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Let the Facts Speak for Themselves: The Empiricist Origins of the Right to Remain Silent

Randa Helfield

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Let the Facts Speak for Themselves: The Empiricist Origins of the Right to Remain Silent

Abstract

Historians have traced the right to silence to early canon law, the political conflicts of the sixteenth and seventeenth centuries, and even The Prisoner's Counsel Act, which effectively silenced the accused by allowing his lawyer to speak for him. This article argues that changes in philosophical notions of truth best explain how, given the importance of the accused's testimony at the altercation trial, her silence could ever have been tolerated and ultimately enforced as a right. By the mid-eighteenth century, the rise of empiricism had shifted the trial's reliance on testimony to a preference for facts, which seemed more immediately verifiable. Once the accused was no longer seen as the most important evidentiary resource, he could be silenced and his lawyer could speak for him without compromising his verdict. Thus the right to counsel did not create the right to silence; rather, the rise of empiricism enabled the creation of both.

Special Issue

Law, Authority & History: A Tribute to Douglas Hay

Let the Facts Speak for Themselves: The Empiricist Origins of the Right to Remain Silent*

RANDA HELFIELD[†]

Historians have traced the right to silence to early canon law, the political conflicts of the sixteenth and seventeenth centuries, and even The Prisoner's Counsel Act, which effectively silenced the accused by allowing his lawyer to speak for him. This article argues that changes in philosophical notions of truth best explain how, given the importance of the accused's testimony at the altercation trial, her silence could ever have been tolerated and ultimately enforced as a right. By the mid-eighteenth century, the rise of empiricism had shifted the trial's reliance on testimony to a preference for facts, which seemed more immediately verifiable. Once the accused was no longer seen as the most important evidentiary resource, he could be silenced and his lawyer could speak for him without compromising his verdict. Thus the right to counsel did not create the right to silence; rather, the rise of empiricism enabled the creation of both.

Les historiens font remonter le droit au silence aux débuts du droit canonique, aux conflits politiques des XVI^e et XVII^e siècles, et même à l'adoption du *Prisoner's Counsel Act*, qui autorise l'accusé à garder le silence et permet à son avocat de parler en son nom. Cet article retrace l'évolution des concepts philosophiques entourant la vérité afin d'expliquer pourquoi, malgré l'importance du témoignage de l'accusé lors d'un procès, le fait de garder le silence a pu être toléré et, en fin de compte, appliqué en tant que droit. Au milieu du XVIII^e siècle, la

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[†] Randa Helfield holds an LLB from Osgoode Hall Law School and a PhD in British Literature from Cornell University. She taught Eighteenth and Nineteenth-Century Literature at the Université de Montréal and has published in legal and literary journals. Her special interest is the relationship between law and literature, and her current research examines the cross-connections between Gothic fiction and the law of Evidence.

montée de l'empirisme fait prévaloir les faits, qui semblent plus immédiatement vérifiables, sur le témoignage. Dès lors que l'accusé n'a plus été considéré comme la principale source de la preuve, il a pu garder le silence et laisser son avocat le défendre, sans compromettre le verdict. Par conséquent, le droit à un avocat n'a pas créé le droit au silence; c'est plutôt l'essor de l'empirisme qui a permis la création des deux.

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HISTORIANS HAVE OFFERED WIDELY DIFFERENT ACCOUNTS of the origins of the right to remain silent. Leonard W. Levy traces the privilege against self-incrimination and the right to silence to common-law procedures established in the Middle Ages, which he argues were invoked and reinforced by men like John Lilburne during the religious and political conflicts of the sixteenth and seventeenth centuries. R.H. Helmholz and M.R.T. MacNair trace the common-law privilege against self-incrimination to the *nemo tenetur* principle and argue that it was an unacknowledged borrowing from Roman-canon law.¹ Other historians link its origin to the interjurisdictional struggles between the common law and ecclesiastical courts in the seventeenth century, and the attempt of the judiciary to impose limits on monarchical power.²

John Langbein argues, however, that the right to silence was an accidental by-product of the *Prisoner's Counsel Act* of 1836, which finally gave defendants the full right to counsel. The Act transformed the "Accused Speaks" trial (which

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1. Leonard W Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (New York: Oxford University Press, 1968); RH Hemholz, "The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century" in RH Hemholz et al, eds, *The Privilege Against Self-Incrimination: Its Origins and Development* (Chicago: University of Chicago Press, 1997); MRT MacNair, "The Early Development of the Privilege against Self-Incrimination" (1990) 10:1 Oxford J Legal Stud 66 at 66-84.
 2. Charles M Grey, "Self-Incrimination in Interjurisdictional Law: The Sixteenth and Seventeenth Centuries" in Hemholz, *supra* note 1.

put pressure on the accused to speak in her own defence) to the adversarial system (which allowed lawyers to speak for her). As a result, the accused was effectively silenced and protected against self-incrimination.³ However, as Langbein himself goes to great lengths to argue, the English altercation or “Accused Speaks” trial was designed to put pressure on the accused to tell his story because, as the person presumably closest to the events in question, his testimony was seen as critical to the ascertainment of truth.⁴ Indeed, one of the chief concerns of those opposing the Prisoner’s Counsel Act was that if lawyers were allowed to speak for defendants, defendants’ testimony—the most important evidence available—would be lost.⁵ And yet the Act was passed and the accused was allowed to remain silent at her trial. Moreover, that silence became a recognized legal right in the years that followed. The question is, if the accused’s testimony was really so important, why was the Act permitted to pass, and how could the accused’s silence eventually become a protected legal right?

This article attempts to answer these questions by following the lead of legal historians such as Douglas Hay, who have used their insights into other disciplines to argue for the close connection between legal and social change. Rather than treating the law as a closed system and explaining the right to silence as the result of other legal developments, my article looks to non-legal changes in society for an explanation, specifically changes in philosophical ideas about the nature of truth. My argument is that legal authority, at any given time, derives from a shared societal belief that it produces accurate and consistent verdicts, and therefore one must look to epistemological changes—*i.e.* changing notions of truth—to understand why legal changes occur. In the late seventeenth century, the rise of science fostered the empiricist idea that truth was derived from sensory observation and first-hand experience, rather than the second-hand narratives of others. By the mid-eighteenth century, the trial’s reliance on witness testimony, including that of the accused, had shifted to a preference for circumstantial evidence made up of a series of connected and corroborating facts, which seemed more immediately verifiable. As a result, the accused was no longer seen as the most important evidentiary resource and could therefore remain silent. The accused’s lawyer could speak for the accused without compromising the truth. The right to counsel did not create the right to silence, as Langbein suggests. Rather, the rise of empiricism enabled the creation of both.

3. John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at 5-6 [Langbein, *Origins*].

4. *Ibid* at 5, 21.

5. *Ibid* at 2.

It is important to note that my argument is not incompatible with that of other legal historians who have attributed the right to silence to religious and political changes in society or to the many legal reforms that occurred in the late eighteenth century, up to and including *The Prisoner's Counsel Act*. Many of these factors no doubt helped pave the way for the creation of this right and should be acknowledged. However, focusing only on changes in politics, religion or legal procedure, as other historians do, rather than the underlying epistemological concerns, does not fully explain how a right to silence could ever become fully entrenched in a legal system that once depended on the accused's testimony as the most important means of determining the truth. Looking to epistemic considerations and tracing the changes in social and legal notions of truth, particularly the rise of empiricism in the late seventeenth and eighteenth centuries and its impact on the laws of evidence, can provide a fuller and therefore more satisfying explanation for how, when, and why the right to silence was finally able to gain traction and be granted the explicit legal recognition and protection it did. The article therefore begins with a brief outline of the epistemological changes that influenced the development of the law of evidence, from medieval law's religious emphasis on divine manifestation, to the altercation trial's troubled reliance on witness testimony and the unsworn statements of the accused. Next, it traces the rise of empiricism in the late seventeenth and eighteenth centuries and its impact on the law, and shows how the new emphasis on factual evidence was hailed as solving the problems inherent in witness testimony, including the unsworn statements of the accused. The claim that facts could "speak for themselves" diminished the need to rely as heavily on witnesses' stories as an evidentiary source.

The third section provides a reading of *The Prisoner's Counsel Act* to show that the changing perception of truth—that truth was to be found in a chain of evidentiary facts rather than the simple narrative of the prisoner—was instrumental in the decision to permit counsel to speak for the accused. Facts were now seen as "speaking" the truth more effectively than the accused, who could therefore be allowed to remain silent without jeopardizing the determination of truth at his or her trial. However, due to the complexity of circumstantial evidence and the occasional difficulty of understanding the connections between all the facts and legal issues, lawyers were seen as useful interpreters and were therefore permitted to speak for this purpose, and it was for this reason that the Act was permitted to pass. Finally, the article shows how the accused's silence eventually became a recognized legal right and argues that this development would not have been possible without the rise of empiricism. Although claims to a privilege against

self-incrimination had been made for hundreds of years, it was only once the accused's silence was no longer seen as interfering with truth that it could be fully established as a privilege and a right.

I. THE MIDDLE AGES: FROM THE "GOD SPEAKS" TRIAL TO THE "JURY SPEAKS" TRIAL

In the early medieval period, it was believed that God was the ultimate source of truth. At the trial by ordeal, the accused was dunked in cold water or burned on the hand. The result was seen as a judgment from God; it was held to be a divine manifestation of innocence or guilt. By 1215 the Ordeals had come to be seen as superstitious and irrational forms of proof, and the Lateran Council abolished them. In England, jurors had already been called upon to provide the names of suspects and decide which ones should proceed to the ordeal. After the ordeals were abolished, they were asked to make final decisions with respect to the accused's innocence or guilt. Their judgment took the place of God's as the final determinant of truth.⁶

Two factors may have made the substitution of a jury's word for God's acceptable in criminal trials. First, juries were composed of men who lived in the vicinity of the crime and were therefore deemed to have first-hand knowledge of the accused and the events in question. As the most direct witnesses of the

6. Assize of Clarendon (1166). See generally, Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley, CA: University of California Press, 1991) at 3-5, 45-51 [Shapiro, *BRD*]; Roger D Groot, "The Early Thirteenth-Century Criminal Jury" in JS Cockburn & Thomas A Green, eds, *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800* (Princeton: Princeton University Press, 1988) at 3-35; Edward Powell, "Jury Trial at Gaol Delivery in the Late Middle Ages: 'The Midland Circuit, 1400-1429'" in *ibid* at 78-116; Levy, *supra* note 1 at 12-18; James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little Brown & Co, 1898) at 24-46; JH Baker, *An Introduction to English Legal History*, 4th ed (New York: Oxford University Press, 2004) at 4-6, 13-26, 71-76. Indeed, as some historians have pointed out, even at the time of the ordeal, juries were effectively deciding the ultimate verdicts. The ordeals were often manipulated in accordance with the accused's character or the degree of suspicion against him. Those who were not strongly suspected, may not have been subjected to as long a burning of the hand, or dunking in the water. Levy, *supra* note 1 at 6. Moreover the fact that juries often decided cases under writs of *de odio et atia* and *de fidelities*, and the fact that these decisions forestalled the trial by ordeal also shows that juries were effectively deciding questions of innocence and guilt long before the abolition of the ordeal, even though their decisions were not officially seen as final. Groot, *supra* note 6 at 5-9, 16. Nonetheless, the idea of divine justice provided an important epistemological guarantee of legal truth.

facts, they were considered to be the best judges of the case.⁷ Leonard W. Levy posits a second, more complex reason why juries' verdicts were accepted in place of God's. Jurors had to swear an oath, and oath taking had a quasi-supernatural character: It was seen as partaking of the divine, and was therefore believed to have a decisive quality in and of itself. In fact, juror's oaths resembled an older medieval form of adjudication, the trial by compurgation, in which the accused was asked to swear to his innocence along with a prescribed number of helpers, or "compurgators." If sworn unanimously, in just the right way, the oaths had the power to make the truth of what they swore to immediately manifest. The connection between jurors' oaths and these long-standing forms of proof may have helped legitimize jurors' verdicts at a time when the belief in God was still strong.⁸ Thus despite the loss of the old superstitious forms of proof based on the belief in divine manifestation, faith in God was still supplying a strong epistemological foundation for the new jury-based law, and ensuring people's belief in its verdicts.

Over time, jurors from the vicinity of the accused or the crime were no longer readily available in every case, and by the fifteenth century, they often had no direct knowledge of the accused or the circumstances of his case.⁹ Nonetheless, the idea persisted that jurors (or at least some of them) had some direct knowledge of the facts of the case, and could supply important information to help with the decision-making process. Thus in the mid 1500s, Chief Justice Fortescue still spoke of jurors as the "near neighbours" of the accused, who could not "but know whether they be worthy of credit or not," even though this was seldom actually the case.¹⁰ Jurors were still seen more as first-hand witnesses than uninformed

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7. JB Post, "Jury Lists and Juries in the Late Fourteenth Century" in Cockburn & Green, *supra* note 6 at 73. See also Powell, *supra* note 6 at 78; Thayer, *supra* note 6 at 90-129. For a more complete history of the trial by ordeal and the transition to the jury system, see Powell, *supra* note 6; Shapiro, *BRD*, *supra* note 6; Groot, *supra* note 6; Post, *supra* note 7.
 8. Levy, *supra* note 1 at 36-37. Shapiro agrees that the law held onto and perpetuated the idea that the jury, even after it lost any personal knowledge of the facts, "still maintained the divine fact-finding spark" and their verdicts were therefore an adequate substitute for the judgment of God. *BRD*, *supra* note 6 at 242.
 9. Powell argues that by the early 1400s, jurors were often not being chosen from the vicinity of the crime. *Supra* note 6 at 88. In most cases, geographical proximity was no longer the most important consideration in choosing a jury. *Ibid* at 88, 96. Juries were chosen as much, if not more, on the basis of their social status and experience. *Ibid* at 96. He concludes that by the early fifteenth century, "the jury was no longer self-informing in the accepted sense—if indeed it ever had been." *Ibid* at 97. It is at this time, he says, that outside evidence was introduced in criminal trials. *Ibid* at 97, 106.
 10. Levy, *supra* note 1 at 19.

triers of fact, a fiction that persisted well into the eighteenth century and that arguably assisted the belief in the jury's ability to find a true verdict. However, it was known in many cases to be just a fiction. With the increased understanding that jurors had, in reality, been transformed from active witnesses into passive triers of fact, the need for additional evidence to fill in the gaps in their knowledge became clear.¹¹ It was at this point that witnesses who actually knew the accused and the circumstances of his or her crime began to appear at criminal trials. And because the accused was perceived as knowing more about the situation than anyone else, his or her statements were seen as a vital evidentiary source.

II. THE "WITNESSES SPEAK" TRIAL

Historical accounts differ as to when the transformation actually occurred, but it is certain that by the fifteenth century, or sixteenth at the latest, witnesses were appearing at criminal trials on a regular basis.¹² Of course it was always understood that witnesses could lie or be mistaken, but because their assertions

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11. See generally, Sir William Holdsworth, *A History of English Law* (London, UK: Methuen & Co, 1966) vol 9 at 126; Barbara Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law and Literature* (Princeton: Princeton University Press, 1983) at 176-77, 189 [Shapiro, *Probability*]. In *BRD*, Shapiro explains that the shift between jurors as witnesses and jurors as passive triers of fact happened so gradually, that the problems with witness credibility were not immediately recognized until a hundred years or so later. Holding onto the idea that jurors were still fact finders and witnesses long after they had actually ceased to be so "provided a legitimating screen that protected the jury's old claim to truth-telling while a new one was sought." Shapiro, *BRD*, *supra* note 6 at 244.
 12. See Levy, *supra* note 1 at 19; Shapiro, *Probability*, *supra* note 11 at 176-77. Langbein argues that the transformation of the jury and the regular use of witness testimony occurred in the mid-16th century; because juries were no longer self-informing accusers, the Marian bail and the committal statutes were created to ensure the successful prosecution and conviction of criminal suspects. The statutes made prosecution obligatory and enabled prosecutors to compel witnesses to testify against the accused. See generally, John H Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, Mass: Harvard University Press, 1974); John H Langbein, "Origins of Public Prosecution" (1973) 17 *Am J Legal Hist* 313 at 313-35. Powell, on the other hand, as noted above, places the transformation of the jury much earlier, arguing that by 1400, jurors were no longer sufficiently self-informing (if indeed they ever were) and thus in need of external evidence to decide criminal cases. *Supra* note 6 at 115-16. He therefore argues for the introduction of witnesses at around the same time. *Ibid* at 106. These witnesses included the accused, the victim and his kin, and the arresting and examining officials such as sheriffs, constables and justices of the peace. *Ibid* at 109-11. Post argues that "witnesses were an acceptable feature of criminal trials" by the late fourteenth century. Post, *supra* note 7 at 75.

were often the only evidence available, they had to be relied upon second-hand. Nonetheless, several factors seemed to justify faith in testimonial truth. First, the fact that witnesses had to swear to their statements on oath meant, at a time when belief in God was still strong, that they were assumed to be unwilling to perjure themselves and risk eternal damnation.¹³ For centuries the oath seemed to provide, in and of itself, a sufficient guarantee of the truth, so much so that juries tended to give all testimony, even that which was least credible, the same weight simply because it was sworn.¹⁴ Unfortunately, the fact that perjury had to be made a crime as early as 1563 suggests that the oath was never a sufficient guarantee of testimonial truth; lying on the stand was common enough to be a genuine cause for concern.¹⁵ The fear of perjury increased as the years went on, reaching a possible peak in the eighteenth century with the scandals surrounding the exposure of crown witnesses who openly lied under oath in exchange for

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13. The reliance on sworn testimony was based on the idea that the vengeance of God would be on the witness who swore to tell the truth and failed. Thomas Starkie, *A Practical Treatise on the Law of Evidence: And the Digest of Proofs, in Civil and Criminal Proceedings*, 2nd ed (London, UK: J & WT Clarke, 1833) vol 1 at 22. For many years, it was held that only a belief in God could guarantee the effectiveness of the oath. As Coke had said, infidels could not be witnesses. Sir Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton*, 19th ed by Francis Hargrave & Charles Butler (London, UK: RH Small, 1832) vol 1 at 6b[a]. Atheists could not testify in court until 1869. See generally, Christopher J W Allen, *The Law of Evidence in Victorian England* (Cambridge, UK: Cambridge University Press, 1997) at 50-94.
 14. See Shapiro, *Probability*, *supra* note 11 at 183; Holdsworth, *supra* note 11, vol 9 at 196, 204-209; JH Wigmore, "The Required Number of Witnesses; A Brief History of the Numerical System in England" (1901) 15:2 Harv L Rev 83 at 88-90. See also, Douglas Lane Patey, *Probability and Literary Form: The Philosophic Theory and Literary Practice in the Augustan Age* (Cambridge, UK: Cambridge University press, 1984) at 7. For example, in the case of the Earl of Stafford (1679), a jury convicted on the basis of incredible testimony simply because the witness had sworn to his statement on oath. Roger North, *The Lives of the Norths*, ed by A Jessopp (Westmead, UK: Gregg International, 1972) vol 1 at 204. Even as late as the 1840s, many still believed that the oath requirement was a sufficient guarantee of testimonial truth. As one passionate writer in *The Times* put it, "it is absolutely certain that the mass of men, even of notorious liars, ... do shrink from perjury, and that, not from a fear of fine or imprisonment, but from a consciousness, ... that they are invoking ONE who knows all truth and falsehood, and who will reward and punish even the fantastic resources by which bad and uneducated men strain to elude the obligation of an oath," *The Times* (15 June 1842) 6. Thus in *Omychund v Barker*, the Attorney General declared that the "solemnity of an oath" was a "security for a person's speaking the truth" and that "[n]o country can subsist a twelvemonth where an oath is not thought binding, for the want of it must necessarily dissolve society." *Omychund v Barker* (1744), 1 Atk 21, 26 ER 15.
 15. Shapiro, *BRD*, *supra* note 6 at 191.

rewards or a pardon.¹⁶ The hysterical language used in discussions of perjury in the eighteenth century shows that false testimony was perceived by many to be a very real threat, and one with no perceivable solution. As Justice Willes put it, “Perjury is the most dangerous to society. It perverts justice—it unhinges the law—it destroys liberty and property...it is a most dangerous evil.”¹⁷ The fact that a bill was proposed to make perjury a capital crime¹⁸ is proof that the problem of perjury seemed to be out of control, making even the sworn testimony of witnesses seem less than reliable. In short, despite the requirement of the oath, the fact that witnesses’ testimony often conflicted and instances of perjury were constantly being discovered made the reliability of this form of evidence a constant concern. As James Oldham puts it, “[T]he adversary system is commonly assumed to be designed to cope with the central supposition that many witnesses cannot be trusted to tell the truth.” And as we have seen, the oath was not providing a sufficient guarantee.¹⁹

Another supposed guarantee of testimonial truth was the “interested witness rule,” which, in the early 1500s, excluded the statements of those who had an interest in the outcome of the trial and whose testimony might therefore be false. Thus all interested witnesses, including the parties in civil suits and the accused, were forbidden to testify under oath. Forcing them to swear to their testimony would put them in the cruel dilemma of having to risk punishment for perjury or

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16. Shapiro argues that the rise in perjured testimony contributed to the growing suspicion that testimony “unsupported by strong circumstantial evidence” was not the best source of evidentiary truth. She says it created an atmosphere of distrust where witness testimony was concerned, for it showed how witnesses could lie, even under oath. *BRD*, *supra* note 6 at 220. In the 1740s, lack of corroboration was made a basis of exclusion, but this was reversed in the 1780s and made the basis of a mere caution. Nonetheless, the need for a caution shows that the law was becoming increasingly reluctant to rely on only one witness’ story. *R v Durham and Crowder*, 168 ER 341, (1787) 1 Leach 478; *R v Atwood & Robbins*, 168 ER 334, (1788) 1 Leach 464. See generally Allen, *supra* note 13 at 43-49; Langbein, *Origins*, *supra* note 3 at 2013-18. For a more detailed discussion of the use of rewards and pardons to facilitate prosecutions, and its tendency to undermine the credibility of a witness’ testimony, see John Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press, 1986) at 50-59, 362, 366-74 [Beattie, *Crime and the Courts*].
17. Quoted in James Oldham, “Truth-Telling in the Eighteenth-Century Courtroom” (1994) 12:1 LHR 95 at 99.
18. *Ibid* at 99-100.
19. *Ibid* at 117. The nineteenth-century debates surrounding the legislation aimed at allowing non-Christians and eventually atheists to provide testimony in court show how despite some die-hard adherents to the old legal traditions, the oath eventually came to be seen as a less valuable and reliable guarantee of testimonial truth. For a full discussion of those debates, see Allen, *supra* note 13 at 60-94.

eternal damnation. More importantly, it could compromise legal truth, because as we have seen, jurors were often inclined to believe even patently false testimony simply because it was sworn.²⁰

In sum, because witness testimony was an important, and often the only available, source of evidence in criminal trials, it had to be relied upon as an

20. See generally, Oldham, *supra* note 17; Joel N Bodansky, “The Abolition of the Party-Witness Disqualification: An Historical Survey” (1981-82) 70:1 Ky LJ 91 at 92; Holdsworth, *supra* note 14; John Henry Wigmore, *A Treatise on Anglo-American System of Evidence in Trials at Common Law, including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada*, 3rd ed (Boston: Little, Brown & Co, 1904) vol 2: ss 575-81 at 674-722 [Wigmore, *Evidence*]. For a full history of the party witness exclusion rule, see Simon Greenleaf, *A Treatise on the Law of Evidence*, 11th ed (Boston: Little, Brown & Co, 1863) vol 1, ss 326-430; Wigmore, *Evidence*, *supra* note 20 ss 575-87 at 688-729; Holdsworth, *supra* note 11 at 193-97; Henry E Smith, “The Modern Privilege: Its Nineteenth-Century Origins” in Helmholz, *supra* note 1 at 148-53; Albert W Alshuler, “A Peculiar Privilege in Historical Perspective” in Helmholz, *supra* note 1 at 196; Bodansky, *supra* note 20 at 91-130. Placing the accused in the position of having to commit perjury or risk eternal damnation was seen as a form of torture, akin to the rack. Holdsworth and Wigmore see the oath as pertaining to different modes of trial—compurgation and wager of law—and explain that this is why the accused could not offer sworn testimony in common-law trials. Holdsworth, *supra* note 1 at 194; Wigmore, *Evidence*, *supra* note 20 at vol 2 at ss 575 at 681-82. Alshuler argues that the oath had a performative or declarative aspect to it; it hearkened back to the medieval trial by compurgation, in which the very act of swearing with the help of “oath-helpers” or compurgators was de facto proof of the truth of the accused’s words. As Alshuler explains, the power of oaths was “great enough that in church courts, and even at an early stage in the king’s courts, they sometimes were treated as conclusive proof.” Later, when the quasi-divine power of the oath was no longer as strong, there was probably still some reluctance to allow the accused to swear to his statements, because it could give juries a false impression of truth and compromise their verdict. As Alshuler puts it, the main purpose of the testimonial disqualification of the accused was “probably...to keep untrustworthy evidence from the trier of fact. ... the disqualification saved juries from the disturbing task of resolving swearing contests, contests that would have revealed the imperfection of the oath as a guarantor of truth.” Alshuler, *supra* note 20 at 187, 283. Whatever the original reason for the rule, by the eighteenth century (and probably before), the general understanding was that the witness’ interest in the matter was what made his ability to swear to his statements problematic, as it would be too large a temptation to commit perjury. See Bodansky, *supra* note 20 at 92; Oldham, *supra* note 17 at 107; Wigmore, *Evidence*, *supra* note 20 at vol 2 at s 576 at 686. Interestingly, witnesses for the defense were included in this exclusion and were not permitted to testify under oath until 1696 for treason trials. *An Act for Regulating of Trials in Cases of Treason and Misprision of Treason*, 7 & 8 Will 3, c 3, s 1. This remained true until 1702 for felony trials. 8 *Statutes of the Realm* 168, 1 Anne, Stat 2, c 9, s 3. Over the years, the interested witness rule was relaxed, going more to the issue of credibility rather than competency. Oldham, *supra* note 17 at 98. The party witness prohibition remained in force much longer; the accused was only permitted to submit sworn testimony on his own behalf in 1898. *The Criminal Evidence Act*, 61 & 62 Vict c 36.

accurate representation of truth. The courts therefore excluded the testimony of witnesses most liable to lie and made those with no obvious interest in lying swear under oath to make testimonial evidence seem more credible.

III. THE CASE OF THE ACCUSED

The accused, of course, was the most interested witness of all, for he or she had the most to lose by testifying. Not only could lying lead to eternal damnation, but the revelation of his or her guilt could result in conviction and death. Exclusion of the accused's testimony, however, was probably also motivated by a concern for testimonial truth as well as for the accused's personal plight. The temptation for the accused to lie was seen by many as too great to resist, and lies, if believed by the jury, would interfere with the outcome of the verdict.²¹ As a result the accused's statements were not permitted under oath. Unfortunately, not allowing the accused to deliver sworn testimony amounted to a "presumption of perjury,"²² and his or her evidence was given very little weight. Where the accused's word contradicted that of another witness, judges reminded jurors whose testimony was sworn and cautioned them to value it accordingly. Indeed, in many cases the unsworn evidence of the accused was held to be no evidence at all.²³

21. Holdsworth, *supra* note 11 at 196.

22. Alshuler, *supra* note 20 at 198.

23. See generally, Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* (Cambridge, UK: Cambridge University Press, 2000) at 62; Zelman Cowen & P B Carter, *Essays on the Law of Evidence* (Oxford, UK: Clarendon Press, 1956) at 210; Smith, *supra* note 20 at 166, 267, n 107. See also, Wigmore, *Evidence*, *supra* note 20 at s 575 at 684-85. Before 1702, because witnesses for the defense were not permitted to provide sworn testimony in court, the sworn testimony on the side of the prosecution was given more weight, and often led to a decision against the accused. See Stephen Landsman, "Rise of the Contentious Spirit: Adversary Procedure in Eighteenth-Century England," (1990) 75:3 Cornell L Rev 496 at 499, 506. Unsworn testimony also worked in favour of child molesters, whose victims could not testify against them under oath. For more examples, see Langbein, *Origins*, *supra* note 3 at 239-42. Cowen and Carter provide an interesting discussion of the judges' contradictory rulings on whether or not witnesses could still make unsworn statements after *The Prisoner's Counsel Act* (1836) was passed. They demonstrate that whether judges allowed them or not, most agreed that those statements had very little value. See *R v Shimmin* (1882), 15 Cox C C 122, 124, Cave J; *R v Beard* (1837), 8 C & P 142, Coleridge J. See also, *R v Rider* (1838), 8 C & P 539, 540, Paterson J. *The Criminal Evidence Act* (1898) formally preserved the right of the accused to make an unsworn statement, but it is clear that such statements still had much less evidentiary weight. Cowen, *supra* note 23 at 210. See also, Allen, *supra* note 13 at 162.

Even the accused's statements against his or her own interest were often devalued. Guilty pleas were discouraged on a regular basis, not to protect the accused against self-incrimination but from a concern for legal truth, which the accused was increasingly seen as unable to provide alone. Judges pushed the accused to go to trial, in hopes that the whole truth about his or her character and case would emerge.²⁴ By the late eighteenth century, the confession rule was excluding guilty admissions altogether if they were influenced by the fear of violence or hope of reward. Again, the concern was not the protection of the accused against self-incrimination but the protection of legal truth, for such statements were seen as potentially false.²⁵ As a result, the accused's guilty admissions were effectively silenced and made inadmissible at trial. Many legal historians have argued that the confession rule can be seen as a response to the crown witness scandals of the eighteenth century, in which criminal accomplices were exposed as offering fraudulent confessions in exchange for rewards and free pardons.²⁶ I would argue, however, that the confession rule was also a response to the rise of empiricism, which made the evidence of facts and circumstances a more reliable form of proof than the potentially faulty or fraudulent evidence of witnesses in general, even the self-incriminating evidence provided by the accused with respect to his or her own intentions. The accused's statements, even when made against his or her own

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24. As Matthew Hale put it, "it is usual for the court...to advise the party to plead and put himself upon his trial, and not presently to record his confession." *Historia Placitorum Coronae: The History of the Pleas of the Crown*, ed by Sollom Emlyn (Philadelphia: H Small, 1847) vol 2 at 225. See also, J M Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Century" (1991) 9:2 LHR 221 at 232 [Beattie, "Scales"]. True, the ostensible goal was to gather enough information about him and his story to see if he qualified for a pardon or a reduced sentence. What is clear, however, is that the facts gleaned from the trial were seen as the best source of that information, and not the mere word of the accused. See generally, Beattie, *Crime and the Courts*, *supra* note 16 at 336-37, 436, 446-49.
25. The classic formulation of the rule was articulated in Warickshall's case in 1783: "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." *R v Warickshall*, 168 ER 234, (1783) 1 Leach 263. Wigmore cites Rudd's case as the first "judicial utterance limiting the admissibility" of confessions. *R v Rudd*, 168 ER 160, (1775) 1 Leach 115; Wigmore, *Evidence* vol 3 at c 819 at 237. Langbein places the confession rule even earlier, arguing that its first formulation occurred in the early 1740s and that the rule was settled by the 1760s. *Origins*, *supra* note 3 at 218. Beattie also sees an inclination on the part of judges to scrutinize involuntary confessions for reliability as early as 1740. *Crime and the Courts* at 365. The fact that the fruits of the accused's confession were always admissible, shows that legal truth was the goal in eighteenth-century criminal trials, and not the rights of the accused.
26. See Smith, *supra* note 20 at 154; Langbein, *Origins*, *supra* note 3 at 181.

interest, were no longer believed without question, if indeed they ever were truly credited at all.²⁷ In short, the altercation trial may have been designed to pressure the accused to speak in his or her own defence, but what he or she had to say was often seen as far from reliable. Unfortunately, the statements of the person closest to the events at the trial seemed necessary. The rise of empiricism, with its strong emphasis on directly perceivable facts, seemed to provide a solution, for it promised a way to determine true verdicts without having to depend on the potentially unreliable story of the accused.

IV. THE RISE OF EMPIRICISM AND THE BIRTH OF THE “FACTS SPEAK” TRIAL

Social historians like Shapiro, Shapin and Ian Hacking have observed a cross-disciplinary shift in the seventeenth century from the idea that truth resides in the authoritative narratives of others to the more empiricist belief that the most highly probably and therefore most satisfactory knowledge derives from the first-hand experience of things. English scientists associated with the Royal Society such as Thomas Browne, Glanville, Boyle, Hooke, and others began rejecting authoritative texts and the unqualified and unexamined testimony of others in favour of their own personal experience and observation; their motto was “Nullius in verba” or “On no man’s word.”²⁸ As William Harvey put it, one should “strive after personal experience,” and not “rely on the experience of others,” and urged his readers “to take nothing on trust” even from him.²⁹ In a similar vein, John Evelyn wrote that it was “base” and “servile” to subordinate our God-given senses to the “blind Traditions”³⁰ of authority, and Boyle argued that it was “improper” to “urge or relye on Testimonys for matters, whose Truth

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27. By the 1760s, Foster had called confessions “the weakest and most suspicious of all evidence.” Sir Michael Foster, *A Report of Some Proceedings on the Commission for the trial of the rebels in the year 1746, in the county of Surry, and other Crown Cases: to which are added discourses upon a few branches of the crown law*, 3rd ed (London: E & R, Brooke, 1792) at 243.
 28. Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago: University of Chicago Press, 1994) at 201.
 29. William Harvey, “Anatomical Exercises on the Generation of Animals: to which are added Essays on Parturition; or the Membranes, and Fluids of the Uterus; and on Conception” in Robert Willis, *The Works of William Harvey* (London: Sydenham Society, 1847) at 157.
 30. John Evelyn, *Sylva; or, A Discourse of Forest Trees, and the Propagation of Timber in His Majesties Dominions. As it was deliver’d in the Royal Society, the XVth of October, CICI) CLXII... To Which is annexed, Pomona; or, An Apendix concerning fruit-trees in relation to cider, the making and several ways of ordering it.* (London: J Martyn & J Allestry, 1664) at 6.

or Falsehood may be proved by manifest Reason or easy Experiment.”³¹ These empiricist ideas about the nature of truth, which advocated a preference for “matters of fact” derived from one’s “own knowledge” over “those which they have but upon trust from others”³² spread to other disciplines as well, such as theology, history, and law.³³

A. LAW AND EMPIRICISM

The rise of science and empiricism in the seventeenth century, with their emphasis on directly observable facts as the best source of evidentiary truth, seemed to promise a solution for the problem of perjury. Of course, both in the scientific and legal domain, it was understood that facts were not always capable of direct observation, and that witnesses were often needed to communicate them to others. Thus the credibility of witnesses remained a necessary concern.³⁴ Nevertheless, the new scientific methods seemed to provide an objective means of guaranteeing the most reliable testimony possible by providing new ways to test and evaluate it. In *An Essay Concerning Human Understanding*, for example, John Locke attempted to devise an empirical means of evaluating witness credibility in the hopes of providing more certainty where testimonial evidence was concerned. Testimony was to be assessed according to the following criteria: the number of

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31. Robert Boyle, “Propositions on sense, reason and authority” in *The Boyle Papers* (1986) vol 9 at fol 25.
 32. Robert Boyle, *New experiments and observations touching cold, or An experimental history of cold begun to which are added an examen of antiperistasis and an examen of Mr. Hob’s doctrine about cold.* (London: John Crook, 1665) at 30.
 33. The fact that many lawyers were involved members and founders of the Elizabethan Society of Antiquaries and The Royal Society provides further evidence of the close relationship between the legal, historical and scientific communities. Shapiro, *Probability*, *supra* note 11 at 164-73. See generally, Shapin, *supra* note 28 at 193-202; Shapiro, *Probability*; Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Baltimore: Johns Hopkins University Press, 1992) at 7-42. (For more detailed accounts of the ways in which changing notions of truth and knowledge due to the “scientific revolution” spread across disciplines, affecting many areas of intellectual life such as theology, history, science and law).
 34. Shapiro, *Probability*, *supra* note 11; Shapiro, *BRD*, *supra* note 6 at 10-11. In *A Social History of Truth*, Steven Shapin also shows how scientists had to become credible witnesses with respect to the truth of their discoveries in order to transmit their new-found scientific knowledge to others. *Supra* note 28 at 18-23. Both Shapiro and Shapin make it clear, however, that first-hand experience and the direct evidence of the senses was a preferred and more desirable form of proof. Shapiro, *Probability*, *supra* note 11 at 30. Testimony was a necessary evil designed to communicate the result of that direct proof to others who could not always be in a position to witness it directly for themselves. See also, Patey, *supra* note 14 at 32.

witnesses testifying to the same fact, the integrity of the witnesses, their skill, their purpose or design, the consistency of their testimony, whether or not that testimony corresponded to external circumstances, and whether or not it conflicted with other testimony in the case.³⁵

The eighteenth century saw the publication of a number of evidentiary treatises that used Locke's criteria to promote new ways of evaluating witness testimony on the basis of its internal consistency and correspondence to external facts.³⁶ As a result, empiricism began influencing both the underlying principles and the practice of law in the courtroom. In accordance with the new empiricist legal theories, judges began calling on parties on both sides to produce more evidence to corroborate their statements; mere testimony, even when sworn, was no longer seen as enough. It is at this point that we begin to see the rise of defence lawyers who, once only permitted to address questions of law (and even then, not usually during the trial), were now increasingly permitted to cross-examine witnesses to test the consistency of their testimony and the correspondence of that testimony with the rest of the facts. Historians are not sure why this legal development occurred, because no specific reasoning was given by the judges to explain it. Beattie suggests that the rise in perjury occasioned by the government's habit of paying rewards to prosecution witnesses and offering pardons for accomplices' testimony may have played a big role. When it became clear that many of these prosecution witnesses were lying on the stand and that the accused

35. John Locke, "An Essay Concerning Human Understanding" in *The Works of John Locke in Nine Volumes*, 12th ed (London: Rivington, 1824) vol 2 at 227.

36. See e.g. Geoffrey Gilbert, *The Law of Evidence*, 2nd ed (London: Owen, 1760). See Shapiro, *BRD*, *supra* note 6 at 220-41; counsel *Probability*, *supra* note 11; Shapiro, *supra* note 28 (for a more detailed account of the way in which evidentiary treatises borrowed from empiricist philosophy). As Shapiro points out, the majority of scientists of the seventeenth century Royal Academy, unlike earlier scientists such as Bacon, were after a more probable determination of truth rather than absolute certainty. Shapiro, *BRD*, *supra* note 6 at 7-8 (realizing that absolute certainty was not possible). However with the help of empirically-derived criteria and objective tests like those devised by John Locke, a high enough level of probability could be attained that would be morally satisfying and provide a sufficient guarantee of truth. Shapiro, *Probability*, at 42.

was in no position to make those lies evident to a jury, judges may have seen the need for lawyers to point out potential flaws in their testimony.³⁷

I would argue that it was not merely the spate of perjuring thief takers that caused judges to allow lawyers to cross-examine witnesses in court; rather, this development was part of the growing influence of empiricism, which was reshaping notions of what constituted the best evidence in court. The new epistemology fostered the preference for factual proofs, which diminished the weight of a single witness's statement even when sworn under oath. As a result, additional evidence was now required to corroborate a witness's words. Judges began calling on parties on both sides to produce more facts and more testimony to counter or corroborate witnesses' statements.³⁸ Ultimately the production of all these additional proofs probably proved too unwieldy for the prosecutors, defendants, and even the judges to accomplish on their own, and the task was taken up by the lawyers.³⁹ The rise of empiricism had called witnesses' words, in general, into question and provided the need for more evidence. Overwhelmed judges were probably only too happy to give lawyers the job of obtaining such evidence and introducing it into court. I would argue, therefore, that it is for this reason that lawyers were permitted to become more involved at the trial: They were needed to help gather more evidence and cross-examine witnesses to ensure that their testimony conformed to the rest of the facts. However, because in the early eighteenth century witness testimony was still seen as a critical form of proof, lawyers were required, at this stage, to restrict their participation in

37. Beattie, "Scales," *supra* note 24 at 233-35. Langbein and Landsman agree. Langbein, *Origins*, *supra* note 3 at 157; Landsman, *supra* note 23 at 579. Landsman, however, notes that the actual numbers of cases involving thief takers was not large and that fears of their perjured testimony dissipated over the course of the century (the last scandal occurring in the 1750s), which suggests that these scandals may not have been enough in and of themselves to have caused the increased reliance on counsel. *Ibid* at 580. As I argue in this paper, the rise of empiricism and the consequent changing epistemological notions of what constitutes the best evidence provides a more comprehensive explanation.

38. Landsman, *supra* note 23 at 525-26. The confession rule was arguably part of this trend, for as Landsman says, out of court admissions of guilt made by the accused were already being questioned as to their origins by judges, showing, even at this early stage, "an increased readiness to make the prosecution shoulder its own burden of proof rather than prove its case out of the defendant's mouth." *Ibid* at 527.

39. *Ibid* at 521-29.

the trial to the examination of witnesses' statements; they were not yet able to substitute their own statements instead.⁴⁰

B. CIRCUMSTANTIAL EVIDENCE

The emphasis on factual evidence reached its peak in the mid-eighteenth century when judges and other legal writers began claiming that facts could “speak” for themselves. Circumstantial evidence came to be seen as a form of proof equal if not superior to other forms of direct evidence, including witness testimony. Circumstantial evidence was hardly a new form of proof in English common law. The idea that presumptions derived from the connections between various circumstances could constitute admissible proof was articulated by Bracton and Coke in the famous example of the man standing over the corpse with a bloody sword in his hand.⁴¹ Indeed, circumstantial evidence was often the only proof available, especially in crimes of secrecy such as poisoning and forgery, in which there were seldom any direct witnesses. However, it was seen as an inferior form of proof, one that was liable to lead to error, and was therefore regarded with extreme suspicion.⁴² By the mid-eighteenth century, however, because it relied on the same process of inductive reasoning used in the natural sciences, circumstantial evidence began being hailed by many as providing the

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40. Beattie acknowledges that the questioning of witnesses was shaped in part by the “intellectual culture within which criminal trials took place.” “Scales,” *supra* note 24 at 235-36. In his view, the new emphasis on probability was changing notions of evidence, fostering a climate in which testimony was to be tested for its degree of probability and therefore its proper evidentiary weight. *Ibid* at 235. Beattie, however, does not argue, as I do, that the rise of empiricism, by emphasizing facts over second-hand testimony, created this perceived need for cross-examination and enabled lawyers to play a more prominent role in criminal trials at this time. *Ibid* at 236. Indeed, he explicitly rejects the view that the increased use of lawyers for the purpose of cross-examination can be traced to changing philosophical ideas about truth. Moreover, he credits lawyers, and not the rise of empiricism, with “shap[ing]” the new “skeptical habits of mind” in the courtroom, and the stronger emphasis on facts. *Ibid* at 235. See also, Beattie, *Crime and the Courts*, *supra* note 16 at 627.
41. Coke, *supra* note 13, vol 1 at 66; Henry Bracton, *On the Laws and Customs of England*, ed & trans by Samuel E Thorne (Cambridge, Mass: Belknap Press of Harvard University Press, 1968) vol 2 at 386.
42. See Shapiro, *BRD*, *supra* note 6 at 211-13. Mathew Hale, like Coke, recognized that circumstantial evidence was sometimes the only available proof and therefore had to be relied upon in such cases, but advised that it be used with great caution. Hale, *supra* note 24 at 288. On the Continent, circumstantial evidence was regarded with even greater suspicion and could never be used as the sole basis of conviction. At most it constituted a quarter proof to be used to justify torturing the accused to obtain a confession. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 1977) at 4.

strongest guarantee of truth. Thus Donat noted in his evidentiary treatise that in circumstantial evidence “one draws consequences from causes to their effects, and from effects to their causes” just as one did in the field of natural science.⁴³ Similarly, Greenleaf explained that circumstantial evidence was based on principles “shared... in common with other departments of science” such as the drawing of inferences from the observed facts of nature and human experience.⁴⁴

By the mid-eighteenth century, circumstantial evidence, once accepted out of necessity in cases without direct witnesses, was now considered to be as strong as, if not stronger than, testimonial representations of truth.⁴⁵ At the trial of *R v Blandy*, for example, the judge told the jury that where “a violent presumption... necessarily arises from circumstances, they [those circumstances] are more convincing and satisfactory, than any other kind of evidence, because facts cannot lie.”⁴⁶ And in *R v Donellan*, Judge Buller agreed, adding that “if the circumstances are such, as when laid together bring a conviction to your minds, it is then fully equal, if not ... more convincing, than positive evidence.”⁴⁷ Indeed, the idea that facts or circumstances cannot lie was quite prevalent in the mid- to late eighteenth century. Thus the judge in the trial of John Barbot agreed with crown counsel that “where the circumstances are so closely connected and linked together,” they amount to “what is called a *violenta praesumptio*,” or “full proof” more powerful than “any one positive evidence, whose memory may be deceitful, or who may possibly be suborned,” for in facts made apparent “from circumstances which are dumb, we cannot be deceived.”⁴⁸ At the trial,

43. Jean Domat, *The Civil Law in its Natural Order*, trans by William Strahan (Boston, Little Brown & Co, 1850) vol 1 at 818, See generally, *Ibid* at 817-26.

44. Greenleaf, *supra* note 20 at 21. Thomas Starkie also noted the similarities between circumstantial evidence and natural science, arguing that both were capable of providing a high degree of knowledge by showing the connections between natural events and their causes. *A Practical Treatise on the Law Of Evidence*, 8th ed (Philadelphia: T & J W Johnson & Co, 1860) vol 1 at 50-51.

45. Shapiro and Welsh also see the rise of circumstantial evidence as conforming to the rise of empiricism because of its “preoccupation with matters of fact.” Shapiro, *Probability*, *supra* note 11 at 271. By the mid to late nineteenth century, the potential flaws in circumstantial evidence came to be seen as much more apparent and it was no longer seen as a superior form of proof. See Welsh, *supra* note 28 at 17-18).

46. “The Trial of Mary Blandy,” (1752) *A complete collection of state trials and proceedings for high treason and other crimes and misdemeanors* (London: TC Hansard, 1816) vol 18 at 1187.

47. Joseph Gurney, *The Trial of John Donellan Esquire for the Wilful Murder of Sir Theodosius Edward Allesley Boughton at the Assize at Warwick, On Friday March 30th 1781* (London: Kearsley and Gurney, 1781) at 52.

48. “The Trial of John Barbot” (1753) *A complete collection of state trials and proceedings for high treason and other crimes and misdemeanors* (London: TC Hansard, 1816) vol 18 at 1314.

circumstantial evidence was therefore hailed as “the best and surest of all kinds [of evidence] and the least likely to deceive and mislead.”⁴⁹ Similarly, a judge in another eighteenth-century case told the jury that “[w]itnesses, gentlemen, may either be mistaken themselves, or wickedly intend to deceive others ... But circumstances, gentlemen, and presumptions, naturally and necessarily arising out of a given fact, cannot lie.”⁵⁰ As William Paley put it in *The Principles of Moral and Political Philosophy* (1785), “A concurrence of well authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie.”⁵¹

The rise of science and the increasing emphasis on empiricism had led to the belief that a more objective means of evaluating the truth of witness testimony was possible, providing a satisfying solution to the problem that witnesses’ words, despite the guarantee of the oath, were not always to be trusted. True, witness testimony was often required to make the facts known to the jury, but the new emphasis on circumstantial evidence meant that that testimony no longer had to be taken at face value. Now it could be evaluated in conjunction with other factual proofs and assessed for its credibility as one more link in the evidentiary chain.⁵²

Thus the overall effect of circumstantial evidence was to convey a strong impression of reliability, for the fact that the whole chain appeared to hold together seemed to confirm the truth of each evidentiary link. Juries no longer needed to rely on the statements of the accused, the least reliable witness of all;

49. *Ibid* at 1296.

50. “The Trial in Ejectment between Campbell Craig, Lessee of James Annesley, esq and others, Plaintiff; and the Right Hon Richard Earl of Anglesea” (1743) *A complete collection of state trials and proceedings for high treason and other crimes and misdemeanors* (London: TC Hansard, 1816) vol 17 at 1430.

51. Paley, *The Principles of Moral Philosophy* (London: Thomas Davison for C & J Rivington, 1829) at 447. See also, Trial of John Barbot, *supra* note 48 at 1244.

52. The more it dovetailed with the rest of the “facts,” the less likely it appeared to be false. Thus at the trial of John Barbot, circumstantial evidence was seen as the best form of proof because it was derived from facts “which the the wit of man could never forge.” “Trial of John Barbot,” *supra* note 48 at 1243-44. Moreover, the longer and more complex the chain of facts, the truer an account it seemed to provide of the events at the trial, for as Judge Buller put, “it is not within the reach and compass of human abilities to invent a train of circumstances which shall be so connected together as to amount to a proof of guilt, without affording opportunities of contradicting a great part, if not all of those circumstances.” Gurney, *supra* note 47 at 52. Thomas Reid agreed, stating that “If the testimony be circumstantial, we consider how far the circumstances agree together, and with things that are known. It is so very difficult to fabricate a story, which cannot be detected by a judicious examination of the circumstances, that it acquires evidence, by being able to bear such a trial.” *Essays on the Intellectual Powers of Man* (Edinburgh: Bell, 1785) at 692.

his or her unsworn and therefore less credible account of his or her acts and intentions could be subordinated to the more directly observable facts in the case, or even eliminated altogether without jeopardizing the determination of truth. Thus the rise of empiricism and consequent belief that “circumstances cannot lie” provided a solution for the problem of perjury and as we shall see, influenced Parliament’s ultimate decision to allow defendants the full right to counsel.

V. THE PRISONER’S COUNSEL ACT (1836)

Beattie argues that the rise of defence counsel may have been the result of a perceived increase in the use of counsel on the part of the prosecution; judges attempted to redress this imbalance by allowing more defence lawyers to take part in criminal trials, in the interest of fairness to the accused.⁵³ While one can certainly see a concern for fairness and equality in the Parliamentary debates, it does not appear to have been the main concern. Indeed, eliminating counsel on both sides would have accomplished that result, but despite the fact that several members of Parliament including the Solicitor General suggested doing just that, those suggestions do not seem to have been taken too seriously, which shows that evening things up was not the primary concern.⁵⁴ I would argue, as the following reading of the Parliamentary Debates will show, that legal truth, not fairness or equality, was the main consideration in the Parliamentary debates. And as we shall see, changes in notions of what constituted the best evidence had made lawyer’s speeches seem like the best way to obtain it.⁵⁵

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53. Beattie, “Scales,” *supra* note 24 at 224-26; Beattie, *Crime and the Courts*, *supra* note 16 at 627. Langbein makes a similar argument, stating that *The Prisoner’s Counsel Act* was passed with a view to “evening things up”: if the prosecution was allowed counsel, it was only fair to grant the same right to the accused. *Origins*, *supra* note 3 at 254.
54. The Solicitor General said that if it was up to him he would do away with counsel altogether. UK, Parliamentary Debates, *Hansard*, 2nd Ser, No 11 (6 April 1824) at 213. Sir Eardley Wilmot agreed, saying that eliminating all speeches made by counsel was an option he would vote for. *Hansard*, 3rd ser, No 31 (17 Feb 1836) at 497.
55. Beattie and Cairns agree that the debates show that truth was the most important objective of the Act. See David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial, 1800-1865* (Oxford: Clarendon Press, 1998) at 69-91; Beattie, “Scales,” *supra* note 24 at 256. Other concerns included correcting the injustice of allowing counsel for the prosecution and for defendants in civil trials and misdemeanours but not felony trials, where the penalties for the defendant were infinitely more severe. Many MPs seemed more concerned about the appearance of injustice than the injustice itself. See *e.g.* UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 199 (Sir James Mackintosh), 182 (Mr Lamb), 212 (Dr Lushington); UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 158-60 (Mr Ewart). For a thorough overview of the *Prisoner’s Counsel Act* and the concerns

A. THE CONCERN FOR LEGAL TRUTH

In the debates, a principal concern was that the new legislation serve rather than jeopardize the determination of legal truth. Thus the Attorney General expressed his concern that “the cause of truth” be advanced, for in his view, the object of the legislation was to ensure that “innocence ... be most certain of acquittal,” and “guilt ... be most sure of conviction.”⁵⁶ Mr. Goulburn agreed, stating that “in criminal cases the attainment of truth was the chief object.”⁵⁷ Similarly, Lord Althorp stated that “[w]hat they had to consider was ... whether the change proposed ... was calculated to lead to a fuller and more perfect development of the truth” and whether or not that “truth was likely to be, in all instances, fairly elicited by a system under which cases could be put strongly on the one side, without allowing an answer to be given by equal talents” on the other.⁵⁸

Though both sides agreed that legal truth was the main goal, their ideas about what constituted that truth differed. Those opposed to the Act believed that truth was to be found in the plain, unvarnished story of the accused. As a result they believed that counsel’s speaking for the defendant would deprive the court of a vital evidentiary source and interfere with the determination of truth. They subscribed to the view Serjeant Hawkins had expressed in the early eighteenth century that “it requires no manner of Skill to make a plain and honest Defence,” and therefore “generally every one of Common Understanding may as properly speak to a Matter of Fact as if he were the best Lawyer.” They agreed with Hawkins that having the accused tell his own story was a better determinant of legal truth, for the “Guilty, when they speak for themselves, may often help

expressed in the Parliamentary Debates, see Cairns, *supra* note 55; Langbein, *Origins, supra* note 3; Allyson N May, “Reluctant Advocates: The Legal Profession and the Prisoner’s Counsel Act of 1836,” in *Criminal Justice in the Old World and New: Essays in Honour of J. M. Beattie*, Greg T Smith et al, eds, (Toronto: University of Toronto Centre of Criminology, 1998) at 183-207.

56. UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 208.

57. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 28 (17 June 1835) at 870.

58. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 163. Viscount Howick also expressed a concern that the current system be “the best mode of eliciting the truth.” UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (24 June 1834) at 823. Similarly, Mr Ewart stated that “his great object...was, to secure the means of eliciting truth and promoting justice.” UK, Parliamentary Debates, *Hansard*, 3rd ser, No 31 (17 Feb 1836) at 497. See also UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 209 (Dr Lushington), 217 (Mr Denman).

to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them.”⁵⁹

The idea that “plain facts” were capable of being articulated clearly and effectively without the need of counsel permeates the speeches of those opposed to the Act. In the early debates, the Attorney General defined truth as a series of simple facts capable of being articulated by the accused and understood by the jury without the potentially harmful obstruction of lawyers. In his view, the facts of most cases were so straightforward that defence counsel’s speech, if allowed by Parliament, “would be a mere repetition of that which was already known.”⁶⁰ Mr. Lamb concurred, arguing that “the fouler the crime is, the clearer and plainer the proof ought to be. No other good reason can be given for the law’s refusing counsel where life is concerned, than that the evidence on which the individual is sought to be condemned must be so perfectly decisive that all the counsel in the world cannot gainsay it . . . It is called evidence, because it is evident. It is one reason why counsel shall not be employed in matters of fact, that the matter is so plain that every one, both jury and commissioners, who hear it, must be convinced that the prisoner is justly convicted.”⁶¹ Mr. Tindal also agreed, arguing that felony cases, unlike civil cases, did not give rise to complex legal issues requiring lawyers to illuminate them: “[T]he simple issue, whether a man did or did not break into a house, was a plain matter of fact.”⁶² Lawyers, by imposing their distorting rhetoric onto such simple facts, only got in the way of the truth.⁶³

B. CIRCUMSTANTIAL EVIDENCE AND THE NEW COMPLEXITY OF TRUTH

Those in favour of the new legislation argued that in many cases, the truth was not simple or readily discernible from the simple statement of the accused; rather it was often made up of a series of evidentiary facts whose relationship to each other and to the case at hand was not immediately apparent. In such cases, it was

59. 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* (London: Eliz. Nutt & R Gosling, 1721) vol 2 at 400.

60. UK, Parliamentary Debates, *Hansard*, 2nd ser, No 15 (25 April 1826) at 599.

61. UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 183-84.

62. UK, Parliamentary Debates, *Hansard*, 2nd ser, No 15 (25 April 1826) at 620.

63. The fear that legal rhetoric would distort the truth was directed mostly at lawyers for the defense, because it was assumed that their concern for the life of their clients would lead them to rhetorical exaggeration. See *e.g.* UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 190, 191 (Mr North), 203 (Sir James Mackintosh), 207, 208 (Attorney-General); UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 163, 164 (Mr Sergeant Spankie), 162 (Mr Poulter); UK, Parliamentary Debates, *Hansard*, 3rd ser, No 28 (17 June 1835) at 870 (Mr Goulburn).

the job of legal experts on both sides to ensure that the relevant facts were brought forward and that their legal significance was made clear. Thus eliminating counsel on both sides might make the trial seem fairer, but it would not contribute to the determination of truth. For, however much rhetorical embellishments might be feared, the new empiricist idea that the strongest evidence was made up of a series of facts related to one another in complex and confusing ways meant that without lawyers to help unravel that complexity, legal truth could not be determined. As Mr. Ewart put it, although the idea “to take away counsel from both sides, and leave the case to be decided by the merits of the evidence” alone appeared at first glance, to be “ingenious,” he thought that “the purposes of justice would not be answered by a bare exposition of the evidence, either for the defence or the accusation, and that the connecting statements of counsel would be required to show the evidence in its proper light.” A law granting both sides the right to counsel was the best solution as it would best “subserve the ends of truth and justice.”⁶⁴

Thus many Members of Parliament agreed with the Criminal Law Commission that the full right of counsel was necessary to the attainment of truth because lawyers were in the best position to know and understand all the facts. The relevant facts in cases of circumstantial evidence were often too numerous for juries and even the accused to keep track of, leading many to believe that lawyers were necessary to enumerate them. As the Commission put it in its second report, “It is next to impossible that the acutest mind should, on the mere hearing of a long detail of conflicting circumstances, and without the aid of comments from professional advocates intimately acquainted with all the facts, be able to state its various bearings with the requisite fullness and accuracy.”⁶⁵

Not only were lawyers needed to enumerate the facts but also to explain their significance for, as Mr. Wynn put it, “[I]n many cases of circumstantial

64. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 159-60.

65. Parliament, “Second Report from His Majesty’s Commissioners on Criminal Law” in *Parliamentary Papers*, No 36 (1836) at 2, 7. Many Members of Parliament agreed. Dr. Lushington, for example, pointed out that it was too much to expect a frightened and inexperienced defendant to “follow an ingenious counsel through an address of an hour and twenty minutes, . . . to unravel the web, to avail himself of doubts, and to convince the jury of his innocence.” UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 211. Viscount Howick agreed that because juries often had “nothing to guide them in a long and complicated case,” and were “called on to listen to the lengthened depositions of a great number of witnesses,” they would “not be able to come to such a sound and accurate conclusion, as they would if a concise and consecutive statement of the chief points of the evidence were made by the Counsel for the prosecution in the first instance.” UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (24 June 1834) at 823.

evidence, there would be no possibility of obtaining a conviction, unless the Jury had pointed out to them previously by the Counsel, those strong points in the evidence of the witnesses which bore directly upon the charge in the indictment.”⁶⁶ James Scarlett agreed, stating that “It was in cases founded on circumstantial evidence that he thought counsel for the prisoners were most required. He had himself often seen persons whom he thought innocent, convicted, and the guilty escape for want of some acute and intelligent counsel to shew the bearings of the different circumstances on the conduct and situation of the prisoner.”⁶⁷ As Lord Lyndhurst put it, circumstantial evidence was a “labyrinth to a person who had not known anything of the case before.”⁶⁸

As we have already seen, with the rise of empiricism, witnesses’ words became increasingly subordinated to the rest of the evidentiary chain and evaluated according to their correspondence with the rest of the facts. Thus in the debates, many Members of Parliament saw the need for lawyers not only to cross-examine the witnesses and point out the contradictions in their stories, but to comment on the credibility of their testimony afterwards, and explain how that credibility (or lack of it) affected the case. As Mr. Serjeant Talfourd put it, “how was the prisoner to be defended, when ... his Counsel could make no statement to the Jury in cases where the infirmity of human nature was most to be deplored, and false judgement most to be apprehended?”⁶⁹ It was no longer enough to challenge the substantive truth of individual witnesses’ statements by means of cross-examination: The significance of that challenge and its relation to the case at hand had to be articulated to juries by legal experts in order to arrive at just and true verdicts. As Cairns puts it, “Cross-examination tested

66. *Ibid* at 821.

67. UK, Parliamentary Debates, *Hansard*, 2nd ser, No 15 (25 April 1826) at 623.

68. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 34 (17 Feb 1836) at 770. Thus, Mr Hill, in speaking of the case of Eliza Fenning, argued that she would never have been convicted if she had had the benefit of Counsel to point out to the Bench and the Jury the “real nature of the evidence.” Had the defendant had a lawyer to “insist upon the circumstance that she herself had taken the poison which was administered to her master’s family, and had suffered severely from its operation,” she might have been acquitted. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 161.

69. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 28 (17 June 1835) at 872.

the credibility of evidence, but a speech from counsel was necessary to bring its significance home.⁷⁰

In sum, the rise of empiricism fostered the view that evidentiary truth was much more complex than had previously been thought, and that all the relevant facts could not be contained within the simple story of any witness, including the accused. And it was this view that eventually led a Parliamentary majority to pass *The Prisoner's Counsel Act*, for by 1836, it was generally believed that facts were key and that in cases of circumstantial evidence especially, counsel was required on both sides to enumerate and explain them to the jury.⁷¹

One might think that allowing lawyers to put forward competing accounts of the facts would negate the possibility that facts could ever provide a trustworthy representation of truth, or that a uniform view of truth was possible. However, the rise of empiricism had fostered the idea that adversarialism was indispensable to the attainment of true verdicts. Presenting all the relevant facts and their possible interpretation on both sides ensured that juries would have a sufficient

70. Cairns, *supra* note 55 at 81. Before *The Prisoners Counsel Act* finally permitted them to comment on the value of witness testimony and make its significance clear in a final speech to the jury, lawyers tried to use cross-examination to accomplish this instead. Some lawyers made speeches in the form of leading questions, while others spent hours trying to make witnesses help them make their point in vain. Dr. Lushington stated that he had seen many a defense lawyer work for three hours to make the significance of the evidence clear through laborious cross-examination only to fail to make his point understood. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 28 (17 June 1835) at 870-71. Many saw that allowing counsel for the accused to connect the facts together in a final speech to the jury would obviate the need for lengthy and ineffectual cross-examinations that attempted but often failed to achieve the same results. As Mr. Serjeant Talfourd put it, "It was...much more difficult...than some Gentlemen imagined to elicit the truth by cross-examination....Without a statement to the Jury, how was it to be expected that during cross-examination the Jury or the Judge would be able to understand at what point the Counsel was aiming, or what was the real nature of his defense?" *Ibid* at 872.

71. See *e.g.* UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 210 (Dr Lushington); UK, Parliamentary Debates, *Hansard*, 3rd ser, No 34 (23 June 1836) at 770 (Lord Lyndhurst); UK, Parliamentary Debates, *Hansard*, 2nd ser, No 15 (25 April 1826) at 623 (James Scarlett); UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 163 (Lord Althorp), 821 (Mr Wynn).

foundation upon which to base their decisions.⁷² Thus in the debates, Mr. Denman claimed that “every righteous judge, would be glad to hear counsel on both sides state to the jury the facts upon which they were called on to pronounce,”⁷³ for as Mr. Grant argued, “It was from the contention of Counsel that truth was elicited for judgement of the Jury and Judge.”⁷⁴ The new empiricist faith that the collection and discussion of all of the facts would provide the best foundation for legal decision-making ultimately enabled the right to have counsel speak for the accused. And as we shall see, it also enabled the development of the accused’s right to remain silent, for only once her statement was no longer seen as an essential evidentiary source could all legal pressure on her to speak be removed.

VI. THE CRIMINAL EVIDENCE ACT (1898)

Interestingly, omitting the testimony of the accused did not accord with the empiricist view that all relevant evidence should be admitted in order to arrive at a true verdict. Bentham himself was against the exclusion of the accused’s testimony for that very reason and argued that defendants should be both

72. See Cairns, *supra* note 55 at 86. Cairns agrees that circumstantial evidence was key in the removal of the felony counsel restriction. Cairns, however, is not concerned with the underlying epistemological changes that gave rise to the new concern for circumstantial evidence, without which, as we both argue, *The Prisoner’s Counsel Act* might never have passed. His explanation for the rise of counsel focuses on the desire for penal certitude in the late eighteenth century which, he argues, depended on advocacy as the best means of arriving at true and certain verdicts. Thus while I would agree with Cairns that bringing in all the facts and their possible interpretations was part of the new quest for legal certainty and truth, and that allowing legal interpretations on both sides conformed to that model of truth, I would argue that that model was seen as more conducive to the discovery of truth because it conformed to empiricist notions of what constituted the best and most complete evidence in criminal legal trials. Moreover, Cairns accepts Langbein’s view that it was the right to counsel and *The Prisoner’s Counsel Act* that led to the right to silence. Because he doesn’t trace the shift in the courtroom from testimonial evidence to the more empiricist reliance on facts, he does not see how those changes led to the idea that the accused’s testimony was no longer necessary to the determination of truth, which is why he could be silenced without jeopardizing the outcome of his trial. It is for this reason that unlike Cairns and Langbein, I do not see *The Prisoner’s Counsel Act* or the right to counsel as having given birth to the right to silence, but rather the rise of empiricism and the shift in the notion of the best legal evidence from testimonial to factual proofs as having given rise to both.

73. UK, Parliamentary Debates, *Hansard*, 2nd ser, No 11 (6 April 1824) at 218.

74. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 24 (4 June 1834) at 168.

competent and compellable witnesses at their trials.⁷⁵ The fact that the defendant was ultimately made a competent witness under *The Criminal Evidence Act* of 1898 suggests that others agreed that the testimony of the accused was an important piece of the evidentiary puzzle. The fact that he was not compelled to testify suggests that his testimony was not seen as an essential part of the body of proof. Indeed, if the accused's testimony was really seen as necessary, it would not have taken so many years for *The Criminal Evidence Act* to pass. On the contrary, it was generally assumed that the accused's statements would be false, which was one of the main reasons why the Act was opposed for so long. For example, one Member of Parliament called it "a Bill for the manufacture of perjury,"⁷⁶ while another declared that if it was passed, "82 per cent. of the prisoners charged" if guilty, would be "invite[d]" to lie.⁷⁷ As Sir James Stephen explained, persons so interested in the outcome of the trial as the accused should not be asked to testify under oath, for "it is not in human nature to speak the truth under such pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion."⁷⁸

By the late nineteenth century, even the oath was no longer perceived to be a guarantee of testimonial truth, for the rise of empiricism and the decline of religion had markedly eroded its power. As Sir Herbert Stephen put it,

75. Jeremy Bentham, *Rationale of Judicial Evidence* in *The Works of Jeremy Bentham* (Edinburgh: William Tait 1843) vol 6 at 204 [Bentham, *Works*]. See also, *ibid* at 44, 338-39, 368, 386-87, 446, 599.

76. UK, Parliamentary Debates, *Hansard*, 4th ser, No 60 (27 June 1898) at 317 (Mr Dillon). See generally, Bodansky, *supra* note 20; Allen, *supra* note 13 at 95-186; Graham Parker, "The Prisoner in the Box—The Making of The Criminal Evidence Act, 1898" in *Law and Social Change in British History: Papers Presented to the Bristol Legal History Conference, 14-17 July 1981* (Atlantic Highlands, New Jersey: Humanities Press, 1984) at 156-75. As one MP said, "[w]hat an awful temptation you hold out to this unfortunate man to perjure himself! To his crime, assuming that he is guilty, you add the crime of perjury. You expose him to a temptation which the average, the ordinary man, would be unable to resist." UK, Parliamentary Debates, *Hansard*, 4th ser, No 56 (25 April 1898) at 1059 (Mr Serjeant Hemphill). Many felt that the temptation would be especially strong for the lower classes, whose "low moral condition" and "habit of lying" made them more likely to commit perjury. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 237 (30 Jan 1878) at 659 (Mr Evelyn Ashley).

77. UK, Parliamentary Debates, *Hansard*, 4th ser, No 56 (25 April 1898) at 1037 (Mr. Atherley-Jones). Sir Herbert Stephen agreed, stating that the "great majority of prisoners are guilty" and therefore "making them witnesses is practically making them perjurers." "A Bill to Promote the Conviction of Innocent Prisoners" (1896) 39 *The Nineteenth Century* 573 ["A Bill"].

78. James Fitzjames Stephen, *A General View of the Criminal Law of England* (London: MacMillan, 1863) at 202.

“One objection to putting a prisoner on oath is that it adds absolutely nothing to the value of what he may say,”⁷⁹ and Frederick Mead of the Thames Police warned that if the accused were permitted to take the stand, “the administration of the oath [would] become even more of a blasphemous farce than it is at present.”⁸⁰ By the end of the century many had lost faith in the oath as a guarantee of truth, and thus Herbert Stephen could write, “It may once have been true that people were afraid to swear falsehoods, and that a sworn statement had consequently a kind of mechanical advantage over one which was not sworn. It is certainly not now true of the ordinary English witness ... [T]he great majority of accused persons, if they are witnesses at all, are dishonest witnesses, and if a witness means to give false evidence, I do not believe the fact of being on oath—apart from his liability to be prosecuted for perjury, which is quite a different thing—ever restrains him in the smallest degree.”⁸¹

Others opposed the Act on the grounds that it would interfere with the privilege against self-incrimination. For by the mid-nineteenth century, the accused’s silence, initially a mere by-product of changing epistemological ideas, had become, with cases like *R v. Garbett* (1847) and *Lord Jervis’ Act* (1848), a recognized legal right.⁸² By 1898, it would have seemed to be too much of an infringement of that now well-established right to force the accused to take the stand: Requiring him to take any oath and potentially incriminate himself reeked too much of foreign Inquisitional law to make any Englishman comfortable with the idea.⁸³ Moreover, some people feared that although the accused would not

79. “A Bill,” *supra* note 77 at 573.

80. “Law of Evidence (Criminal Cases) Bill,” *The Times* (9 April 1898) 10.

81. “A Bill,” *supra* note 77 at 573. Those in favour of the Bill, were not oblivious to the potential problem of perjury. They argued, however, that the problem always existed and that the exclusion of interested parties had never prevented it. Indeed, as Lord Brougham had much earlier pointed out, there were those who would lie to save others and not themselves, and that in such cases, perjury was more difficult to detect because the reasons for it were not as obvious. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 116 (11 April 1851) at 4-5. See also UK, Parliamentary Debates, *Hansard*, 3rd ser, No 118 (16 July 1851) at 841 (Attorney-General).

82. *R v Garbett* (1847), 169 ER 227, 1 Den 236. For a detailed explanation of how this case helped give rise to a full privilege against self-incrimination, see Smith, *supra* note 20 at 174-80. *Lord Jervis’ Act* gave the accused the right to be warned that he need not say anything and that anything he did say could be used in evidence against him (11 & 12 Vict c 42 (1848)).

83. See for example UK, Parliamentary Debates, *Hansard*, 4th ser, No 56 (25 April 1898) at 1031 (Mr Gibson Bowles), 1037 (Mr Atherley-Jones), 1002 (Mr Lloyd Morgan), 1067-8 (Sir Elliott Lees); and UK, Parliamentary Debates, *Hansard*, 3rd ser, No 237 (30 Jan 1878) at 662 (Serjeant Simon).

be forced to take the stand, his testimony would shift the burden of proof from the prosecution to himself and thereby compromise his defence. So long as the accused could not testify, it had been up to the prosecution to prove its own case. The defence merely had to prove that his opponent had failed. The new reforms, as Herbert Stephen argued, would work against the now well-established idea that “it is for those who affirm guilt to prove it, and that, in fairness and justice, they should have to do so without, in substance, calling upon the accused to contribute, by his own weakness, to his own destruction.”⁸⁴ Thus his enforced silence due to the inability to testify was seen by Stephen and many others as the accused’s best protection: It could never be shaken by cross-examination, and was therefore believed to be the best statement he could make. The question, then, is why, given all the potential problems with allowing the accused to testify under oath, was *The Criminal Evidence Act* ever passed at all?

Once again, the empiricist view that legal truth requires an openness to all sources of evidence, true or false, prevailed, allowing and even requiring that the potentially unreliable testimony of the accused be admitted at his trial.⁸⁵ All evidence was now welcome, for the rise of empiricism had made it possible for the potentially perjured testimony of all witnesses, including the accused, to be admitted without fear of jeopardizing the system; any falsehoods in their testimony could be discovered by comparing it with the rest of the evidentiary facts. The accused’s story would constitute merely one more link in the chain of evidence to be considered in the search for judicial truth. As Sir James Fitzjames Stephen explained, no objections to the competency of a witness should prevail anymore because “though it may be expected that particular classes of witnesses will not always tell the truth, yet their testimony will have some sort of relation to it, from which it may be inferred what the truth really is...[E]vidence, whether true or false, is almost always instructive, and ought therefore to be given in all cases for what it is worth.”⁸⁶

Thus the rise of empiricism created a perceived need for the inclusion of all the relevant evidence, including the potentially unreliable testimony of the accused. Moreover, it also provided an effective means of testing the truth of that testimony through cross-examination, which tested the consistency

84. “A Bill,” *supra* note 76 at 575. See generally, Allen, *supra* note 13 at 157-61; Parker, *supra* note 71 at 167.

85. Cairns and Beattie agree that allowing the accused to testify was a way to gather more evidence from which to discover the truth. To see how their overall arguments differ from mine, see Beattie, *supra* note 40; Cairns, *supra* note 55.

86. Stephen, *supra* note 78 at 284.

of witnesses' words and their correspondence with the rest of the evidentiary facts.⁸⁷ Thus although many feared a rise in perjury with the Act's passage, they remained confident that the credibility of every witness, even the one most likely to lie—the accused—could be tested by comparing his or her story to the rest of the evidentiary facts. The years of dealing with circumstantial evidence had taught that there were ways of evaluating all evidence for its probative value and that even false testimony could contribute to reliable determinations of truth. As Bentham had stated years earlier, all evidence should be included at the trial, for truth depended on a willingness to “see everything that is to be seen” and “hear everybody who is likely to know anything about the matter,” especially the accused, who presumably knew more about it than anyone else.⁸⁸ As J. Pitt Taylor put it, there was no such thing as too much evidence, for all facts, true and false, were potentially a source of valuable information. “In investigating questions of fact,” he said, “men are far more likely to err by being forced to grope their way to a conclusion in the twilight or in the dark, than by having their mental vision dazzled by excess of light.”⁸⁹

In the end, the Act was passed with the caution that the accused's silence was not to be made the subject of negative comment. Nonetheless, it was recognized by everyone that negative inferences would inevitably be drawn

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87. Proponents of the new legislation argued that allowing the accused to take the stand would expose his statements to the scrutiny and test of cross-examination and therefore provided the highest degree of truth. See for example, UK, Parliamentary Debates, *Hansard*, 3rd ser, No 116 (11 April 1851) at 5 (Lord Brougham); UK, Parliamentary Debates, *Hansard*, 4th ser, No 54 (10 March 1898) at 1173 (Earl of Halsbury, Lord Chancellor). They contrasted this with the position of defendants in other proceedings, such as Chancery suits, where the accused was allowed to make sworn affidavits in private, which were never tested by means of cross-examination. See generally, Allen, *supra* note 13 at 98-180; Bodansky, *supra* note 20 at 100-101, 119-26. In such cases, the risk of falsehood was far greater.
88. Bentham, *Works*, *supra* note 75 at vol 7 at 599. SSee also, Bodansky, *supra* note 20 at 124, 128.
89. “Society for Promoting the Amendment of the Law” (1861) 5 Solicitors' Journal 351 at 363. The view that interested party testimony should be included because truth was best derived from a consideration of all the relevant facts was espoused by Bentham's followers on both sides of the Atlantic. In England, see UK, Parliamentary Debates, *Hansard*, 3rd ser, No 237 (30 Jan 1878) at 667-68 (Sir George Bowyer). In the United States, Edward Livingston argued that it made no sense to “exclude all interested testimony...[b]ecause a part only is unworthy of credit”; rather it should be left to the jury to “let in the interested testimony which is worthy of credit, and exclude that which is not.” *Introductory Report to the Code of Evidence [of Louisiana]* [circa 1830], reprinted in *The Complete Works of Edward Livingston on Criminal Jurisprudence: consisting of systems of penal law for the State of Louisiana and for the United States of America, with the introductory reports to the same* (New York: National Prison Association of the United States, 1873) vol 1 at 429.

from that silence. As Serjeant Simon put it, the accused would be “practically bound” to give evidence, for if he did not, the jury would infer guilt from his silence.⁹⁰ Others agreed that if the Bill was passed, “[e]very prisoner will think it is his duty to go into the witness box and deny the crime.”⁹¹ The accused’s refusal to exercise her long withheld right of being able to tell her story under oath and have it weighed as much as every other witness’ testimony against her would inevitably be seen as a sign of her guilt.⁹² As Bentham put it, “Innocence claims the right of speaking, as guilt invokes the privilege of silence.”⁹³ Many agreed with the view that innocent men would take the stand because they had no fear of cross-examination, and that silence was a strong indicator of guilt. Indeed, they welcomed this proof of the criminal’s wrong-doing, for in their view only the innocent deserved legal protection.⁹⁴ Thus the rise of empiricism, by granting the accused both the right to speak and the right to remain silent, ironically put him right back in the position he was in at the altercation trial centuries before: He was pressured to speak or condemned for his silence, risking self-incrimination either way. For in an empiricist age dominated by the need for directly observable truths rather than unsubstantiated stories, the fact of his silence spoke against him more loudly than words.

90. UK, Parliamentary Debates, *Hansard*, 3rd ser, No 237 (30 Jan 1878) at 663.

91. UK, Parliamentary Debates, *Hansard*, 4th ser, No 56 (25 April 1898) at 1037 (Mr Atherley-Jones).

92. See Frederick Mead, *The Times* (9 April 1898). In fact, one year after *The Criminal Evidence Act* was passed, the judge’s ability to comment on the accused’s silence was made a matter of judicial discretion. *R v Rhodes*, [1899] 1 QB 77.

93. Jeremy Bentham, *A Treatise on Judicial Evidence* (1825) in M Dumont, ed (Littleton, Colorado: Fred B Rothman & Co, 1981) at 241. Bentham observed a “natural” and “manifest” connection “between delinquency on the one hand, and silence under inquiry on the other.” Bentham, *Works*, *supra* note 75 at 446.

94. See also, “Lord Brougham in the Times” (19 March 1858); Bentham, *Works*, *supra* note 75 at 454-56. See also Cairns, *supra* note 55 at 175; Allen, *supra* note 13 at 164.

