarity with legal doctrine led him frequently astray. Examples include the bizarre assertion that counsel was required in misdemeanor cases and confusing an appeal of felony (a distinct action at common law) with the appeal of a criminal case from a lower court to a higher court. *Rackow*, *supra*, at 4, 6.

[52] *See* Joseph H. Smith, *The English Criminal Law in Early America*, *in* THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES 3, 3 (Joseph H. Smith & Thomas G. Barnes eds., 1975).

prosecution was brought. In 1702, Nicholas Bayard was prosecuted for high treason in New York.[53] His counsel, James Emot and William Nicholl, objected to jurors, cross-examined witnesses, and delivered lengthy arguments to the jury.[54]

Little is known about misdemeanor cases, although the limited information suggests that, consistent with English practice, counsel was allowed. Arthur Scott, for example, found counsel to be active in seventeenth-century Virginia misdemeanor cases.[55] A New York court allowed counsel to a misdemeanor defendant in 1686,[56] and a Delaware court allowed an attorney to represent the defendant in a 1687 case for "playing at cards."[57] Defense counsel appeared in a 1692 Pennsylvania criminal defamation case and made arguments to the jury.[58] The most famous colonial misdemeanor case was the 1735 trial of John Peter Zenger in New York for seditious libel. Zenger's counsel, the colorful

[53] *The Trial of Nicholas Bayard for High Treason, New York City, 1702*, *in* 10 AMERICAN STATE TRIALS 518 (John D. Lawson ed., 1918).

[54] *Id.* at 522, 523-24, 527, 531-36. On Bayard's trial, see generally Adrian Howe, *The Bayard Treason Trial: Dramatizing Anglo-Dutch Politics in Early Eighteenth-Century New York City*, 47 WM. & MARY Q. 57 (1990). There are variant spellings of the attorneys' names; Howe uses "Nicholls" and "Emott." *Id.* at 69. Other sources refer to "Nicoll." William Nicoll, HIST. SOC'Y OF THE N.Y. CTS. https://history.nycourts.gov/figure/william-nicoll/ (last visited July 10, 2023) [https://perma.cc/HG5M-CL52].

Legal historians Julius Goebel and Raymond Naughton asserted that the participation of counsel resulted from the court's "misapprehension" about the applicability of the Treason Trials Act. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 574 n.104 (1944). Goebel and Naughton also noted that counsel had been allowed in the 1691 treason trials of Jacob Leisler and his associates. *Id.* Court records, however, make clear that Leisler was allowed counsel with respect to a challenge to the indictment, which had always been allowed under English law. Lawrence H. Leder, *Records of the Trials of Jacob Leisler and His Associates*, 36 N.Y. HIST. SOC'Y Q. 431, 440 (1952). There is no evidence suggesting that defense counsel participated in the trials themselves.

[55] ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 78 (1930).

[56] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1093 (1994).

[57] C.H.B. TURNER, SOME RECORDS OF SUSSEX COUNTY, DELAWARE 122 (1909). For later appearances by defense counsel in Delaware misdemeanor cases, see 8 AMERICAN LEGAL RECORDS: COURT RECORDS OF KENT COUNTY, DELAWARE 1680–1705, at 260, 261, 272 (Leon deValinger, Jr. ed., 1959).

[58] Proprietor v. Boss (1692), *in* SAMUEL W. PENNYPACKER, PENNSYLVANIA COLONIAL CASES 117, 123 (Philadelphia, Rees Welsh & Co. 1892).

Andrew Hamilton of Philadelphia, delivered a stirring argument to the jury on the importance of free speech.[59] But the typical misdemeanor defendant most likely did not have counsel. In her study of Massachusetts verbal offenses in the eighteenth century, for example, Kristin Olbertson found that "[d]efense attorneys were rare."[60]

An overarching problem was the general shortage of trained, professional lawyers in many colonies.[61] As Richard B. Morris noted, "The services of an agent or attorney-in-fact, as distinguished from the professional practitioner, were frequently resorted to in all colonial courts of the seventeenth century."[62] It has been estimated that in 1691 there were only fifteen to twenty lawyers practicing in New York, most of middling quality.[63] By 1725, the quantity and quality of attorneys in New York had improved significantly.[64] But many other colonies lagged behind; in North Carolina, for example, there was nothing resembling an elite bar even by the 1720s.[65]

A. Seventeenth-Century Predecessors?

Historians looking for the right to counsel in felony cases have occasionally delved far back into seventeenth-century America, suggesting that America developed a right to counsel decades before the Treason Trials Act of 1696. The evidence for these claims, however, is not especially strong, and it is very hard to identify clear recognition of such a right prior to the eighteenth century.

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[59] THE TRYAL OF JOHN PETER ZENGER 19-29 (London, J. Wilford 1738).

[60] KRISTIN A. OLBERTSON, THE DREADFUL WORD: CRIMINAL SPEECH AND POLITE GENTLEMEN IN MASSACHUSETTS, 1690–1776, at 22 (2022).

[61] *See* CHARLES WARREN, A HISTORY OF THE AMERICAN BAR, COLONIAL AND FEDERAL, TO 1860, at 73, 78, 107 (1911).

[62] 2 AMERICAN LEGAL RECORDS: SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674–1784, at 52 (Richard B. Morris ed., 1935) [hereinafter SELECT CASES OF THE MAYOR'S COURT].

[63] Note, *Law in Colonial New York: The Legal System of 1691*, 80 HARV. L. REV. 1757, 1770 (1967); *see also* Eben Moglen, *Considering* Zenger*: Partisan Politics and the Legal Profession in Provincial New York*, 94 COLUM. L. REV. 1495, 1511-12 (1994).

[64] GOEBEL & NAUGHTON, *supra* note 54, at xxvi; 2 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 57-58 (2013).

[65] 2 NELSON, *supra* note 64, at 92.

In 1641, Massachusetts adopted the "Body of Liberties," which provided that "[e]very man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him."[66] This was primarily an anti-lawyer provision, ensuring that anyone, regardless of professional qualifications, could argue in court. To drive home the point, the provision also forbade payment for such services, so that a professional class of lawyers would not emerge.[67] Moreover, the provision specifically stated that it did not exempt parties from "[a]nswering such Questions in person as the Court shall thinke meete to demand of him."[68] As such, it likely had no impact on the conduct of felony trials. It referred to *who* could appear, not *when* they could appear.

John Acevedo has suggested that this provision might be the origin of a right to defense counsel in America.[69] Professor Acevedo conducted a thorough survey of the extant seventeenth-century criminal records from Massachusetts (over 6,000 cases in total) but identified only two in which the presence of counsel could potentially be inferred.[70] Neither case involved counsel acting for defendants in the course of trial.

The first case, the 1637 trial of Anne Hutchinson, occurred four years before the adoption of the Body of Liberties.[71] Hutchinson raised a procedural point at her trial, and Acevedo notes that "[i]t is widely believed that Hutchinson received legal counsel in the night."[72] But this was hardly unusual — Hutchinson was certainly free to consult with counsel out of court. And English law permitted counsel to raise points of law even in court.[73]

The second was a 1644 burglary case, in which the defendant, James Ward, argued that burglary had not been specifically identified as a

[66] THE MASSACHUSETTS BODY OF LIBERTIES ¶ 26 (1641), https://history.hanover.edu/texts/masslib.html [https://perma.cc/982D-PHXW].

[67] *Id.*

[68] *Id.*

[69] John Felipe Acevedo, *The Ideological Origins of the Right to Counsel*, 68 S.C. L. REV. 87, 89 (2016).

[70] *Id.* at 114-15.

[71] *Id.* at 109.

[72] *Id.* at 110, 114.

[73] *See supra* Part I.

crime in the Body of Liberties.[74] But this, too, involved a point of law, and it requires little imagination to determine what led the defendant to raise this point — his father, Nathaniel Ward, had drafted the "Body of Liberties."[75]

In short, there is no direct evidence of an attorney representing a seventeenth-century Massachusetts felony defendant in court, and nothing developed in the colony equivalent to the "lawyerized" adversary criminal trial that would emerge in the 1700s. No lawyers, for example, appeared for the defendants in the Salem witch trials of 1692/93, the most famous felony trials of the century, nor is there any evidence suggesting that their absence was noteworthy.[76]

John Murrin, citing a 1647 statute, argued that defendants in seventeenth-century Rhode Island "had the right to counsel. Indeed, each town was required to maintain two attorneys for whoever had need of one."[77] But this provision of the statute, entitled "Touching Pleaders," appears to have allowed persons to employ attorneys to plead for them in civil cases; it states nothing explicitly about criminal cases.[78]

In 1668/69, the Rhode Island Assembly enacted a law stating that a criminal defendant would have the "lawful privilege" to "procure an

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[74] Acevedo, *supra* note 69, at 114.

[75] *Id.* at 115.

[76] For reports of the trials, see COTTON MATHER, THE WONDERS OF THE INVISIBLE WORLD (Boston, Benjamin Harris 1693); Letter from Thomas Brattle, F.R.S. (Oct. 8, 1692), *in* NARRATIVES OF THE WITCHCRAFT CASES 1648–1706, at 165, 174-77 (George Lincoln Burr ed., 1914). Similarly, no attorneys appeared for the defendants in two prominent Boston witchcraft trials in the early 1650s. *See* MALCOLM GASKILL, THE RUIN OF ALL WITCHES: LIFE AND DEATH IN THE NEW WORLD 179-83, 193-94 (2021).

[77] John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial by Jury in Seventeenth-Century New England*, *in* SAINTS AND REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 152, 167-68 (David D. Hall, John M. Murrin & Thad W. Tate eds., 1984).

[78] Act of May 19-21, 1647, *in* 1 RECORDS OF THE COLONY OF RHODE ISLAND 147, 200-01 (John Russell Barlett ed., Providence, A. Crawford Greene & Bros. 1856). The Duke of York's Laws, promulgated for New York in 1665, similarly allowed sheriffs, constables, and clerks to plead the cases of poor persons, provided they did not also sit in judgment. The Duke of York's Laws, 1665–75, *in* 1 COLLECTIONS OF THE NEW YORK HISTORICAL SOCIETY 307 (1809), https://history.nycourts.gov/wp-content/uploads/2018/12/Publications_Dukes-Transcript.pdf [https://perma.cc/T4C6-L5PR]. There is no direct evidence that this authority was employed in criminal cases, as opposed to civil cases.

attornye to plead any poynt of law that may make for the clearing of his innocencye."[79] The Assembly was concerned that innocent persons might be accused through "mallice and envie" and "may not bee accomplished with soe much wisdome and knowlidge of the law as to plead his own innocencye &c."[80] But this authorized no more than what was already allowed in England — the use of counsel to argue points of law.[81]

Anton-Hermann Chroust suggested that in New Hampshire prisoners "charged with a felony apparently had a right to be heard by counsel."[82] But his evidence consisted of a 1696 trial in which the prisoners were allowed counsel on a point of law.[83]

Although the use of defense counsel in seventeenth-century American felony cases cannot be conclusively ruled out, it is highly unlikely that anything resembling a full defense by counsel was allowed. Historians making such claims bear a heavy burden of persuasion, a burden that, at least so far, has not been met.

B. Eighteenth-Century Origins

The eighteenth century presents a very different picture. For this period, we can point to definitive moments when American jurisdictions began recognizing a broad right to defense counsel in felony cases. Defense counsel would no longer be limited to the uncommon role of raising points of law but could participate fully in the trial by interrogating witnesses and addressing the jury.

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[79] Act of Mar. 11, 1668/69, *in* 2 RECORDS OF THE COLONY OF RHODE ISLAND 238, 239 (John Russell Barlett ed., Providence, A. Crawford Greene & Bros. 1857).

[80] *Id.*

[81] *See supra* Part I. Anton-Hermann Chroust's praise of this provision, as putting Rhode Island in the "forefront of progressive societies," seems based on his misperception that English law "denied any and all legal assistance to persons indicted of a felony." 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 138 (1965).

[82] CHROUST, *supra* note 81, at 130.

[83] *Id.* Chroust's errors in this regard have unfortunately been repeated in later accounts relying on his work. *See, e.g.*, LEONARD W. LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY 192 (1995) (stating that counsel was permitted in felony cases in "Rhode Island after 1664, New Hampshire after 1696").

1. William Penn and the Charter of Privileges

In 1701, William Penn, the proprietor of the colony of Pennsylvania, issued a Charter of Privileges, which provided, among many other provisions, that "all Criminalls shall have the same Priviledges of Wittnesses and Councill as theire Prosecutors."[84] The original 1681 charter by King Charles II granting Pennsylvania to William Penn had explicitly provided that English law would govern felonies in the colony.[85] Penn's 1701 Charter of Privileges was thus a significant innovation, and it appears to be the first colonial enactment explicitly recognizing a right to counsel in felony cases. Granting defense counsel the same privileges as prosecutors was especially striking. Even the English courts, when they began to occasionally permit felony defense counsel in the 1730s, did not go so far — defense counsel were limited to examining and cross-examining witnesses, and raising points of law; they could not address the jury.[86] The immediate effect of the reform may have been somewhat limited, as Pennsylvania had few practicing attorneys at the time.[87] Nonetheless, in a 1702 murder case, defense counsel was present and objected to the jury.[88]

Extending counsel to felony defendants was a major development in common law criminal procedure. It is thus especially frustrating that there appears to be no surviving direct evidence for why this reform was adopted in Pennsylvania in 1701.[89] Penn, a Quaker who had been prosecuted for his religious activities in England, had long been a critic

[84] William Penn, The Charter of Privileges, *in* 4 THE PAPERS OF WILLIAM PENN 105, 108 (Richard S. Dunn, Mary Maples Dunn, Craig W. Horle, Alison Duncan Hirsch, Marianne S. Wokeck & Joy Wiltenburg eds., 1987).

[85] CHARTER FOR THE PROVINCE OF PENNSYLVANIA (1681), https://avalon.law.yale.edu/17th_century/pa01.asp [https://perma.cc/F5VK-D6GG].

[86] LANGBEIN, *supra* note 18, at 171. Some judges required defense counsel to submit examination questions to the judge. BEATTIE, *supra* note 21, at 359.

[87] ANDREW R. MURPHY, WILLIAM PENN: A LIFE 263, 276 (2018); *cf.* WARREN, *supra* note 61, at 107 (suggesting that in 1706 the Pennsylvania bar consisted of only four attorneys).

[88] Letter from James Logan to William Penn (Mar. 2, 1702), *in* 1 CORRESPONDENCE BETWEEN WILLIAM PENN AND JAMES LOGAN, SECRETARY OF THE PROVINCE OF PENNSYLVANIA, AND OTHERS 82, 92 (Edward Armstrong ed., Philadelphia, J.B. Lippincott & Co. 1870).

[89] Scholarly literature has largely ignored this provision as well. An exhaustive study of the early courts of Pennsylvania, for example, made no mention of it whatsoever. WILLIAM H. LOYD, THE EARLY COURTS OF PENNSYLVANIA (1910).

of English criminal justice.[90] But his earlier denunciations of English law had not focused on a right to counsel.[91] Similarly, the Pennsylvania Assembly had presented a lengthy list of grievances to Penn, but lack of defense counsel was not one of them.[92] The primary dispute between Penn and the Assembly concerned titles to land, an issue addressed in a separate Charter of Property.[93] Indeed, Penn himself urged the Assembly to "Consider their Privileges as well as Property," since privileges were the "Bulwark to Secure the other."[94] Eventually, the provision with respect to defense counsel emerged from the negotiations between Penn and the Assembly. If Penn was the driving force behind the provision, as seems likely, there are at least three possible explanations for his actions.

First, Penn had always been interested in the reform of English criminal law and hoped that his province of Pennsylvania could demonstrate the viability of his ideas.[95] Penn would certainly have taken notice of England's extension of defense counsel to treason defendants in 1696 — he had himself been arrested on suspicion of treason in England in 1689 and 1690.[96] Extending this benefit to felony more generally was a logical next step, especially for a committed reformer of the criminal law. This explanation is certainly plausible, but it does not directly explain why he acted in 1701, rather than earlier.

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[90] JACK D. MARIETTA & G.S. ROWE, TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682–1800, at 8-9 (2006).

[91] WILLIAM PENN, THE PEOPLES ANCIENT AND JUST LIBERTIES ASSERTED 3-4 (London, 1670). Similarly, there is nothing on defense counsel in WILLIAM PENN, THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY (Philadelphia, 1687). In 1709, Penn contended that "all wise men press that as the most Capitall thing to a quiet Govermt to Suffer no lawyers in it." Letter from William Penn to James Logan (Oct. 8, 1709), *in* 4 THE PAPERS OF WILLIAM PENN, *supra* note 84, at 660, 661.

[92] Letter from Pennsylvania Assembly to William Penn (Sept. 20, 1701), *in id.* at 91, 91-92.

[93] *Id.* at 85.

[94] 2 COLONIAL RECORDS OF PENNSYLVANIA: MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 40 (Philadelphia, Jo. Severns & Co. 1852) (minutes from July 26, 1701).

[95] *See* WILLIAM M. OFFUTT, JR., OF "GOOD LAWS" AND "GOOD MEN": LAW AND SOCIETY IN THE DELAWARE VALLEY, 1680–1710, at 16-21 (1995).

[96] 3 THE PAPERS OF WILLIAM PENN 217, 275 (Richard S. Dunn, Mary Maples Dunn, Marianne S. Wokeck, Joy Wiltenburg, Alison Duncan Hirsch & Craig W. Horle eds., 1986).

Second, Penn feared losing control of his colony. From 1692 to 1694, the Privy Council had gone so far as to suspend Penn as the colony's governor and replace him with a royal governor.[97] Although Penn returned to power, there were continuous attempts to chip away at his authority. In 1696, Parliament passed a new Navigation Act, which empowered England's Board of Trade to create vice-admiralty courts in the colonies.[98] These courts, which sat without juries, represented a significant incursion into Penn's colony, and he complained bitterly about their creation.[99] According to Penn, the colony's inhabitants were not being treated "like English men" and the vice-admiralty courts were a "Blow that is given to Jurys."[100] "[D]etermining these causes without a jury," Penn noted, "gives our people the greatest discontent, looking upon themselves as less free here than at home."[101] Penn thoroughly distrusted the English officials sent to administer the vice-admiralty courts, later describing them as the falsest men alive,[102] and by 1701, he had become convinced that English officials were likely to suspend his charter entirely.[103] A provision allowing defense counsel could be a useful protection for the colony's residents against a potential future royal government in which Penn had no faith.

A third factor may have been even more significant — piracy. In the 1690s, a number of pirates had settled in Pennsylvania, buying land, marrying local women, and bragging about their exploits in taverns, where they were enormously popular.[104] William Penn was appalled by the pirates, and feared that Pennsylvania's seeming embrace of them could undermine his control of the colony.[105] In 1700, Parliament took matters into its own hands, by enacting a law allowing pirates to be tried

[97] GARY B. NASH, QUAKERS AND POLITICS: PENNSYLVANIA, 1681–1726, at 182-87 (new ed. 1993).

[98] 3 THE PAPERS OF WILLIAM PENN, *supra* note 96, at 441, 469.

[99] Letter from William Penn to William Trumbull (Jan. 4, 1697), *in id.* at 475, 475-76.

[100] Letter from William Penn to Robert Harley (Jan. 30, 1699), *in id.* at 568, 568.

[101] Letter from William Penn to Robert Harley (Apr. 1701), *in* 4 PAPERS OF WILLIAM PENN, *supra* note 84, at 42, 44.

[102] Letter from William Penn to John Evans (Aug. 9, 1703), *in id.* at 230, 231.

[103] NASH, *supra* note 97, at 222.

[104] MARK G. HANNA, PIRATE NESTS AND THE RISE OF THE BRITISH EMPIRE, 1570–1740, at 1-2 (2015).

[105] *Id.* at 3.

and executed before vice-admiralty courts without juries.[106] Accused pirates could therefore no longer appeal to the sympathies of local juries. This is precisely the sort of pro-prosecution procedural innovation that Langbein saw driving the adoption of felony defense counsel in England. Although Penn detested the pirates, he cared deeply about trial by jury and hated the idea of juryless criminal trials in a vice-admiralty court.[107] In a 1700 letter, Penn complained about the "Act of Piracy" and argued that it was a "great Affront & Injustice that my Waters should be under another Vice Admiralty."[108]

Penn may well have thought that pirates facing conviction without juries should at least be afforded the privilege of defense counsel. But did the Charter of Privileges apply in the vice-admiralty courts? There was arguably no direct conflict with the parliamentary statute, which permitted defendants to summon witnesses but said nothing about defense counsel.[109] And there were some earlier indications supporting the application of Pennsylvania law. The colony had previously enacted a statute providing for jury trial for violations of the Navigation Acts (this statute was later annulled by English authorities), and Judge Robert Quarry of the vice-admiralty court appeared to assume that the colony's statute restricted his ability to proceed without a jury.[110] Quarry complained that the Pennsylvania statute was created "on purpose to destroy the powers of the Admiralty."[111] If Quarry's assumption was correct, the Charter of Privileges would also apply in the vice-admiralty court. But even if it did not, the provision's inclusion in the charter would at least allow defendants to make the argument, and, if it was

[106] An Act for the More Effectual Suppression of Piracy 1698–99, 11 Will. III, c. 7.

[107] *See, e.g.*, Letter from William Penn to Board of Trade (Apr. 28, 1700), *in* 3 PAPERS OF WILLIAM PENN, *supra* note 96, at 592, 596 (hoping that "our Civil Courts might, by Juries, decide all the rest as formerly, which they will have to be the Right of the English Subject at home, & therefore it should not be denied them here").

[108] Letter from William Penn to Charlwood Lawton (Dec. 10, 1700), *in id.* at 624, 625; *see also* HANNA, *supra* note 104, at 235, 287-89.

[109] An Act for the More Effectual Suppression of Piracy, 11 Wm. III, c. 7.

[110] NASH, *supra* note 97, at 196, 198; Letter from Board of Trade to William Penn (Sept. 12, 1699), *in* 3 PAPERS OF WILLIAM PENN, *supra* note 96, at 576, 576; Letter from Samuel Carpenter and Others to William Penn (July 4, 1698), *in id.* at 552, 553.

[111] Letter from Robert Quarry to the Board of Trade (May 18, 1699), *in* 3 PAPERS OF WILLIAM PENN, *supra* note 96, at 570, 571.

rejected, would highlight even more brightly the perceived procedural deficiencies of the vice-admiralty courts.

Regardless of the ultimate motivation for the reform, felony defense counsel quickly became deeply rooted in Pennsylvania's legal system. Seventeen years later, in 1718, the Pennsylvania Assembly enacted a comprehensive criminal justice reform statute to bring Pennsylvania law into closer alignment with English practice.[112] But the Assembly was careful to preserve the protections for defense counsel, providing that in all trials of capital crimes, "learned counsel" shall be "assigned to the prisoners."[113]

It appears that most felony defendants took advantage of Pennsylvania law. In a 1729 trial in a Court of Admiralty held in Philadelphia, a ship's captain was accused of murdering a passenger.[114] The captain's attorney presented a number of witnesses to provide context to the events.[115] A Philadelphia newspaper reported that the captain's subsequent acquittal was "to the general Satisfaction of the People, who before had been greatly exasperated against him."[116] In a 1749 Philadelphia highway robbery trial, the court heard from "Counsel both for the King and Prisoners."[117] By 1750, a defendant in a felony case who represented himself had become so unusual that a court clerk specifically indicated it in the records.[118]

Penn's Charter of Privileges — including the right of defense counsel for felony defendants — also applied to the three "lower" counties of Pennsylvania, which would eventually become the separate state of Delaware.[119] The Charter, which granted the Delaware counties the right to create their own legislature, was often referred to in Delaware as the "Charter of Delaware."[120] In 1719, the Delaware legislature adopted a

[112] Act of May 31, 1718, ch. 236, *in* 3 THE STATUTES AT LARGE OF PENNSYLVANIA 199 (Harrisburg, Clarence M. Busch 1896).

[113] *Id.* at 201.

[114] PA. GAZETTE, Dec. 1, 1729.

[115] *Id.*

[116] *Id.*

[117] PA. GAZETTE, Sept. 28, 1749.

[118] MARIETTA & ROWE, *supra* note 90, at 161 & 310 n.18.

[119] ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA 347 (2008).

[120] *Id.*

criminal justice statute nearly identical to the 1718 Pennsylvania statute, including the provision assigning counsel to all prisoners in capital cases.[121]

2. Statutory Recognition in Other Colonies

So far as I can determine, only two other colonies, South Carolina and Virginia, enacted a statutory right to defense counsel in felony cases prior to the Revolution.

a. South Carolina

William E. Nelson has persuasively argued that in the early 1700s, "law practice in South Carolina assumed a level of sophistication, complexity, and technicality unsurpassed in mainland British North America."[122] Whereas other colonies had sometimes experimented with deviations from the common law, South Carolina legal practice was cast firmly in the English mode.[123] This included the traditional rule against defense counsel in felony cases. In 1718, for example, the "most famous trial in early South Carolina history" took place when Stede Bonnet and his associates were tried and convicted for piracy.[124] Although the Crown was represented by two attorneys, the accused pirates had to represent themselves.[125]

In 1731, the South Carolina Assembly enacted a comprehensive statute regulating the judiciary.[126] Among other provisions, the statute provided that any person charged with a capital offense would be permitted to make a "full defence, by counsel learned in the law."[127] The Assembly noted that "many innocent persons under criminal prosecutions, may suffer for want of knowledge in the laws, how to make a just defense."[128]

[121] Act of 1719, ch. 22, in 1 THE LAWS OF THE STATE OF DELAWARE 64, 66 (Newcastle, Samuel Adams & John Adams 1797).

[122] 2 NELSON, *supra* note 64, at 70.

[123] *Id.* at 67-73.

[124] *Id.* at 75.

[125] *Id.*

[126] Act of Aug. 20, 1731, Pub. L. No. 552, *in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 123, 123-30 (John Fauchereaud Grimké ed., Philadelphia, R. Aitken 1790).

[127] *Id.* at 130.

[128] *Id.* at 129.

Curiously, the Assembly also justified the reform with a somewhat unflattering reflection on South Carolina's own judiciary, stating "[T]he judges and justices of the several courts here, who ought to assist the prisoner in matters of law, cannot be presumed to have so great knowledge and experience as the great judges and sages of the law sitting in his Majesty's courts at Westminster."[129]

In 1732, a South Carolina newspaper noted that a man charged as an accessory before the fact to a burglary and robbery, had counsel "assigned [to] him agreeable to a Law of this Province, in Cases of Felony."[130] Two years later, in yet another piracy case, a newspaper reported, "The Witnesses were cross-examined by Richard Allen, Esq.; who was Council for the Prisoner."[131] The defendant was acquitted.[132]

b. Virginia

In 1734 Virginia enacted a statute providing that "in all trials for capital offences, the prisoner, upon his petition to the court, shall be

[129] *Id.* at 129-30. On the limited legislative history of this provision, see William S. McAninch, *Criminal Procedure and the South Carolina Jury Act of 1731*, *in* SOUTH CAROLINA LEGAL HISTORY: PROCEEDINGS OF THE REYNOLDS CONFERENCE, UNIVERSITY OF SOUTH CAROLINA, DECEMBER 2–3, 1977, at 181, 193 (Herbert A. Johnson ed., 1980). The Commons House pushed for the provision, which His Majesty's Council initially resisted. *Id.* The Commons House argued that a similar provision had "been passed in the plantations," perhaps a reference to the 1701 Pennsylvania statute, and the Council ultimately dropped its opposition. *Id.* The statutory language may have been a deliberate personal insult aimed at South Carolina's Chief Justice, Robert Wright, whose father had been Chief Justice of the Court of King's Bench. Edward Irving Carlyle, *Wright, Sir James, in* 63 DICTIONARY OF NATIONAL BIOGRAPHY, 1885–1900, at 107 (1900). The Commons House was pointedly noting that Robert Wright was not as learned and experienced as his father.

[130] S.C. GAZETTE, March 25, 1732.

[131] PA. GAZETTE, Sept. 19, 1734.

[132] *Id.* Hoyt P. Canady argued that "there is little to suggest that appointed attorneys did more than argue points of law." HOYT P. CANADY, GENTLEMEN OF THE BAR: LAWYERS IN COLONIAL SOUTH CAROLINA 74 (1987). The newspaper account cited above is significant evidence to the contrary. Similarly, in 1770, the lieutenant governor of South Carolina emphasized in a letter to English officials that South Carolina felony defense counsel were not limited to raising points of law. W. ROY SMITH, SOUTH CAROLINA AS A ROYAL PROVINCE, 1719–1776, at 128 (1903). Canady found that between 1769 and 1776, at least one-third of felony defendants had counsel. CANADY, *supra*, at 74.

allowed counsel."[133] Arthur Scott argued that there was no evidence that this allowed counsel to "cross-examine witnesses, or address the jury," but it is hard to see what the statute would have accomplished if it failed to provide even those protections.[134] Scott suspected that few defendants retained counsel even after the 1734 statute, based on the scarcity of references to criminal trials in the "letters, papers, and biographies" of Virginia lawyers,[135] but surely some defendants must have taken advantage of this new opportunity.

3. Recognition by Courts

Statutes were not the only way to recognize a right to defense counsel. As in England, courts could simply allow defense counsel to appear without waiting for legislative authorization. It appears that courts did so in a number of colonies, but the precise details are frustratingly unclear.

a. Mid-Atlantic Colonies

In Maryland, a defendant in a 1707/08 case moved to have "Council Assigned to him he being Ignorant in Such Cases."[136] The court appointed two counsel to serve on his behalf.[137] Although this case has been cited for the general availability of counsel in eighteenth-century

[133] Act of Aug. 1734, ch. 7, *in* 4 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 403, 403-04 (William Waller Hening ed., Richmond, W.W. Gray 1820). Virginia had first imposed formal requirements for admission to the bar just two years earlier. A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE, 1680–1810, at 108 (1981).

[134] SCOTT, *supra* note 55, at 79. Virginia would not likely have adopted a major statutory provision just to confirm the pre-existing right of counsel to raise points of law.

[135] *Id.* at 79 n.100; *cf.* HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 89 (1965) ("There are few instances on record suggesting that felons availed themselves of the services of lawyers.").

[136] Regina v. Jones (Mar. 1707/08), *in* Kent County Court, Proceedings, 1707–1709, 765 ARCHIVES OF MD. ONLINE 47-47v (2018), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000765/html/am765--47b.html [https://perma.cc/4J8Z-EW5L].

[137] *Id.* at 47v.

Maryland,[138] the charge was adultery and it appears to have been prosecuted as a misdemeanor, for which counsel had always been allowed.[139] William E. Nelson, in his survey of colonial Maryland law, states that criminal defendants received the benefit of "appointment of counsel throughout the century."[140] None of the cases Nelson cites, however, involved counsel being granted to felony defendants. C. Ashley Ellefson, by contrast, concluded, "A short search in the court records at the Maryland State Archives in Annapolis will reveal the absence of attorneys for defendants in most criminal prosecutions."[141] Yet this is less telling than it might seem, as court records routinely omitted information on counsel. In 1760, a convicted felon sought a pardon on the ground that he was "Convict and Condemned to die partly for want of Money . . . to employ Council."[142] This petition suggests that counsel in felony cases had become routine at least by 1760. But precisely when and why colonial Maryland courts initially extended the right to counsel in felony cases remains a mystery.

New Jersey initially followed the rule against defense counsel. In 1692, the king's attorney general appeared before the court in Burlington, West New Jersey to prosecute a murder case.[143] The Court asked the defendant to speak for himself before sending the jury out. The

[138] William E. Nelson, *The Law of Colonial Maryland: Virginia Without Its Grandeur*, 54 AM. J. LEGAL HIST. 168, 176 n.55 (2014).

[139] *Regina v. Jones*, *supra* note 136, at 47.

[140] Nelson, *supra* note 138, at 176.

[141] C. ASHLEY ELLEFSON, SEVEN HANGMEN OF COLONIAL MARYLAND 50 n.53 (2009); *cf.* C. ASHLEY ELLEFSON, THE COUNTY COURTS AND THE PROVINCIAL COURT IN MARYLAND, 1733–1763, at 334 (1990) (criminal defendants in eighteenth-century Maryland "seldom had the assistance of an attorney") [hereinafter COUNTY COURTS AND THE PROVINCIAL COURT].

[142] Petition of John Harrison (Sept. 29, 1760), *in* PROCEEDINGS OF THE COUNCIL OF MARYLAND, 1753–1761 (William Hand Browne ed., 1911), 31 ARCHIVES OF MD. ONLINE 413 (2018), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000031/html/am31--413.html [https://perma.cc/2KGG-5GYN]; *see also* James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681–1837*, 40 AM. J. LEGAL HIST. 455, 457 (1996).

[143] 5 AMERICAN LEGAL RECORDS: THE BURLINGTON COURT BOOK: A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY, 1680–1709, at 138 (H. Clay Reed & George J. Miller eds., 1944).

defendant asked to have counsel, "being ignorant in the Lawe."[144] The court responded, that "if hee want to know any particuler in Lawe touching the premisses, hee shall be informed; but if it be in matter of Fact, Counsell against the King cannot be allowed him."[145] By at least 1729, however, New Jersey courts appear to have granted defense counsel as a matter of grace. A newspaper account of a 1729 rape trial in New Jersey, for example, noted that "[t]he Prisoner made little defence himself; but having Counsel allow'd by the Lenity of the Court, several Witnesses were call'd."[146] The witnesses unsuccessfully attempted to discredit the alleged victim's credibility.[147] By the early 1750s, defense attorneys for felony defendants in New Jersey had become routine. George C. Thomas III found defense counsel in over half of the cases in a survey of records from 1749 to 1757 (the true number may be even higher, as the presence of counsel was not always indicated in court records).[148]

b. New England Colonies

In Massachusetts, counsel appeared for defendants in piracy cases as early as 1704.[149] As noted above with respect to Pennsylvania, piracy cases were not tried under common law.[150] In England, under parliamentary statutes of 1536, piracy cases were tried by special

[144] *Id.*

[145] *Id.*

[146] PA. GAZETTE, Nov. 13, 1729.

[147] *Id.*

[148] George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–57*, 1 N.Y.U J.L. & LIBERTY 671, 686-91 (2005). For two of these cases, see *King v. Goble* (N.J. Oyer & Terminer 1752) and *King v. Roberts* (N.J. Oyer & Terminer 1752) in Phyllis B. D'Autrechy, *Records of the New Jersey Court of Oyer and Terminer, 1749–1762*, 71 GENEALOGICAL MAG. OF N.J. 85, 93-94 (1996). Thomas suggests that defense counsel may not have been allowed to examine witnesses, Thomas, *supra*, at 688, but this appears to be contradicted by the 1729 newspaper account, PA. GAZETTE, *supra* note 146, and would have been inconsistent with the practice in neighboring Pennsylvania.

[149] The Trial of Captain John Quelch and Others for Piracy, Boston, Massachusetts, 1704, *in* V AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY (1914–1936) 330, 332 (John D. Lawson ed., 1916).

[150] *See supra* Part II.B.I.

commissions following common law procedure.[151] But these statutes did not apply to the colonies, and the Massachusetts piracy cases were subject to a 1700 act of Parliament that allowed for trial by special commissions without juries following civil law procedure.[152]

Even when allowing counsel, however, the judges in the Massachusetts piracy cases appeared to follow the traditional English rule restricting their ability to address factual matters. In the 1704 case, the defendant "wished to know whether he might not have counsel allowed him, upon any matter of law that might happen upon his trial."[153] The presiding judge responded, "The Articles upon which you are arraigned are plain matters of fact; however, that you may have no reason to complain of hardship, Mr. James Meinzies, attorney at law, may assist you, and offer any matter of law in your behalf upon your trial."[154] At the close of the prosecution's case, Meinzies raised a number of points of law, but the defendant had to question witnesses himself.[155]

Counsel were also allowed in two piracy cases from 1717.[156] In the first case, counsel withdrew after the court denied a motion for an additional witness.[157] In the second case, counsel represented the defendant throughout the trial, although the court requested that the defendant speak for himself with respect to factual matters.[158] At the close of the evidence, the court asked the defendant "[w]hat he had to say for himself."[159] The defendant replied that he "was not on board of the Scotch Ship that was sunk as was reported" and that the evidence "sufficiently proved his Innocence."[160] His "[a]ttorney had fully spoke his Mind & Sentiments, and therefore he should not trouble this

[151] M.J. Prichard & D.E.C. Yale, *Introduction* to HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION, at cxxxvii, cxliii-cxlv (M.J. Prichard & D.E.C. Yale eds., 1993).

[152] DAVID R. OWEN & MICHAEL C. TOLLEY, COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE, 1634–1776, at 6, 34, 166-67 (1995); HANNA, *supra* note 104, at 289-90.

[153] The Trial of Captain John Quelch, *supra* note 149, at 332.

[154] *Id.*

[155] *Id.* at 344-48. On this trial, see HANNA, *supra* note 104, at 330-45.

[156] THE TRIALS OF EIGHT PERSONS INDITED FOR PIRACY 3, 16 (Boston, B. Green 1718).

[157] *Id.* at 5.

[158] *Id.* at 19.

[159] *Id.* at 21.

[160] *Id.*

Honorable Court any longer in his Defence, or to that purpose."[161] It seems likely that the defendant was referring to his counsel's earlier statements on points of law.

Outside of the piracy context, lawyers began regularly appearing on behalf of criminal defendants in colonial Massachusetts at some point in the first half of the eighteenth century.[162] Unfortunately, many of the details of this process — such as precisely when and why defense counsel were first permitted, as well as the precise scope of their activities — are unclear. David Flaherty, who conducted the most thorough investigation of this subject, noted that "a great deal remains elusive, especially because of the limitations of the available evidence."[163] Flaherty concluded that "the use of defense counsel was well established by the 1720s at the latest," although he found some evidence suggesting that defense attorneys were active as early as the first decade of the eighteenth century.[164]

The much more difficult question is the extent to which defense counsel were allowed to examine witnesses and address the jury.[165] Flaherty noted that this question must be addressed "with a great deal of caution, since there are no trial transcripts in the modern sense for provincial Massachusetts."[166] By 1770, judges showed little hesitation in postponing the murder trial of Ebenezer Richardson until the defendant

[161] *Id.*

[162] Massachusetts was slow to develop a significant bar. In 1740, there were only fifteen trained attorneys in the colony. 3 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 92 (2016).

[163] David H. Flaherty, *Criminal Practice in Provincial Massachusetts*, *in* LAW IN COLONIAL MASSACHUSETTS 1630–1800, at 191, 191 (1984).

[164] *Id.* at 216.

[165] William E. Nelson notes that, in colonial Massachusetts, "[c]ourts were prepared to appoint counsel or to allow a defendant to retain one when he or she so requested." 3 NELSON, *supra* note 162, at 106. Nelson does not provide chronological parameters for this claim, and his primary citation is to a 1741 misdemeanor defamation case in a county court, a case that tells us little about felony procedure. *Id.* at 198 n.49. For the county case, see Rex v. Taylor (May 1741), *in* 4 Hampshire County Inferior Court of Common Pleas and Court of General Sessions of the Peace fo. 22v (unpublished court record), https://credo.library.umass.edu/view/pageturn/mums704-i4145/#page/55/mode/1up [https://perma.cc/P5H5-YSKR].

[166] Flaherty, *supra* note 163, at 226.

could secure counsel.[167] When no attorney was willing to appear, the justices ordered an attorney to represent Richardson.[168] Five years earlier, a defense attorney was making extensive arguments in a murder case, and, although the surviving record is not crystal-clear on this point, it appears that the counsel was addressing the jury.[169]

In New Hampshire, the traditional rule restricting counsel to raising points of law was in effect in 1696.[170] In a burglary case from 1736/37, however, the defendant "desired that Mr. Parker might be of Council for him & the Court assigned him to be of Council."[171] This suggests that by at least 1736/37, felony defendants were allowed counsel with the permission of the court.

In Rhode Island, the defendants in a series of 1723 piracy trials did not have access to counsel.[172] In a 1743 trial, however, an enslaved man had two counsel in a case of attempted rape, although the extent of their participation at trial is unknown.[173] Another hint comes from a 1744 murder case, where the defendant's brother paid £150 for a Boston lawyer "for Pleading his Case at his Tryale" and fifty pounds to another lawyer "for pleading the Case."[174] These very large sums suggest that

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[167] JOHN PHILLIP REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 57-58 (1977).

[168] *Id.* at 58.

[169] Dom. Rex v. Mangent (1765), *in* JOSIAH QUINCY JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 162, 163 (Boston, Little Brown 1865).

[170] *See* ELWIN L. PAGE, JUDICIAL BEGINNINGS IN NEW HAMPSHIRE 1640–1700, at 58 (1959).

[171] Rex v. Keniston (N.H. Super. Ct. 1736/37) (microfilm copy from Utah Genealogical Society). The jury issued a special verdict, the case was continued, *id.*, and the defendant then escaped from prison, 5 PROVINCIAL PAPERS: DOCUMENTS AND RECORDS RELATING TO THE PROVINCE OF NEW-HAMPSHIRE FROM 1738 TO 1749, at 8 (Nathaniel Bouton ed., Nashua, Orren C. Moore 1871). Keniston was later executed in Massachusetts for another burglary. *Id.* William E. Nelson first uncovered this case. 4 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 8, 161 n.11 (2018).

[172] TRYALS OF THIRTY-SIX PERSONS FOR PIRACY 4, 6-7, 8, 10, 12 (Boston, Samuel Kneeland 1723).

[173] ELAINE FORMAN CRANE, WITCHES, WIFE BEATERS, AND WHORES: COMMON LAW AND COMMON FOLK IN EARLY AMERICA 131 (2011).

[174] *Id.* at 172-73 (quoting Cash Book of John Banister, 1739–47).

counsel were actively involved throughout the trial, and not limited to raising points of law.[175] Right to counsel in felony cases thus seems likely to have been established in Rhode Island by the mid-1740s and may have originated somewhat earlier.

The right to defense counsel in Connecticut is more difficult to trace. In 1796, Zephaniah Swift stated the Connecticut practice was for the chief justice to "ask[] the prisoner if he desires counsel, which if requested, is always granted, as a matter of course. On his naming counsel, the court will appoint or assign them."[176] Swift's discussion does not suggest that the practice was a recent innovation, and, given the acceptance of counsel in neighboring Massachusetts and Rhode Island, it is likely that it existed much earlier.[177]

c. Southern Colonies

Courts in North Carolina may have allowed felony defense counsel by the 1730s. Donna J. Spindel found lawyers defending clients at the General Court, where felonies were tried during this period, although it is not clear whether their participation was limited to raising points of law.[178] I have found no evidence for Georgia, although lawyers were not

[175] One English pound in the early eighteenth century would be equivalent to 200 to 300 English pounds today. Robert D. Hume, *The Value of Money in Eighteenth-Century England: Incomes, Prices, Buying Power — And Some Problems in Cultural Economics*, 77 HUNTINGTON LIBR. Q. 373, 381 (2014).

[176] 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 392 (Windham, CT, John Byrne 1796).

[177] William M. Beaney stated that in Connecticut the right "apparently existed after 1750," but his only citation is to Swift. BEANEY, *supra* note 51, at 16. In a 1744 trial before the General Assembly, counsel for Elihu Hall, a minister indicted for speaking against the laws of the colony, raised jurisdictional arguments and presented witnesses. 9 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 28-30 (Charles J. Hoadly ed., Hartford, CT, Case, Lockwood & Brainard 1876). The case appears to have been prosecuted as a misdemeanor, however, so counsel's appearance was not novel.

[178] Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720–1740*, 25 AM. J. LEGAL HIST. 141, 145 (1981). William E. Nelson cites the 1759 case of *King v. Dawson* for the proposition that defendants were allowed counsel. 4 NELSON, *supra* note 171, at 8, 161 n.11. The case was a felony, but I do not see any indication of counsel in the court records. King v. Dawson (New Bern, N.C. Mar. 1759), https://digital.ncdcr.gov/Documents/Detail/new-bern-district-trial-argument-reference-

allowed to practice in any form in the colony until 1754, so any recognition of felony defense counsel would have occurred after this date.[179]

4. No Recognition at All?

The colony with the least evidence for a right to defense counsel is New York. As Julius Goebel and Raymond Naughton pointed out, "In New York from the time of the proprietor down to the Revolution, the common law manner of criminal trial, with all its shortcomings, remained the model for the colonists and . . . was never the subject of any attempted legislative improvement."[180] Moreover, they found "only on points of law could counsel appear in felony cases, and there is no evidence that the colonial judges indulged prisoners beyond this limit as sometimes occurred in England."[181] As a result, there was no functioning privilege against self-incrimination during the colonial period.[182] By contrast, in misdemeanor cases, attorneys regularly appeared.[183]

In numerous cases arising out of the New York Conspiracy of 1741 (an alleged plot between enslaved persons and poor whites to burn down Manhattan), the defendants, both enslaved and free, did not have counsel.[184] In one case, five prosecution lawyers handled the case against four defendants.[185] After witness testimony, the court simply asked the defendants, "Have you any questions to ask these witnesses?"[186] At the

and-appearance-docket-supreme-court-of-oyer-and-terminer-and-superior-court-1758-1765-1767-1769-1770/1808429?item=1808517 [https://perma.cc/S3TL-XDRY].

[179] Charles C. Olson, *"Pro Bono Publico": A History of Georgia's Prosecuting Attorneys (1732–2012)*, 25 J.S. LEGAL HIST. 235, 237 (2018).

[180] GOEBEL & NAUGHTON, *supra* note 54, at 558.

[181] *Id.* at 574.

[182] *Id.* at 659. In a 1721 felonious taking case, the attorney for the Crown pointed to the prisoner's silence in his closing argument. *Id.* at 662.

[183] *Id.* at 574. Goebel and Naughton refer to defense counsel making arguments in assault and intrusion cases, cases which were likely misdemeanors. *Id.* at 660-61, 665. On defense counsel in nineteenth-century New York, see Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800–1865*, 22 J.L. & SOC'Y 443, 454-55 (1995).

[184] *See* DANIEL HORSMANDEN, THE NEW YORK CONSPIRACY, OR A HISTORY OF THE NEGRO PLOT 118 (New York, Southwick & Pelsue, 2d ed. 1810).

[185] *Id.* at 109, 114.

[186] *Id.* at 114.

close of testimony, the defendants were told, "[N]ow is the time for you the prisoners, severally to offer what you can in your own defence, that then the counsel for the king may sum up the evidence."[187] The prisoners then "severally spoke in their justification in their turns, protested their innocence, and declared that all the witnesses said against them was false, and called upon God to witness their asservations."[188] In a later trial, defendant John Ury vigorously cross-examined witnesses himself, but was nonetheless convicted and executed.[189]

5. Post-Independence

After independence, new state constitutions in Delaware, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, and Vermont explicitly guaranteed a right to counsel.[190] Georgia, North Carolina, South Carolina, and Virginia did not.[191] Both Virginia and South Carolina, however, had long-standing statutes protecting the right,[192] and North Carolina may have recognized the right prior to independence.[193] Two states, Rhode Island and Connecticut, did not adopt new constitutions, but Rhode Island had previously allowed defense counsel, and Connecticut likely had as well.[194] By the end of the eighteenth century, the right to counsel in felony cases was firmly established throughout all the states. At the federal level, the right was guaranteed in the Sixth Amendment to the United States Constitution.[195]

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[187] *Id.* at 118.

[188] *Id.*

[189] *Id.* at 292-96. For overviews of the New York Conspiracy, see PETER CHARLES HOFFER, THE GREAT NEW YORK CONSPIRACY OF 1741: SLAVERY, CRIME, AND COLONIAL LAW (2003); JILL LEPORE, NEW YORK BURNING: LIBERTY, SLAVERY, AND CONSPIRACY IN EIGHTEENTH-CENTURY MANHATTAN (2005).

[190] PETER J. GALIE, CHRISTOPHER BOPST & BETHANY KIRSCHNER, BILLS OF RIGHTS BEFORE THE BILL OF RIGHTS: EARLY STATE CONSTITUTIONS AND THE AMERICAN TRADITION OF RIGHTS, 1776–1790, at 84 (2020).

[191] *Id.*

[192] *See supra* Part II.B.2.a.–.b.

[193] *See supra* Part II.B.3.c.

[194] *See supra* notes 172–77 and accompanying text.

[195] U.S. CONST. amend. VI.

III. THE RISE OF PUBLIC PROSECUTION IN AMERICA

One of the great difficulties in explaining the introduction of defense counsel in felony cases is identifying precisely why the change was made. In his study of English procedure, Professor Langbein argued that the rise of felony defense counsel was a response to a series of innovations in early eighteenth-century prosecutorial practice that seemed to weight trials unfairly against defendants.[196] Langbein emphasized three such innovations: (1) the increasing use of lawyers to present prosecution cases; (2) the reward system, which risked perjurious testimony by people seeking to obtain monetary rewards for bringing criminals to justice; and (3) the use of Crown witnesses to present accomplice testimony in gang crimes.[197] As a result, courts were willing to allow defense counsel in order to "even up" the two sides at trial.[198]

Did colonial Americans introduce defense counsel for similar reasons? I have found no evidence suggesting that a reward system or the use of accomplice testimony was a significant factor in colonial America. But Langbein's first explanation — the increased use of lawyers to present prosecution cases — merits close examination.

By way of background, it is critical to understand the unusual nature of public prosecution by lawyers for most of the history of the common law. The state was not entirely uninvolved in criminal prosecutions — under statutes of Queen Mary in the 1550s, for example, justices of the peace played a significant role in interrogating suspects and in preserving evidence for trial, a practice that was followed by colonial American justices of the peace.[199] But the state typically did not employ counsel to prosecute crimes directly at trial. In England, the prosecution was rarely represented by counsel, except in significant state matters such as treason.[200] Prosecutions were handled at trial by private parties,

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[196] LANGBEIN, *supra* note 18, at 4, 106-77.

[197] *Id.*

[198] *Id.* at 4.

[199] JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 34-54 (1974); Moglen, *supra* note 56, at 1094-1104.

[200] Albert J. Reiss, Jr., *Public Prosecutors and Criminal Prosecution in the United States of America*, 20 JURID. REV. 1, 4 (1975).

typically the victims.[201] As late as 1834, it was estimated that the prosecution was represented by counsel in only five percent of criminal cases.[202] An elementary system of public prosecution was not introduced in England until 1879.[203]

The use of private parties as prosecutors appears to have been the norm in the earliest American colonies, and it persisted in many places for a significant period.[204] Indeed, the ubiquity of such prosecutions fatally undermines Justice Scalia's blustering claim in *Morrison v. Olson* that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function."[205]

American colonies nonetheless experimented with public prosecution by lawyers at trial to a far greater extent, and at a much earlier period, than did their counterparts in England. Regularized prosecutions conducted by governmental officials became a normal part of criminal procedure in many American colonies. If the prosecution was now employing counsel, it would seem reasonable to grant similar privileges to the defense. American courts may have been tempted to "even up" both sides in the same manner that they would later do in England.

The strongest assertion of this theory comes from legal historian William E. Nelson, who points to the use of lawyers by prosecutors as the most likely explanation for the extension of counsel to criminal defendants. "Local prosecutors," Nelson argues,

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[201] *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 7-11 (1980). Bruce Smith has clarified that public officials routinely prosecuted certain misdemeanor cases before the magistrates' courts in London beginning around 1750. Bruce P. Smith, *The Myth of Private Prosecution in England, 1750–1850*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 151, 152 (Markus D. Dubber & Lindsay Farmer eds., 2007).

[202] LANGBEIN, *supra* note 18, at 285.

[203] Reiss, Jr., *supra* note 200, at 4.

[204] *See* JOHN D. BESSLER, PRIVATE PROSECUTION IN AMERICA: ITS ORIGINS, HISTORY, AND UNCONSTITUTIONALITY IN THE TWENTY-FIRST CENTURY, at xxi-xxvi (2022); Jonathan Barth, *Criminal Prosecution in American History: Private or Public*, 67 S.D. L. REV. 119, 121 (2022); Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 UC DAVIS L. REV. 411, 413 (2009).

[205] Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting). On this point, see Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?*: Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069 (1990).

> had been appointed to represent the Crown in criminal proceedings in most jurisdictions beginning in the late seventeenth or early eighteenth century, and an almost immediate response to their appointment was to recognize the right of defendants to retain counsel and, at least in capital cases, to have counsel appointed to represent indigent defendants who requested assistance.[206]

There is considerable force to Nelson's argument, and lawyer prosecutors are obviously a critical part of the story. Every colony that introduced felony defense counsel had previously introduced some form of public prosecution by lawyers. Yet a closer look at the details suggests that the connection is not quite as tidy as Nelson's argument would suggest. Not every colony that introduced lawyer prosecutors introduced defense counsel, New York being the most prominent example.[207] And the timing was often separated by many decades, suggesting that one development did not necessarily immediately follow upon the other.

This Part explains the rise of lawyer-prosecutors in America and considers how it interacted with the recognition of defense counsel. Section A examines the colonies with roots in the Dutch colony of New Netherland; Section B turns to the other colonies.

A. New Netherland and the Schout

Accounts of the rise of the prosecutor have tended to emphasize the distinctive role played by the Dutch colony of New Netherland.[208] Initially concentrated in Manhattan Island, the colony extended to the Connecticut River in the east, up the Hudson River to the north, as well

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[206] 4 NELSON, *supra* note 171, at 8.

[207] *See supra* Part II.B.4.

[208] The Dutch influence was first emphasized in W. Scott Van Alstyne, Jr., *The District Attorney: A Historical Puzzle*, 1952 WIS. L. REV. 125, 128-38. For a historical overview of the colony, see JAAP JACOBS, THE COLONY OF NEW NETHERLAND: A DUTCH SETTLEMENT IN SEVENTEENTH-CENTURY AMERICA (2009).

as to regions to the south, including parts of modern New Jersey, Pennsylvania, and Delaware.[209]

The Dutch settlers of New Netherland followed their distinctive system of Roman-Dutch law.[210] This system, in sharp contrast to the common law, did not employ juries.[211] Criminal prosecutions were conducted under the continental inquisitorial system, with judges taking the primary role in deciding and resolving cases.[212] An equally stark contrast was that the Dutch did not permit private prosecutions; all prosecutions had to be conducted by a public prosecutor.[213] In the Netherlands and New Netherland, the prosecutor was an official known as a *schout*.[214]

The *schout* combined the functions of sheriff and prosecutor, operating as the chief law enforcement officer of a county, in addition to bringing criminal cases in court. *Schouts* were not required to be legally trained.[215] A deputy *schout* in Fort Orange, for example, is

[209] Charles T. Gehring, *Introduction* to FORT ORANGE COURT MINUTES: 1652–1660, at xv (Charles T. Gehring ed., 1990).

[210] For an overview, see J.W. WESSELS, HISTORY OF THE ROMAN-DUTCH LAW (1908). The term "Roman-Dutch" law was in use by 1652. Linda Biemer, *Criminal Law and Women in New Amsterdam and Early New York*, *in* A BEAUTIFUL AND FRUITFUL PLACE: SELECTED RENSSELAERSWIJCK SEMINAR PAPERS 73, 73 (Nancy Anne McClure Zeller ed., 1991). For published records of the Dutch courts, see FORT ORANGE COURT MINUTES, *supra* note 209; MINUTES OF THE COURT OF RENSSELAERSWYCK 1648–1652 (A.J.F. Van Laer ed., 1922); THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS (Berthold Fernow ed., New York, Knickerboxer Press 1897) (7 vols.).

[211] 2 NELSON, *supra* note 64, at 9.

[212] For an overview of the Dutch legal system in New Netherland, see *id.* at 9-16.

[213] WESSELS, *supra* note 210, at 374.

[214] In New Amsterdam, the functions of the *schout* were initially combined with those of another officer called the *fiscael*; these functions were separated in the 1650s. JACOBS, *supra* note 208, at 66-67, 91, 98. In Fort Orange (later re-named Albany), a court for the trial of civil and minor criminal cases was created in 1652, in which the prosecuting officer was the *commies*, or commissary of the fort. The *commies* presided when the court sat as a criminal court. His duties appear to be similar to that of the *schout*. Gehring, *supra* note 209, at xxvi.

[215] DENNIS SULLIVAN, THE PUNISHMENT OF CRIME IN COLONIAL NEW YORK: THE DUTCH EXPERIENCE IN ALBANY DURING THE SEVENTEENTH CENTURY 38 (1997).

described in court records as a "soldier,"[216] and an early *schout* in Rensselaerswijck was a farmer.[217] The only *schout* with legal training may have been Adrian van Donck, a former law student at the University of Leyden, who was appointed *schout* in Rensselaerswijck in 1641.[218]

The Roman-Dutch law provided little scope for defense counsel in criminal cases.[219] The defendant had no right to remain silent; instead, a key part of the trial was the questioning of the defendant by the magistrates.[220] Under a Dutch law of 1570, a defendant had no right to counsel, unless the judges thought it was necessary.[221] New Netherland never developed much of a legal profession, so even if a defendant had sought an attorney, there would have been few available.[222] On rare occasions, a defendant might send someone to court in his place. In a 1654 case, for example, a defendant accused of stabbing sent a representative to request that the case be resolved through compromise.[223] But such instances were not remotely comparable to defense by trial counsel.

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[216] Extraordinary Session, Dec. 28, 1652, *in* FORT ORANGE COURT MINUTES, *supra* note 209, at 34, 34. Deputies occasionally prosecuted cases. *See id.* at 275, 277, 368.

[217] Stefan Bielinski, *The Schout in Rensselaerswijck: A Conflict of Interests*, *in* A BEAUTIFUL AND FRUITFUL PLACE, *supra* note 210, at 3, 4.

[218] *Id.* at 6.

[219] Even in modern times, defense counsel plays a largely passive role in Dutch criminal trials. As one account explains, "The defendant in most cases is primarily the object of investigation. With an occasional exception, legal questions play a minor role. Evidentiary questions arise relatively seldom . . . . What discussion does take place generally focuses on sentencing questions." INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 354 (D.C. Fokkema, J.M.J. Chorus, E.H. Hondius & E. Ch. Lisser eds., 1978).

[220] 2 NELSON, *supra* note 64, at 12-13.

[221] WESSELS, *supra* note 210, at 376.

[222] 2 NELSON, *supra* note 64, at 11. Court records occasionally show persons acting as an "attorney," mostly in civil cases, but these were likely agents acting with power of attorney, rather than members of a bar. *See* FORT ORANGE COURT MINUTES, *supra* note 209, at 43, 141. The first lawyer in New Netherland was Lubbert Dinclagen, who had a doctorate in law. He served as *fiscael* in 1634. Jaap Jacobs, Crimen Laæsæ Maiestatis *or Abuse of Power*? *The 1647 Trial of Cornelis Melijn and Jochem Pietersz Kuijter*, *in* OPENING STATEMENTS: LAW, JURISPRUDENCE, AND THE LEGACY OF DUTCH NEW YORK 83, 102 n.20 (Albert M. Rosenblatt & Julia C. Rosenblatt eds., 2013).

[223] Tuesday, June 30, 1654, *in* FORT ORANGE COURT MINUTES, *supra* note 209, at 141, 142.

In 1664, New Netherland fell to the English, who allowed a number of Dutch communities to retain many aspects of Dutch law.[224] Initially, the "Duke's Laws," named for the Duke of York, applied only to English communities on Long Island and were only gradually extended to the entire colony.[225] Criminal jury trial was, of course, the primary procedural innovation, although even this failed to immediately penetrate to the colony's more remote areas.[226] The English ban on felony defense counsel was initially of little direct relevance, since under Dutch law, accused criminals had not been regularly represented by counsel either.

At least four English colonies were eventually formed out of the territory that had encompassed New Netherland. Each continued to embrace a broad role for government officials in conducting prosecutions for crime.

1. New York

As New Netherland transformed into New York, the distinctive Dutch institution of the *schout* survived throughout the colony. In New Amsterdam (modern Manhattan), the Dutch *schout* Allard Anthony continued to prosecute cases following the English takeover.[227] In a case from the late 1670s, for example, the Manhattan sheriff presented a

[224] On the transition, see 2 NELSON, *supra* note 64, at 30-42.

[225] David William Voorhees, *English Law Through Dutch Eyes*, in OPENING STATEMENTS, *supra* note 222, at 207, 208. The Dutch reconquered New Netherland in 1673, but the colony was ceded back to English control in 1674. During the reconquest period, *schouts* prosecuted cases in the traditional Dutch manner. *See* 7 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS 18, 28, 84, 85, 89 (Berthold Fernow ed., New York, Knickerbocker Press 1897); Barth, *supra* note 204, at 131.

[226] *See* 2 NELSON, *supra* note 64, at 32.

[227] *See* JACOBS, *supra* note 208, at 102; 6 THE RECORDS OF NEW AMSTERDAM FROM 1653 TO 1674 ANNO DOMINI: MINUTES OF THE COURT OF BURGOMASTERS AND SCHEPENS 18, 23, 31-32, 34, 37, 38, 43, 56, 64-65, 72, 87 (Berthold Fernow ed., New York, Knickerbocker Press 1897); *see also* GOEBEL & NAUGHTON, *supra* note 54, at 565 ("During the period 1665-1672, the Mayor's Court procedure does not appear from the records to have been very different from that at Albany where the Dutch customs prevailed."). On the Mayor's Court more generally, see Richard B. Morris, *Introduction* to SELECT CASES OF THE MAYOR'S COURT, *supra* note 62, at 1.

criminal charge for disembarking a ship's passengers without giving notice to the city.[228] Other government officials occasionally prosecuted as well. In a 1669 case, the marshal, William Pattison, appeared to prosecute on "behalfe of himselfe and Our Souveraigne Lord the King."[229] The government did not hold exclusive power over prosecution, however, as it appears private prosecutions were regularly brought as well.[230]

Outside of Manhattan, the court of Fort Orange (modern Albany) continued to operate, with the Dutch *schout*, Gerrit Swart, retaining his office, although now bearing responsibility for a wider territory.[231] In the early 1670s, Swart was replaced by Captain Sylvester Salisbury, the first English *schout* for the region.[232] The court's minutes were nonetheless kept in Dutch until 1686, when the court was replaced with a mayor's court for the city of Albany.[233] Other upstate towns continued to employ *schouts*. Schenectady received its own *schout* in the late 1660s,[234] as did Esopus in 1670.[235]

In the late 1600s, New York effectively replaced its Dutch criminal courts with new courts based firmly on English models. In 1683 it adopted courts of oyer and terminer for the trial of felonies, and in 1691 it firmly established county courts of sessions for the trial of misdemeanors.[236]

Yet in one significant respect, the Dutch influence persisted. Prosecution of criminal defendants by government attorneys, which was

[228] Ashton v. Pattishall, *in* SELECT CASES OF THE MAYOR'S COURT, *supra* note 62, at 742.

[229] 6 RECORDS OF NEW AMSTERDAM, *supra* note 227, at 194.

[230] Barth, *supra* note 204, at 129-32.

[231] JACOBS, *supra* note 208, at 103. On the Upper Hudson jurisdictions, see 2 NELSON, *supra* note 64, at 32-38.

[232] SULLIVAN, *supra* note 215, at 40 (stating a date of 1670 for Salisbury's appointment); *cf. id.* at 9 (stating the date as 1671).

[233] Gehring, *supra* note 209, at xxviii.

[234] JACOBS, *supra* note 208, at 103.

[235] 6 RECORDS OF NEW AMSTERDAM, *supra* note 227, at 247-48.

[236] GOEBEL & NAUGHTON, *supra* note 54, at 19, 26-27; Voorhees, *supra* note 225, at 211, 219-20. Goebel and Naughton noted, "So far as existing records show no grand jury ever functioned in New York before 1681." GOEBEL & NAUGHTON, *supra* note 54, at 334. On the transition from Dutch law to English law in New York, see HERBERT A. JOHNSON, ESSAYS ON NEW YORK COLONIAL LEGAL HISTORY 37-54 (1981).

rare in England, continued in New York. William E. Nelson has found that "[l]ocal prosecutors to represent the Crown in criminal proceedings were appointed at least from the outset of the 1700s."[237] Details, unfortunately, are scarce. Goebel and Naughton found that the "[m]anagement of [p]rosecutions" was "[o]ne of the most puzzling aspects of the accusatory process in New York."[238] The courts appear to have granted less deference to the attorney general than did courts in England, occasionally appointing other persons to represent the Crown or granting a *nolle prosequi* without the attorney general's consent.[239] By the eighteenth century, the Crown was "usually represented by a competent Attorney General or a deputy familiar with the routine of securing a conviction."[240] Surviving records of their case outlines suggest a high degree of professional skill.[241]

2. Delaware

The Dutch conquered the former Swedish colony of New Sweden in 1655, and control of what is much of modern Delaware was transferred to the jurisdiction of New Netherland.[242] After the English conquest in 1664, the Dutch courts were allowed to continue largely as they had before, including *schouts* as prosecutors.[243] In 1672, the city of New Castle was converted to English laws, with the *schout* replaced by a sheriff.[244] New Castle would serve as the principal court for the Delaware region.[245] In 1676, court records noted that Captain Edmund Cantwell had been appointed to "be sheriffe or scout and act accordingly for the due Execution of the lawe."[246] That same year, Governor Edmund Andros directed that the high sheriff of New Castle would be "Sheriffe

[237] 2 NELSON, *supra* note 64, at 55.

[238] GOEBEL & NAUGHTON, *supra* note 54, at 366.

[239] *Id.* at 367.

[240] *Id.* at 574.

[241] *Id.* at 621.

[242] Charles T. Gehring, *Introduction* to XX-XXI NEW YORK HISTORICAL MANUSCRIPTS: DUTCH xi (Charles T. Gehring, ed., 1977).

[243] *Id.* at xiii.

[244] *Id.* at xiii; XX-XXI NEW YORK HISTORICAL MANUSCRIPTS, *supra* note 242, at 38-39.

[245] Gehring, *supra* note 242, at xiii.

[246] XX-XXI NEW YORK HISTORICAL MANUSCRIPTS, *supra* note 242, at 117.

as in Engl., and according to the now pra[ctice] on Long Island, to act as a principall office[er for] the Execucion of [the Lawes] but not as a Justice of Peace or Magistrate."[247] With this directive, Andros clearly eliminated the Dutch function of the *schout* as a member of the bench, but it did not eliminate the *schout*'s prosecutorial function in court. Criminal prosecutions in New Castle were formally brought by "Capt[ain] Ed: Cantwell High Sheriffe" on behalf of the king, and the court records describe the sheriff as the "p[laintiff]."[248]

Prosecutorial practice in other counties varied. In the court at Upland (now Chester, Pennsylvania), Sheriff Cantwell prosecuted offenders in the name of the king.[249] By contrast, in Sussex County, Delaware, there did not appear to be a regular system of prosecution. A charge of sorcery against "Symon a Dutchman," for example, was dismissed when the plaintiff did not appear to "prosecute the prisoner."[250]

In 1682, the Delaware counties were transferred to William Penn, and English common law was adopted at a much larger scale.[251] "King's Attorneys" soon began regularly prosecuting cases in the county courts.[252]

3. New Jersey

In West New Jersey, sheriffs did not have any prosecuting role, and private prosecutions were the norm until at least 1695.[253] But government attorneys soon began appearing occasionally for the prosecution. In 1686 Christopher Snowden appeared as "Attorney

[247] *Id.* at 120.

[248] RECORDS OF THE COURT OF NEW CASTLE ON DELAWARE, 1676–1688, at 16 (1904). In a civil suit in 1677, the court allowed the *schout* to appear for the defendant, an "[i]lliterate person . . . there being no other attorney but what the Plt. Imployes." XX-XXI NEW YORK HISTORICAL MANUSCRIPTS, *supra* note 242, at 144.

[249] 7 MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA: THE RECORD OF THE COURT AT UPLAND, IN PENNSYLVANIA 1676–1681, at 51 (Philadelphia, J.B. Lippincott & Co. 1860).

[250] TURNER, *supra* note 57, at 107.

[251] 2 NELSON, *supra* note 64, at 128.

[252] *See* 8 AMERICAN LEGAL RECORDS, *supra* note 57, at 94-98, 131, 138, 145-47, 153-54, 162-63, 182, 197, 198, 204-06, 234-37, 242, 248-49, 251-52, 261, 263, 270, 271, 278, 297-300, 328.

[253] *See* 5 AMERICAN LEGAL RECORDS, *supra note* 143, at 63, 75, 88, 95, 102, 160, 180, 182, 183 (H. Clay Reed & George J. Miller eds., 1944).

Generall for the King" to prosecute a murder case.[254] In 1694, the "King's Attourney Generall" prosecuted a case of a murdered infant child, and shortly thereafter, a case of cohabitation.[255] By the 1700s, the King's (or Queen's) Attorney regularly appeared in the Burlington court to prosecute offenses ranging from adultery to the killing of a horse.[256]

4. Pennsylvania

In Pennsylvania, the state attorney general can be found presenting indictments as early as 1683.[257] Although the attorney general would have a broad role with respect to criminal cases, private prosecutions nonetheless remained common.[258] In 1685, Samuel Hersent was appointed attorney for the County of Philadelphia and empowered to "prossecute all offenders against [th]e penall Laws of this Province."[259] Hersent was also the county sheriff, and the Provincial Council of Pennsylvania soon forbade any sheriff from acting as an attorney in the same court in which he was sheriff, thereby ending the possibility of a *schout*-like official combining prosecutorial and shrieval offices.[260] By 1694/95, in the Chester County Court of Quarter Sessions, attorney David Lloyd represented the Crown to prosecute Josiah Taylor and Mary Williamson for "being too Familier each with other."[261]

Historians Jack Marietta and G.S. Rowe note that in "early Pennsylvania, the task of prosecuting offenses in the name of the crown fell to attorneys-general or, more likely, to their deputies ('Attorneys for

[254] *Id.* at 56.

[255] *Id.* at 167, 177.

[256] *See, e.g.*, *id.* at 261-62 (adultery), 263 (theft), 297-98 (killing of a horse). For cases of prosecution by government attorneys where the charge is less clear, see *id.* at 204, 307, 309, 312.

[257] OLIVER W. HAMMONDS, THE ATTORNEY GENERAL IN THE AMERICAN COLONIES 13 (1939).

[258] *Id.* at 14.

[259] 1 COLONIAL RECORDS OF PENNSYLVANIA: MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 117 (Harrisburg, Theophilus Fenn 1838) (minutes from Nov. 15, 1685).

[260] *Id.* at 121 (minutes from Feb. 1, 1686); 1 FRANK M. EASTMAN, COURTS AND LAWYERS OF PENNSYLVANIA: A HISTORY 120 (1922).

[261] RECORD OF THE COURTS OF CHESTER COUNTY, PENNSYLVANIA, 1681–1697, at 339 (1910).

the King')."[262] "Prosecutions of minor criminal activities remained in the hands of laymen victims," they suggest, "but even in the first decade of the eighteenth century, agents for the king and the Proprietor . . . managed the prosecutions of more severe crimes."[263] As the eighteenth century progressed, these officials "more frequently replaced citizen prosecutors" with respect to even minor offenses.[264]

B. The Prosecutor in Other Jurisdictions

Colonies with no connection to New Netherland embraced lawyer prosecutors almost as enthusiastically, suggesting that the legacy of the *schout* was not the primary factor driving this change.

1. New England Colonies

The New England colonies adopted lawyer prosecutors in the second half of the seventeenth century. The earliest innovation appears to be in Rhode Island, which in 1650 authorized its attorney general to "bringe all such matters of penall lawes to tryall."[265]

Other colonies soon followed. In 1662, the Connecticut General Assembly appointed William Pitkin to prosecute four individuals as "Attourney for [th]e Gener[al] Court" at a court to be held in Hartford.[266] In 1704, the Connecticut legislature authorized counties to appoint "a sober, discreet and religious person" as "Atturney for the Queen, to prosecute and implead in the lawe all criminall offenders, and to doe all other things necessary or convenient as an atturney to suppress vice and im[m]oralitie."[267] Massachusetts appointed an attorney general in 1680 to handle certain witchcraft cases.[268] His

[262] MARIETTA & ROWE, *supra* note 90, at 163.

[263] *Id.*

[264] *Id.*

[265] HAMMONDS, *supra* note 257, at 15 (quoting Act of General Court, May 23, 1650).

[266] 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 388 (J. Hammond Trumbull ed., Hartford, CT, Brown & Parsons 1850).

[267] 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 468 (Charles J. Hoadly ed., Hartford, CT, Case, Lockwood & Brainard 1868). This appears not to have displaced private prosecutions, which continued in Connecticut, and may have been used primarily to prosecute moral offenses. Barth, *supra* note 204, at 136-37.

[268] HAMMONDS, *supra* note 257, at 5.

responsibilities were eventually expanded to cover prosecutions of a broader variety of cases, although the formal scope of the job was left somewhat unclear.[269] New Hampshire introduced the office of attorney general in 1683 and charged him with prosecuting cases before grand juries.[270]

2. Southern Colonies

The introduction of lawyer prosecutors in southern colonies tended to parallel developments in other colonies. In Virginia, the attorney general was responsible for prosecutions of at least some crimes by the late seventeenth century, and special king's attorneys were occasionally appointed in the counties.[271] A 1705 Virginia law recognized that the attorney general would frequently prosecute a wide array of crimes.[272] In 1711, Virginia governor Alexander Spotswood arranged for deputy queen's attorneys to regularly prosecute cases in the county courts.[273]

In 1660, Maryland authorized its attorney general to represent the Crown in all criminal and civil cases.[274] By the eighteenth century, the attorney general appeared in the provincial court and some of the county courts; deputy attorneys, called "clerks of the peace" or "clerks of indictments" prosecuted cases in the other county courts.[275]

By 1708, South Carolina's attorney general was authorized to "Prosecute all Matters Criminall as well as Civill."[276] In a 1734 piracy case, for example, the prosecution was represented by the "King's Advocate General."[277] Similarly, the North Carolina attorney general

[269] *Id.* at 6.

[270] JACOBY, *supra* note 201, at 15.

[271] SCOTT, *supra* note 55, at 80.

[272] Act of Oct. 1705, ch. 19, *in* 3 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 287, 293 (William Waller Hening ed., Philadelphia, Thomas Desilver 1823); *see also* RANKIN, *supra* note 135, at 54-56.

[273] ROEBER, *supra* note 133, at 64.

[274] HAMMONDS, *supra* note 257, at 3-4.

[275] ELLEFSON, COUNTY COURTS AND THE PROVINCIAL COURT, *supra* note 141, at 147-48, 207.

[276] HAMMONDS, *supra* note 257, at 18 (quoting Letter from the Lords Proprietors of Carolina to William Saunders (Dec. 11, 1708), *in* COMMISSIONS AND INSTRUCTIONS FROM THE LORD PROPRIETORS OF CAROLINA TO PUBLIC OFFICIALS OF SOUTH CAROLINA, 1685–1715, at 215 (A.S. Salley, Jr. ed., 1916)).

[277] PA. GAZETTE, Sept. 19, 1734.

was involved in the prosecution of criminal cases at least by 1725.[278] An act of 1738/39 authorized the attorney general to appoint deputy attorneys in each county to prosecute crimes.[279]

Georgia appointed its first attorney general in 1754, with prosecution of crimes being one of his primary duties.[280]

C. Interaction with Defense Counsel

The history recounted above allows us to make somewhat more refined connections between the rise of lawyer prosecutors and the rise of defense counsel in felony cases. At the broadest level, the connections clearly run in one direction; every jurisdiction that recognized defense counsel did so *after* employing lawyers far more broadly as prosecutors than was the case in England. The initial innovation was the use of lawyer prosecutors, and felony defense attorneys as an "evening-up" response is an entirely plausible explanation.

At the same time, two very significant caveats must be noted. First, not every jurisdiction with lawyer prosecutors recognized a right to defense counsel. And, second, some of the jurisdictions that did recognize the right did so well after the introduction of lawyer prosecutors.

The most glaring example of the first caveat is the colony of New York, which had employed state prosecutors from its earliest days as a Dutch colony and employed lawyer prosecutors in the late seventeenth century following the English takeover.[281] If lawyer prosecutors consistently drove the recognition of defense counsel, New York should have been at the epicenter of that change. Yet, as far as I am able to discern, New York did not explicitly recognize such a right until the American Revolution.[282]

With respect to the second caveat, there was often a significant time lag between the introduction of lawyer prosecutors and recognition of

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[278] Barth, *supra* note 204, at 142; *see also* HAMMONDS, *supra* note 257, at 11; Spindel, *supra* note 178, at 145.

[279] PAUL M. MCCAIN, THE COUNTY COURT IN NORTH CAROLINA BEFORE 1750, at 33 (1954).

[280] Olson, *supra* note 179, at 237-38.

[281] *See supra* Part II.B.4.

[282] *See supra* Part II.B.4.

felony defense counsel. In Virginia, for example, lawyers began prosecuting in the late 1600s, but the colony did not recognize a statutory right to defense counsel until 1734.[283] Rhode Island empowered its attorney general to prosecute cases in 1650, but many decades appear to have elapsed before defense counsel was recognized.[284] Similarly, South Carolina introduced lawyer prosecutors in 1708 but did not authorize felony defense counsel until 1731.[285] New Jersey employed lawyer prosecutors beginning in the 1680s, but felony defense counsel did not immediately emerge.[286] Pennsylvania might demonstrate the closest connection, introducing lawyer prosecutors in the 1680s and felony defense counsel in 1701, but even this can hardly be said to be immediate.[287] And the introduction of lawyer prosecutors did not seem to be a driving factor in Pennsylvania's adoption of defense counsel in 1701.[288]

These time lags suggest that, if lawyer prosecutors were ultimately driving the recognition of defense counsel, it took some period of time for those effects to work themselves out. Only after a period of years did it become apparent that some "evening out" needed to occur between the prosecution and the defense. Further archival research across a range of jurisdictions may help clarify the details of the transition, but it is likely that much of the story will remain mysterious.

IV. AMERICAN INFLUENCES ON ENGLISH ADVERSARY CRIMINAL TRIAL

One of the great puzzles of the development of adversary criminal trial in England is precisely why the judges began to allow defense counsel to appear in felony cases. As Professor Langbein noted, "We do not know how the judges came to work the change in felony procedure. If the judges or some of them deliberated about the change and came to a collective decision to alter the practice, they left no record of it."[289] It

[283] *See supra* notes 133–35, 271–73 and accompanying text.

[284] *See supra* notes 172–75, 265 and accompanying text.

[285] *See supra* notes 122–32, 276–79 and accompanying text.

[286] *See supra* notes 253–56 and accompanying text.

[287] *See supra* notes 84–88, 257–64 and accompanying text.

[288] *See supra* Part II.B.1.

[289] LANGBEIN, *supra* note 18, at 173.

appears that individual trial judges made the decision, as an exercise of discretion.[290]

For a tradition-bound profession, such a change would be far more palatable if there was evidence that it proved workable elsewhere. If, as this Article suggests, "lawyerized" criminal trial for felonies was first developed in America, is it possible that the American experience influenced English development? Did judges rely, at least in part, on the successful American experiment? Direct evidence, unfortunately, is and will likely remain elusive. Nonetheless, American influence is at least a possibility.

Such influence requires a means of transmission. How, precisely, could knowledge of the American experiment have reached English judges and barristers? Some potential suspects can be quickly ruled out. There were no printed law reports in colonial America, so decisions of American courts were not readily available.[291] Similarly, the routine proceedings of American criminal courts were not likely to have received any attention from the London newspapers.

Official channels might have been somewhat more promising. The Privy Council reviewed (and often vetoed) the statutes of colonial legislatures.[292] After 1696, this review usually followed the advice of the Board of Trade.[293] In 1718, an officer known as the "King's Counsel" was appointed to offer legal advice with respect to colonial legislation.[294] Members of the Privy Council and the Board of Trade, in addition to the King's Counsel, would therefore have been aware of the 1701 and 1718 Pennsylvania statutes, as well as the 1731 South Carolina statute and the 1734 Virginia statute. Of these, only the King's Counsel appears to have been a practicing barrister.[295] From 1725 to 1746, the King's Counsel was

[290] *Id.*

[291] Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEG. HIST. 48, 48 (1981).

[292] ELMER BEECHER RUSSELL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 15-16 (1915).

[293] *Id.* at 44-45.

[294] *Id.* at 53, 63.

[295] *See id.* at 65-66. The Board of Trade sometimes included the lord chancellor, a judicial figure, but not one with responsibility for criminal trials. *Id.* at 45.

Francis Fane, a barrister of Middle Temple.[296] Fane could certainly have related the news of the South Carolina and Virginia statutes to his fellow barristers, but he would have had little knowledge of how the change had actually operated. Nor would he have been familiar with the jurisdictions that had introduced felony defense counsel without statutory innovation.

Direct knowledge of judicial proceedings was far less likely to have crossed the Atlantic. The Judicial Committee of the Privy Council reviewed decisions of American courts, but only in civil cases, and its decisions were not printed.[297] Relatedly, admiralty officials may have had familiarity with American practice, but their lawyers were trained under the civil law, not common law, and their professional society, Doctor's Commons, was entirely distinct from those of the common lawyers.[298]

An alternative explanation, worthy of consideration, is that persons with direct experience with the introduction of felony defense counsel in America transmitted their knowledge through the English Inns of Court.

The four English Inns — Middle Temple, Inner Temple, Lincoln's Inn, and Gray's Inn — were the center of the English legal profession.[299] All barristers had to be admitted to the bar of an Inn in order to appear before the central royal courts. Each Inn was housed in an impressive physical campus. At the center of Inn life was the Hall, where judges, barristers, and law students would dine together.[300]

The American experience with felony trials could have been transmitted through the Inns of Court in at least two ways. One possibility is that English barristers who had spent time in America

[296] *Id.* at 66; ARTHUR ROBERT INGPEN, THE MIDDLE TEMPLE BENCH BOOK 242 (1912).

[297] MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 73, 141 (2004). For a comprehensive catalog of colonial appeals, see *Appeals to the Privy Council from the American Colonies: An Annotated Digital Catalogue*, THE AMES FOUND., https://amesfoundation.law.harvard.edu/ColonialAppeals/index.php (last updated Sept. 23, 2021) [https://perma.cc/6B2A-XMMS].

[298] JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 131-33, 180-81 (5th ed. 2019).

[299] For an overview, see W.C. RICHARDSON, A HISTORY OF THE INNS OF COURT: WITH SPECIAL REFERENCE TO THE PERIOD OF THE RENAISSANCE (1975).

[300] *Id.* at 26.

introduced the practice to their fellow members. The primary difficulty with this theory is that there appear to be very few English barristers who had spent any time practicing law in the colonies; those that immigrated to America tended to stay there.[301]

One curious possibility concerns William Keith, who served as the lieutenant governor of Pennsylvania from 1716 to 1726.[302] Keith had originally entered Middle Temple in 1704, and, although biographical accounts are silent on this point, Middle Temple records confirm that he was called to the bar in late 1729.[303] This suggests that Keith qualified as a barrister after he departed Pennsylvania in March 1728, although it is unclear to what extent he developed any legal practice.[304] Nonetheless his potential presence in the Inns, as a former high-ranking official in the colony that had done the most to promote the use of counsel in felony cases, just as the English courts were beginning to make tentative steps in this direction, is noteworthy.

The second theory involves the Inn's American members, most of whom initially entered as students. Education at the Inns of Court was not cheap, and the men who attended the Inns tended to come from families with substantial wealth. By the early eighteenth century, annual costs amounted to approximately £100, well beyond the reach of most parents.[305] The American members were often the sons of prominent colonial officials, and many would have had familiarity with American court practices.[306] Some had already developed legal practices

[301] For an overview, see DAVID LEMMINGS, PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY 231-39 (2000); *see also* John Colyer, *The American Connection*, *in* HISTORY OF THE MIDDLE TEMPLE 239, 281-85 (Richard O Havery ed., 2011).

[302] Charles P. Keith, *Sir William Keith*, 12 PA. MAG. HIST. & BIOGRAPHY 1, 9, 23 (1888).

[303] Colyer, *supra* note 301, at 283; David Haugaard, *Sir William Keith*, *in* 2 LAWMAKING AND LEGISLATORS IN PENNSYLVANIA: A BIOGRAPHICAL DICTIONARY 561, 562 (Craig W. Horle, Jeffrey L. Scheib, Joseph S. Foster, David Haugaard, Carolyn M. Peters & Laurie M. Wolfe eds., 1997).

[304] Keith, *supra* note 302, at 23. On Keith's time in London, see Haugaard, *supra* note 303, at 582-84.

[305] DAVID LEMMINGS, GENTLEMEN AND BARRISTERS: THE INNS OF COURT AND THE ENGLISH BAR 1680–1730, at 24 (1990); Colyer, *supra* note 301, at 242.

[306] On American students from Philadelphia and Charleston, see Sally Hadden, *London's Middle Temple and Law Students from the New World*, *in* ENGLISH LAW, THE LEGAL

themselves in the colonies. One can easily imagine these American students explaining how American courts were employing defense counsel in felony cases. Barrister John Colyer has speculated that the pro-colonial stance of members of Parliament such as Edmund Burke and John Dunning may have been "created or nurtured by their contact with the young American students they met in [Middle Temple] Hall."[307] A similar dynamic earlier in the century might help explain a willingness to experiment with defense counsel.

One should be careful not to imagine, however, that this simply involved an American student casually speaking with a royal judge over dinner. Two factors limited this possibility. First, seating in the Halls for dining was determined by rank. In the Tudor and early Stuart periods, dining in the Inns was rigidly hierarchical, with tables arranged by rank, and with the more senior members being served before more junior members.[308] These distinctions may have loosened slightly by the eighteenth century, but the newest members were still relegated to "clerk's" tables.[309] Second, dining in Hall had become less frequent. In the early eighteenth century, it was still expected that students and practicing barristers would "reside and dine together during the four law terms" and eating a certain number of meals in Hall was still a required step for admission to the bar.[310] Nonetheless, many Inn members did not dine in Hall, and between 1688 and 1730, the number of diners in Gray's Inn, for example, declined by more than half.[311] Between 1710 and 1729, evening meals were discontinued at all of the Inns.[312] As historian David Lemmings has noted, the Inns "entered the Hanoverian period as pale shadows of their former selves."[313]

PROFESSION, AND COLONIALISM: HISTORIES, PARALLELS, AND INFLUENCES (Cerian Griffiths & Łukasz Korporowicz eds.) (forthcoming 2024) (on file with author).

[307] Colyer, *supra* note 301, at 248.

[308] WILFRID R. PREST, THE INNS OF COURT UNDER ELIZABETH I AND THE EARLY STUARTS 48 (1972).

[309] BURTON ALVA KONKLE, BENJAMIN CHEW 42 (1932).

[310] LEMMINGS, *supra* note 305, at 31, 63-64.

[311] *Id.* at 34-36.

[312] *Id.* at 41.

[313] *Id.* at 40.

The mechanisms of transmission are therefore far more likely to be indirect. American members could pass on their knowledge to barristers and to fellow students, many of whom would become barristers themselves and aware that denial of counsel to felony defendants had been successfully abandoned elsewhere. American members who formed friendships with their English counterparts may well have corresponded with them after their return to America.

To be clear, there is no direct evidence of American members of the Inns of Court transmitting legal knowledge to their English counterparts. But it is the most likely locus for the transmission of transatlantic legal knowledge and is a possibility worthy of serious consideration. This Part accordingly identifies some of the American members who would have been well-positioned to explain the American experience with defense counsel.

A. Pennsylvania Members

Pennsylvania recognized defense counsel in felony cases in 1701,[314] so any students attending after that point are potentially relevant. The most critical, however, are those that attended in the early 1730s, when English courts first permitted felony defense counsel.[315] By this point, the Pennsylvania experiment had been ongoing for over thirty years.

In 1713, Andrew Hamilton, who had already built an accomplished career as an attorney in Pennsylvania, Maryland, and Delaware, became a member of Gray's Inn and quickly qualified as a barrister.[316] Hamilton returned to Pennsylvania, and served as attorney general of the colony from 1717 to 1724.[317] In 1729, he sent his son, also named Andrew Hamilton, to Middle Temple; the younger Hamilton became a barrister three years later.[318] If we were looking for a well-informed Pennsylvanian who was present at the Inns right around the time that English courts began recognizing the right to counsel in felony cases,

[314] *See supra* Part II.B.1.

[315] *See supra* note 21 and accompanying text.

[316] BURTON ALVA KONKLE, THE LIFE OF ANDREW HAMILTON, 1676–1741, at 13, 16-17 (1941).

[317] *Id.* at 26, 35.

[318] Colyer, *supra* note 301, at 269.

there is no better suspect than the younger Hamilton. His father's career would have given him intimate familiarity with Pennsylvania legal practice.

Another equally well-positioned student was Joseph Growdon, who entered Gray's Inn in 1730.[319] His father, also named Joseph Growdon, served fifteen terms in the Pennsylvania Assembly.[320] He was the speaker in the session that adopted the Charter of Privileges, as well as for seven other sessions; he also served as the colony's chief justice for six years.[321] The younger Growdon was, at the time of his admission, the attorney general of Pennsylvania and would remain so until 1738, so it is not entirely clear whether he ever physically attended the Inn.[322]

Earlier entrants include William Assheton, who entered Gray's Inn in 1713,[323] and James Trent, who entered Middle Temple in 1718.[324] Trent's father, William Trent, was a prosperous Philadelphia merchant who, though lacking legal training, had served on the Pennsylvania Supreme Court, where he heard felony cases.[325] William Trent was also the speaker of the Pennsylvania Assembly when the 1718 legislation that confirmed the right of felony defense counsel was passed.[326] In 1720, William Allen entered Middle Temple.[327] The son of a wealthy merchant, Allen later became the chief justice of the Pennsylvania Supreme Court.[328] Although Allen stayed in England until 1726, he was often away

[319] E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT 91 (1924).

[320] Joseph S. Foster, *Joseph Growdon*, *in* 1 LAWMAKING AND LEGISLATORS IN PENNSYLVANIA: A BIOGRAPHICAL DICTIONARY 381, 381 (Craig W. Horle, Marianne S. Wokeck, Jeffrey L. Scheib, Joseph S. Foster, David Haugaard, Rosalind J. Beiler & Joy Wiltenburg eds., 1991).

[321] *Id.* at 381, 385; *Session List: The General Assembly of Pennsylvania, 1682–1709*, *in id.* at 59, 77-79.

[322] JONES, *supra* note 319, at 91.

[323] *Id.* at 8.

[324] Colyer, *supra* note 301, at 268.

[325] *Id.*; G.S. ROWE, EMBATTLED BENCH: THE PENNSYLVANIA SUPREME COURT AND THE FORGING OF A DEMOCRATIC SOCIETY, 1684–1809, at 51 (1994); Carolyn M. Peters, *William Trent*, *in* 2 LAWMAKING AND LEGISLATORS IN PENNSYLVANIA, *supra* note 303, at 993, 998.

[326] Peters, *supra* note 325, at 998. William Trent also served briefly as chief justice of New Jersey in the 1720s. *Id.* at 999.

[327] Colyer, *supra* note 301, at 268.

[328] Ruth Moser Kistler, *William Allen, Provincial Man of Affairs*, 1 PA. HIST. 165, 165-66 (1934).

from Middle Temple, including a stint at Cambridge and sightseeing on the continent.[329] Another Middle Temple entrant that same year was Anthony Palmer of Philadelphia, who became a barrister in 1726.[330] Palmer's father had served as president of Pennsylvania's Provincial Council.[331]

A slightly later arrival was Benjamin Chew, who entered Middle Temple in 1743.[332] But Chew brought deep familiarity with Pennsylvania and Delaware legal practice. Chew had been a clerk for Andrew Hamilton the elder in Philadelphia, and his father had been the chief justice of Delaware, a colony, like Pennsylvania, that had recognized defense counsel in felony cases since the 1701 Charter of Privileges.[333]

B. South Carolina Members

South Carolina recognized a statutory right to counsel in 1731. An especially intriguing South Carolinian to enter the Inns that decade is Charles Pinckney, who entered Inner Temple in 1734.[334] Pinckney had served as South Carolina's attorney general from 1732 to 1733, and thus would have had deep familiarity with the state's legal system.[335] His time at the Inns was limited, however, and he returned to South Carolina after six months.[336]

Other South Carolinians from that decade include Stephen Fox Drayton, who may have briefly attended Inner Temple in 1733;[337] William Wragg, who was admitted to Middle Temple in 1725 and called to the bar

[329] Craig W. Horle, *William Allen*, *in* 3 LAWMAKING AND LEGISLATORS IN PENNSYLVANIA: A BIOGRAPHICAL DICTIONARY 231, 232 (Craig W. Horle, Joseph S. Foster & Laurie M. Wolfe eds., 2005).

[330] JONES, *supra* note 319, at 166.

[331] *Id.*

[332] Colyer, *supra* note 301, at 270.

[333] *See* KONKLE, *supra* note 309, at 25, 29-31; *supra* note 84 and accompanying text.

[334] JONES, *supra* note 319, at 170.

[335] SMITH, *supra* note 132, at 412.

[336] CANADY, *supra* note 132, at 220.

[337] J.G. de Roulhac Hamilton listed Stephen Fox Drayton entering Middle Temple in 1733. J.G. de Roulhac Hamilton, *Southern Members of the Inns of Court*, 10 N.C. HIST. REV. 273, 279 (1933). Inn records, however, show Drayton entering Inner Temple in 1733. 4 A CALENDAR OF THE INNER TEMPLE RECORDS 279 (R.A. Roberts ed., 1933). On South Carolinians and the Inns of Court, see generally CANADY, *supra* note 132, at 206-50.

in 1733;[338] and Thomas Corbett who entered Inner Temple in 1739.[339] A slightly later arrival was James Wright, son of the chief justice of South Carolina, who entered Gray's Inn in 1741.[340]

C. Virginia Members

In the early eighteenth century, most of Virginia's lawyers had been educated at one of the Inns of Court.[341] William E. Nelson notes that "Virginia sent more of its sons to study law in the Inns of Court than did any other North American colony — over sixty in all."[342] The earliest students mostly intended to be owners of plantations, rather than practicing lawyers, but many of the later students embarked on legal careers.[343]

A handful of Virginia students entered the Inns in close proximity to Virginia's 1734 statutory adoption of a right to defense counsel in felony cases. Thomas Nelson entered Inner Temple in 1733; George Carter entered Middle Temple in 1733; John Grimes entered Inner Temple in 1736; and Peyton Randolph entered Middle Temple in 1739.[344] Randolph, who would later become the first president of the Continental Congress, is particularly intriguing, as his father, Sir John Randolph, was Speaker of the Virginia House of Burgesses in 1734.[345]

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[338] JONES, *supra* note 319, at 220.

[339] *Id.* at 52-53. Hamilton also lists William Gregory as entering Middle Temple. Hamilton, *supra* note 337, at 279. Although Gregory later became a judge in South Carolina, he was a native of Ireland. Colyer, *supra* note 301, at 284; JONES, *supra* note 319, at 89.

[340] JONES, *supra* note 319, at 221.

[341] WARREN, *supra* note 61, at 45.

[342] 4 NELSON, *supra* note 171, at 15.

[343] *See* ROEBER, *supra* note 133, at 24, 56.

[344] Hamilton, *supra* note 337, at 278; Colyer, *supra* note 301, at 269; JONES, *supra* note 319, at 40-41, 91. On Nelson, see JONES, *supra* note 319, at 163. Hamilton also lists Robert Lightfoot as entering Middle Temple in 1734. Hamilton, *supra* note 337, at 278. Although Lightfoot later served as an admiralty judge in Virginia, he was a native of England. Colyer, *supra* note 301, at 284; WILKINS UPDIKE, MEMOIRS OF THE RHODE-ISLAND BAR 246 (Boston, Thomas H. Webb & Co. 1842); JONES, *supra* note 319, at 131-32.

[345] JOHN J. REARDON, PEYTON RANDOLPH 1721–1775: ONE WHO PRESIDED, at xi, 4-5 (1982).

D. Other Colonies

Several Massachusetts students might have transmitted knowledge of Massachusetts's innovations with respect to defense counsel. Joseph Gooch, for example, entered Inner Temple in 1720.[346] An even more promising candidate is Jonathan Belcher, who entered Middle Temple in 1730 and was called to the bar in 1734.[347] His father, also named Jonathan Belcher, was the governor of Massachusetts and New Hampshire from 1730–1741.[348]Among students from other colonies, a noteworthy person is Stephen Bordley of Maryland, who was admitted to Inner Temple in 1729.[349] His father was a prominent lawyer who had served as attorney general of Maryland.[350]

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The factors Professor Langbein identified as pushing English courts to recognize felony defense counsel[351] would have operated, of course, even without the presence of any American influences, and England itself had taken the first steps toward greater use of defense counsel with the Treason Trials Act of 1696. But the American example should not be overlooked as a possible contributing factor. Americans familiar with the introduction of felony defense counsel were present in the heart of legal London just as the English courts were beginning to consider the same innovation. These members from across the seas may have helped assuage doubts about the wisdom of such a radical change to established criminal procedure.

CONCLUSION

Due to the frustrating limitations of the source material, the full story of the development of adversarial criminal trial in the American colonies will likely never be fully told. Nonetheless, this Article sketches out the

346 JONES, *supra* note 319, at 88.

347 Colyer, *supra* note 301, at 269; JONES, *supra* note 319, at 15.

348 S. Buggey, *Belcher, Jonathan*, *in* 4 DICTIONARY OF CANADIAN BIOGRAPHY (1979), http://www.biographi.ca/en/bio/belcher_jonathan_4E.html [https://perma.cc/DJ83-UTMQ].

349 JONES, *supra* note 319, at 26.

350 *Id.*

351 *See supra* notes 196–98 and accompanying text.

story's broad contours and suggests areas where further research might potentially fill in some details.

The fictional character of Perry Mason was always very American. But this Article makes clear just how very American he was. It was American jurisdictions, breaking free from centuries of common law tradition, that first allowed counsel to provide a full defense to persons accused of felony. They did so for a variety of reasons, with Pennsylvania likely taking the lead from fear of pirates being tried without juries. The introduction of public prosecutors was indisputably significant, as many jurisdictions sought to give the defense the same benefits that were provided to the prosecution. But the process was far from seamless and certainly not automatic or immediate.

More speculatively, it is possible that this American experiment with felony defense counsel shaped English practices. We often imagine the common law as taking a one-way voyage from England to America. But in this context, at least, legal ideas may have held a return ticket. Colonial Americans, familiar with the American use of defense counsel, were present at the center of the English legal profession during the period in which English courts began taking the first steps to recognize felony defense counsel.

The early eighteenth century in the North American colonies was a transformative period that continues to shape the everyday conduct of felony criminal trials both in England and in America.[352] It is a period that deserves to be more widely appreciated and widely celebrated for its distinctive contribution to criminal procedure. Every lawyer representing felony defendants today in the common law world is a direct descendant of that unknown man who first stood up in a Pennsylvania courtroom and proudly introduced himself as "counsel for the defense."

[352] For an argument that the rise of American defense counsel led to the Confrontation Clause of the Sixth Amendment, see Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995); *see also* Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 354 (2009) ("[I]nterpreters need to be concentrating on the American history of the adversary system's development, not the English history, for surely it was the American developments that were the foundation for the rights that were constitutionalized.").